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Vol. I

TRANSCRIPT OF RECORD

(Pages 1 to 688)

Supreme Court of the United States

OCTOBER TERM, 1951

No. 230

BESSER MANUFACTURING COMPANY AND JESSE H. BESSER, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

FILED AUGUST 9, 1951

PROBABLE JURISDICTION NOTED OCTOBER 8, 1951.

SUPREME COURT OF THE UNITED STATES

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VOL. I

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[fol. a]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

Civil No. 8144

UNITED STATES OF AMERICA, Plaintiff,

v.

BESSER MANUFACTURING COMPANY, STEARNS MANUFACTURING COMPANY, INC., Jesse H. Besser, Louis Gelbman and Hamlin F. Andrus, Defendants

[fols. 1-2] DOCKET ENTRIES

1. Apr. 28, 1949. Complaint filed. Plaintiff, $15.00.

* * * * * * *

[fol. 4] 138. Jan. 30, 1951. Opinion of the court filed and entered. Picard, J.

139. Mar. 13, 1951. Notice of hearing on proposed judgment for Nov. 19/51 filed. Picard, J.

140. Mar. 16, 1951. Proposed Judgment of U. S. and affidavit of service filed.

140. Mar. 19, 1951. Hearing on proposed judg.—witness sworn—adj. without date. Picard, J.

141. Mar. 19, 1951. Suggested amendment to Judgment filed.

142. Mar. 26, 1951. Proposed Judgment of U. S. filed.

1942. Apr. 3, 1951. Hearing on proposed judgment (submitted). Picard, J.

143. Apr. 3, 1951. Proposed amendment to paragraphs 6 & 7 filed.

144. Apr. 12, 1951. Final Judgment for pltf. with costs to be taxed filed and entered. Picard, J.

145. Apr. 23, 1951. Designation of committee members pursuant to sec. 7 of Judgment filed.

146. May 8, 1951. Motion for Stay filed—hearing May 8/51. Picard, J.

147. May 8, 1951. Petition to order compliance with Judgment filed.

147. May 8, 1951. Hearing on appl. for stay of execution temporarily denied without prejudice. Picard, J.

148. May 9, 1951. Designation of committee members filed.

149. May 10, 1951. Memorandum of Louis Gelbman, et al. filed.

150. May 14, 1951. Cert. Copy of order of Supreme Ct. staying Judgment filed and entered. Reed, S. J.

* * * * * * * *

[fol. 5] 159. May 22, 1951. Telegram of Carl R. Henry and John W. Babcock filed.

160. May 24, 1951. Affidavit in support of reporters filed.

161. May 29, 1951. Order approving pltf's bill of costs filed and entered. Picard, J.

162. May 29, 1951. Proposed form of license agreement filed.

163. June 5, 1951. Transcript of 5/16/50 filed and returned.

164. June 7, 1951. Petition for Appeal.

165. June 7, 1951. Order allowing appeal of Besser Mfg. Co. and Jesse H. Besser to Supreme Court of U. S. filed and entered. Picard, J. Defendant, $5.00.

166. June 7, 1951. Assignments of error and prayer for reversal filed.

167. June 7, 1951. Jurisdictional statement filed.

167. June 8, 1951. Citation issued.

168. June 12, 1951. Motion for leave to file a minority report filed—hearing June 18/51. Picard, J.

169. June 13, 1951. Citation returned served.

170. June 13, 1951. Cost bond on appeal of Jesse H. Besser in $250.00 filed—Aetna Cas. & Surety Co.

171. June 13, 1951. Cost bond on Appeal of Besser Mfg. Co. in $250.00 filed. Picard, J.

172. June 13, 1951. Statement calling att. to provisions of Supreme Court Rule 12(3) filed.

172. June 18, 1951. Motion contd. to 6/25/51. Picard, J.

173. June 25, 1951. Affidavit of Eugene F. Olsen filed.

174. June 25, 1951. Affidavit of Roy W. Darden filed.

175. June 27, 1951. Order to file document and affidavits filed and entered. Picard, J.

176. July 3, 1951. Designation of Besser Mfg. Co. and Jesse H. Besser filed.

177. July 10. Stipulation and order extending time to docket appeal for 30 days filed—order entered. Picard, J.

178. July 11, 1951. Designation of additional matters for inclusion in appeal record filed.

[fol. 6] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

COMPLAINT—Filed April 28, 1949

The United States of America, Plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this action against the defendants and complains and alleges as follows:

I

Jurisdiction and Venue

1. This complaint is filed and this action is instituted under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," commonly known as the Sherman Act, in order to prevent and restrain continuing violations by the defendants, as hereinafter alleged, of Sections 1 and 2 of said act.

2. The defendants Besser Manufacturing Company and Stearns Manufacturing Company, Inc., transact business and are found within the Eastern District of Michigan, and said defendants and the defendant Jesse H. Besser are inhabitants of said district.

[fol. 7]

II

The Defendants

3. Besser Manufacturing Company (hereinafter referred to as Besser Co.) is a corporation organized and existing under the laws of the State of Michigan, with offices and principal place of business at Alpena, Michigan. Besser Co. is the largest manufacturer of concrete block machines in the United States.

4. Stearns Manufacturing Company, Inc., (hereinafter referred to as Stearns) is a corporation organized and existing under the laws of the State of Michigan, with offices and principal place of business at Adrian, Michigan. Stearns is the second largest manufacturer of concrete block machines in the United States.

5. Louis Gelbman is a resident of Yonkers, New York, and is the co-owner with Hamlin F. Andrus of certain United States Letters Patent relating to concrete block machines, which patents are listed in Appendix "A" attached hereto and made a part hereof.

6. Hamlin F. Andrus is a resident of Yonkers, New York, and is the co-owner with Louis Gelbman of certain hereinabove mentioned United States Letters Patent relating to concrete block machines.

7. Jesse H. Besser is a resident of Alpena, Michigan, and is the president and principal stockholder of the Besser Co.

8. Acts alleged in this complaint to have been done by any corporate defendant were authorized, ordered and done by officers, agents or employees of said corporation, including Jesse H. Besser, acting on behalf thereof.

III

Trade and Commerce

9. Concrete building blocks and other concrete masonry [fol. 8] units are utilized extensively in the construction of residential, farm and commercial structures. The commercial production of such blocks and units is now almost entirely accomplished by machines, herein referred to as "concrete block machines," which form and compress a concrete mixture into molded units of a size and shape suitable for the building purposes for which they are intended.

10. The two types of concrete block machines are respectively called "vibrators" and "tampers." The former employs vibration as a means of settling and packing the concrete mixture into a mold, and the latter utilizes a tamping mechanism to pack and compress the mixture into a mold. Non-automatic machines have become relatively unimportant in the industry by virtue of the development in recent years of machines designed to operate automatically and to repeat the block making process continuously. The highest production capacities and consequent greatest efficiency and economy of operation have been obtained by automatic machines of the vibrator type, some of which are capable of producing up to 800 standard 8" x 8" x 16" concrete blocks per hour. Automatic vibrator machines are consequently of much greater importance in the concrete block industry than any of the other types of concrete block machines.

11. Concrete block machines are made by concerns located in various states of the United States and are sold and shipped in interstate commerce to concerns which utilize such machines in the production of concrete building blocks and other concrete masonry units.

12. Besser Co. manufactures concrete block machines in the State of Michigan and sells or leases such machines, and ships such machines, to purchasers and lessees in states other than the State of Michigan. Its sales of concrete block machines for 1947 exceeded $4,200,000. In addition, Besser Co. during 1947 leased concrete block machines having a sales value of more than $300,000.

[fol. 9] 13. Stearns manufactures concrete block machines in the State of Michigan and sells and ships such machines to purchasers in states other than the State of Michigan. Its sales of concrete block machines for the fiscal year ending August 31, 1947, amounted to approximately $1,800,000.

IV

Offenses Charged

14. The defendants Besser Co. and Jesse H. Besser have, since in or about the year 1931 and continuously thereafter up to and including the date of the filing of this complaint,

attempted to monopolize interstate trade and commerce in concrete block machines; have, beginning in or about the year 1942 and continuously thereafter up to and including the date of the filing of this complaint, been engaged in a combination and conspiracy with the other defendants to restrain and to monopolize said trade and commerce; and have monopolized said trade and commerce; all in violation of Sections 1 and 2 of the Sherman Act. Defendants are continuing and threaten to and will continue said offenses unless the relief hereinafter prayed for is granted. The aforesaid attempt to monopolize, monopolization, and combination and conspiracy, and certain of the acts, acquisitions, agreements, arrangements and understandings which formed a part and were used in effectuation thereof are hereinafter more fully set forth and described.

15. In or about the year 1931, Besser Co. and Jesse H. Besser purchased the majority of the capital stock of Consolidated Concrete Machinery Corp., a Michigan corporation engaged in the manufacture and sale of concrete block machines at Adrian, Michigan. At the time of the pur-[fol. 10] chase of such stock, Consolidated Concrete Machinery Corp. was the principal competitor of Besser Co. in the manufacture and sale of such machines. Thereafter Besser Co. caused the manufacturing plant of Consolidated Concrete Machinery Corp. at Adrian, Michigan to be closed and dismantled, and subsequently caused Consolidated Concrete Machinery Corp. to be dissolved.

16. In or about the year 1935, Besser Co. purchased from Industrial Brownhoist Corporation, an Ohio corporation which was engaged in the manufacture and sale of concrete block machines, the inventory and assets of that part of the business of said company which related to the manufacture and sale of such machines. Thereupon, Industrial Brownhoist Corporation discontinued the manufacture and sale of concrete block machines.

17. On or about the 29th day of October 1938, Besser Co. entered into an agreement with one Stephen Flam, who was engaged in the manufacture and sale of concrete block machines at Van Nuys, California. By the terms of said agreement, exclusive territories for the manufacture, lease and sale of certain types of concrete block machines were allo-

cated to each of the parties. The territory allocated to Stephen Flam consisted of the States of Washington, Oregon, California, Idaho, Nevada, Utah, Arizona, New Mexico and Texas, and the rest of the United States, its territories and possessions were allocated to Besser Co. While the aforesaid agreement purported to be a license to Besser Co. under certain patents and patent applications owned by Stephen Flam, relating to concrete block machines, by the specific terms of said agreement the territorial restrictions were made applicable to certain concrete block machines embodying devices other than those claimed in said patents. In addition, any improvements developed by either party and relating to the concrete block machines comprehended by the agreement were to fall within the [fol. 11] scope of the agreement and to be subject to its terms.

18. In or about the year 1940, Stearns, then the principal competitor of Besser Co. in the manufacture and sale of concrete block machines, was the exclusive licensee under patents owned by Louis Gelbman and Hamlin F. Andrus relating to concrete block machines. In that year, suit was instituted in the United States District Court for the Southern District of New York against a user of a concrete block machine manufactured by Besser Co. for alleged infringement of one of said patents. The suit was defended by Besser Co. and resulted in a holding that the two claims of said patent which were in issue were invalid and not infringed. Thereafter, on or about December 7, 1942, the defendants entered into an agreement whereby Stearns relinquished its aforesaid exclusive license and Besser Co. and Stearns were licensed to make, use and sell concrete block machines under the patents then held by Louis Gelbman and Hamlin F. Andrus and any and all improvements or inventions thereafter made by either of them, relating to concrete block machines of the vibrator type. By the terms of said agreement the defendants agreed that no other licenses under any of such patents, improvements or inventions would be issued without the written consent of both Besser Co. and Stearns.

19. Thereafter, Louis Gelbman and Hamlin F. Andrus have referred to Besser Co. and Stearns all requests from

others for licenses under such patents, improvements and inventions, and Besser Co. and Stearns have in all instances refused to grant permission for the issuance of licenses to others, excepting certain restricted licenses or releases in settlement of purported patent controversies.

20. On or about November 21, 1946, Besser Co. entered into agreements with the hereinabove mentioned Stephen Flam and with Stephen Flam, Incorporated, a California corporation engaged in the business of manufacturing and [fol. 12] selling concrete block machines. By the terms of said agreements:

(a) Besser Co. purchased the assets of Stephen Flam, Incorporated, which related to the manufacture and sale of concrete block machines;

(b) Stephen Flam, Incorporated, agreed to refrain from engaging in the business of manufacturing and selling concrete block machines in the State of California so long as Besser Co. was engaged in that business in said State;

(c) Stephen Flam granted Besser Co. an exclusive license under all patents and patent applications owned by him relating to concrete block machines;

(d) Stephen Flam was employed by Besser Co. on a part time basis for a period of approximately five years; and

(e) Stephen Flam agreed for a period of approximately eight years not to engage or be employed or permit his name to be used in any business or enterprise for the manufacture of concrete block machines, excepting in connection with Besser Co.

21. During the period from 1945 to the date of this complaint, Besser Co. and Jesse H. Besser have secretly purchased, through agents, more than 85,000 shares of the capital stock of Stearns at a cost in excess of $1,000,000. By such stock purchases, Besser Co. and Jesse H. Besser have acquired control of Stearns.

22. For the purpose of eliminating competition in the manufacture and sale of concrete block machines, the de-

fendants have harassed and oppressed actual and potentia competitors by:

[fol. 13] (a) Threatening suit against such competitors for infringement of patents owned or controlled by one or more of the defendants;

(b) Threatening suit and instituting suit for infringement of such patents against customers and prospective customers of such competitors, with the intent and purpose of discouraging and preventing purchases of concrete block machines from such competitors;

(c) Making and causing to be made derogatory and disparaging statements concerning concrete block machines made by such competitors, and concerning the products of such machines, and making and causing to be made statements to the effect that purchasers of such machines would be unable to obtain parts or service therefor and that production of such machines would be limited or discontinued, all with the intent and purpose of discouraging and preventing purchases of concrete block machines from such competitors; and

(d) Inducing and attempting to induce persons and concerns who had arrangements with such competitors to manufacture concrete block machines for them or to license patent rights to them, to discontinue and withdraw from such arrangements; and inducing and attempting to induce, by offers of employment and by other means, persons associated with competitive com-
[fol. 14] panies to cause such companies to discontinue or abandon competition with Besser Co.

23. Since in or about October 1947, Besser Co. has adopted and adhered to a policy of leasing certain concrete block machinery to users and of refraining from selling such machinery, for the purpose of retaining control over used concrete block machines and preventing the marketing of such used machines in competition with new concrete block machines manufactured by Besser Co.

V

Effects of Violations

24. The aforesaid attempt to monopolize and monopolization and combination and conspiracy have had the following effects:

(a) Besser Co. and Jesse H. Besser have monopolized the aforesaid trade and commerce in concrete block machines and have acquired and obtained control over approximately 80 per cent of the production of such machinery.

(b) The defendants have unreasonably restrained interstate trade and commerce in the manufacture and sale of concrete block machines.

(c) Persons desiring to engage in the manufacture and sale of concrete block machines have been excluded therefrom.

(d) Purchasers and users of concrete block machines have been denied access to a free competitive market therefor.

[fol. 15]

VI

Relief

Wherefore, plaintiff demands:

1. That the aforesaid attempt to monopolize, monopolization and combination and conspiracy be adjudged and decreed to be unlawful and in violation of Sections 1 and 2 of the Sherman Act.

2. That the Court adjudge and decree that the defendants have combined and conspired to restrain and to monopolize interstate trade and commerce in concrete block machines in violation of Sections 1 and 2 of the Sherman Act, and that Besser Co. and Jesse H. Besser have attempted to monopolize and have monopolized said trade and commerce in violation of Section 2 of the Sherman Act.

3. That the defendants and each of them and their officers, directors, agents, representatives, successors and all persons or corporations acting or authorized to act on behalf of them or any of them be perpetually enjoined from

combining and conspiring to restrain or to monopolize, attempting to monopolize or monopolizing interstate trade and commerce in concrete block machines; and that they be perpetually enjoined from engaging in or participating in practices, contracts, relationships or understandings, or claiming any rights thereunder, having the purpose or effect of continuing, reviving or renewing any of the aforesaid violations of the Sherman Act.

4. That the Court adjudge and decree that the defendants have used patent rights owned or controlled by them or any of them unlawfully in instituting, effectuating, and maintaining the aforesaid combination and conspiracy, attempt to monopolize and monopolization, and enter such orders relating to any and all of their patent rights as the Court may deem appropriate and necessary to prevent further unlawful use thereof, to dissipate the effects of the [fol. 16] unlawful conduct herein alleged, and to establish free and unfettered competition in the trade and commerce herein described.

5. That Besser Co. and Jesse H. Besser be required to take such steps as may be necessary to divest themselves of any and all control over, or financial interest of whatever nature in, Stearns under such terms and conditions and according to such a plan or program as may be approved by and subject to the supervision of the Court; and that they be perpetually enjoined from acquiring or holding, directly or indirectly, through subsidiary corporations, agents, representatives, assignees or otherwise, any of the capital stock, properties or assets of Stearns or of any other concern engaged in the manufacture of concrete block machines.

6. That at the election of any present or future lessee of one or more concrete block machines from Besser Co., and upon such conditions and terms as the Court shall determine and order with due consideration for the rental and other charges already paid by said lessee to Besser Co. for the use of such machines, Besser Co. be required to sell such machines to said lessee and divest itself of its entire right, title, claim and interest therein.

7. That plaintiff have such other, further and different relief as the nature of the case may require and the Court may deem just and proper.

8. That plaintiff recover the costs of this suit.

Dated April 28, 1949.

Robert L. Tollefsen, William E. Speer, Special Attorneys.

Tom C. Clark, Attorney General; Herbert A. Bergson, Assistant Attorney General; Manuel M. Gorman, Special Assistant to the Attorney General; Edward T. Kane, United States Attorney.

[fol. 17] APPENDIX "A" TO COMPLAINT

U. S. Patent Number	Issue Date
1867144	July 12, 1932
2003632	June 4, 1935
2069880	February 9, 1937
2366780	January 9, 1945
2029365	February 4, 1936
2251447	August 5, 1941
2269955	January 13, 1942
2275676	March 10, 1942
2360122	September 30, 1943

[fol. 18] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—June 10, 1949

Now comes the Besser Manufacturing Company, Defendant, by John W. Babcock, its attorney, and answers the Complaint of the Plaintiff as follows:

I

Jurisdiction and Venue

1. Answering Paragraph 1 of said Complaint, this Defendant admits that the Acts of Congress therein described appear to be related to a subject matter such as is alleged in the Complaint, but does not admit that as far as this

Defendant is concerned there is any reason for the filing of such Complaint or the institution of such action;

2. Answering Paragraph 2 of said Complaint, this Defendant admits the allegations therein contained;

II

The Defendants

3. Answering Paragraph 3, this Defendant admits the allegation of its corporate organization, existence and location, but as to the allegation that it is the largest manufacturer of concrete block machines in the United States, having neither knowledge nor information sufficient to form a belief, neither admits nor denies such allegation, but leaves Plaintiff to its proofs thereof;

[fol. 19] 4. Answering Paragraph 4, this Defendant admits the allegations of the corporate organization, existence and location of Stearns Manufacturing Company, Inc., but as to the remaining allegations in said paragraph, having neither knowledge nor means of information sufficient to form a belief, neither admits nor denies such allegation, but leaves Plaintiff to its proofs thereof;

5, 6 & 7. This Defendant admits the allegations contained in Paragraphs 5, 6 and 7 of Plaintiff's Complaint;

8. Since the allegation in Paragraph 8 makes general reference to all actions, some of which are allegedly improper and unlawful, Defendant is compelled to deny the allegations in said Paragraph 8 as such allegations are made. Further answering said Paragraph, this Defendant denies that any acts alleged to have been done by Defendant Stearns Manufacturing Co. were authorized, ordered or done by direction of this Defendant;

III

Trade and Commerce

9. Answering the allegations in Paragraph 9, this Defendant admits that concrete building blocks and other concrete masonry units are utilized extensively in the construction of structures as alleged, and that machines described as concrete block machines produce the results

described, but as to the allegation that the commercial production of such blocks and units is now almost entirely accomplished by machines, this Defendant having neither knowledge nor means of information sufficient to form a belief, neither admits nor denies such allegation, but leaves Plaintiff to its proofs thereof;

10. Answering Paragraph 10, this Defendant admits that there exists two types of machines respectively called "vibrators" and "tampers", that the operation of such two machines generally is as described in said paragraph, and that the highest production capacities have been obtained by automatic machines. As to the remaining allegations in said paragraph, however, this Defendant having neither knowledge nor information, or means of information sufficient to form a belief, neither admits nor denies such allegations, but leaves Plaintiff to its proofs thereof; [fol. 20] 11 and 12. Answering the allegations contained in Paragraphs 11 and 12, this Defendant admits the same;

13. Answering the allegations in Paragraph 13, this Defendant admits that Stearns Manufacturing Company manufactures, sells and ships machines as alleged, but as to the allegation specifying the total dollars of sales, this Defendant having neither knowledge nor information sufficient to form a belief, neither admits nor denies the same, but leaves Plaintiff to its proofs thereof;

IV

Offenses Charged

14. Answering Paragraph 14 of Plaintiff's Complaint, this Defendant denies the allegations therein contained;

15. Answering the allegations in Paragraph 15, this Defendant admits the allegation that it purchased the capital stock of Consolidated Concrete Machinery Corp., but denies all remaining allegations in said Paragraph 15;

16. Answering the allegations in Paragraph 16, this Defendant admits the allegations therein contained;

17. Answering the allegations in Paragraph 17, this Defendant admits that "on or about the 29th day of October, 1938, Besser Co. entered into an agreement with one

Stephen Flam, who was engaged in the manufacture and sale of concrete block machines at Van Nuys, California." As to the remaining allegations in said Paragraph, the same being only an interpretation of said Agreement, Defendant believes that such allegations do not require answering since interpretation of said Agreement will be the prerogative of this Honorable Court. Defendant, however, denies any allegation or claim of illegality or impropriety in the making of said Agreement, and denies any violation of any of the laws of the United States in the making of said Agreement. Further answering said Paragraph 17, Defendant expressly denies that the making of said Agreement and that any of the terms of said Agreement were in any manner an attempt to monopolize interstate trade and com-
[fol. 20a] merce, were a combination and conspiracy, and were in fact monopolizing trade and commerce as elsewhere alleged in Plaintiff's Complaint.

18. Answering the allegations in Paragraph 18, this Defendant admits the allegations of fact as alleged in said Paragraph, but denies that the same were a part of, were used in effectuation of, and were in any manner an attempt to monopolize interstate trade and commerce, were in any manner a combination and conspiracy and were in any manner actual monopolizing of trade and commerce in violation of the laws of the United States or otherwise;

19. Answering Paragraph 19, this Defendant having no personal knowledge whether Louis Gelbman and Hamlin F. Andrus have referred all requests from others as alleged, and having no knowledge or means of information or knowledge sufficient to form a belief, of the meaning and extent of use of the word "restricted" as intended and as used by the Plaintiff in said Paragraph, neither admits nor denies such allegations, but leaves Plaintiff to its proofs thereof. Further answering said Paragraph, this Defendant admits that there have been instances when it has refused to grant permission for the issuance of licenses under certain patents. Further answering said Paragraph, this Defendant denies that any of such facts, circumstances or conduct are in any way, are or have been in any way, a part of and used in effectuation of any attempt to monopolize,

any monopolization, and any combination and conspiracy to restrain and monopolize trade and commerce;

20. Answering the allegations in Paragraph 20, this Defendant admits that on or about November 21, 1946 it entered into an Agreement with one Stephen Flam and with Stephen Flam, Incorporated. As to the remaining allegations in said paragraph, the same being a recitation of interpretation of said Agreement, since the interpretation of such Agreement if it ever becomes competent, material and relevant evidence, is the prerogative of the Court, this Defendant believes that such allegations do not require [fol. 21] answer. Further answering said Paragraph, however, this Defendant denies that the making of said Agreement and that the terms of said Agreement are or have been in any way any attempt to monopolize, any monopolization, and any combination and conspiracy to monopolize trade and commerce as alleged in Plaintiff's Complaint;

21. Answering the allegations in Paragraph 21, this Defendant admits that prior to the date of Plaintiff's Complaint it has purchased more than 85,000 shares of the capital stock of Stearns and has paid therefor in excess of $1,000,000.00. Further answering said Paragraph, this Defendant denies that it has acquired control of Stearns either by such stock purchases or otherwise, and denies that such stock purchases were in any manner any attempt to monopolize, any monopolization, and any combination and conspiracy to monopolize trade and commerce in violation of any of the laws of the United States;

22. Answering the allegations in Paragraph 22 of Plaintiff's Complaint, this Defendant denies the same;

23. Answering the allegations in Paragraph 23 of Plaintiff's Complaint, this Defendant admits that it has followed the practice and policy of leasing certain concrete block machinery to users thereof, but except for such admission denies the allegations in said Paragraph 23;

24. Answering the allegations in Paragraph 24, this Defendant denies the allegations therein contained.

Wherefore this Defendant prays that it may have the judgment and decree of this Honorable Court dismissing

Plaintiff's Complaint, and denying all prayer for relief as set forth in said Plaintiff's Complaint.

Besser Manufacturing Company, by John W. Babcock, Its Attorney, 3346 Penobscot Bldg., Detroit 26, Michigan. Cadillac 0154.

Dated: June 10, 1949.

[fol. 22] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF DEFENDANT, JESSE H. BESSER—June 10, 1949

Now comes Jesse H. Besser, Defendant, by Carl Henry, his attorney, and answers the Complaint of the Plaintiff as follows:

I

Jurisdiction and Venue

1. Answering Paragraph 1 of said Complaint, this Defendant admits that the Acts of Congress therein described appear to be related to a subject matter such as is alleged in the Complaint, but does not admit that as far as this Defendant is concerned there is any reason for the filing of such Complaint or the institution of such action;

2. Answering Paragraph 2 of said Complaint, this Defendant admits the allegations therein contained;

II

The Defendants

3. Answering Paragraph 3, this Defendant admits the allegation of the corporate organization, existence and location of Besser Manufacturing Company, but as to the allegation that it is the largest manufacturer of concrete block machines in the United States, having neither knowledge [fol. 23] nor information sufficient to form a belief, neither admits nor denies such allegation, but leaves Plaintiff to its proofs thereof;

4. Answering Paragraph 4, this Defendant admits the allegation of the corporate organization, existence and location of Stearns Manufacturing Company, Inc., but as to the remaining allegations in said paragraph, having neither knowledge nor means of information sufficient to form a belief, neither admits nor denies such allegation, but leaves Plaintiff to its proofs thereof;

5, 6 and 7. This Defendant admits the allegations contained in paragraphs 5, 6 and 7 of Plaintiff's Complaint;

8. Since the allegation in Paragraph 8 makes general reference to all actions, some of which are allegedly improper and unlawful, Defendant is compelled to deny the allegations in said Paragraph 8 as such allegations are made. Further answering said Paragraph, this Defendant denies that any acts alleged to have been done by Defendant Stearns Manufacturing Co. were authorized, ordered or done by direction of this Defendant;

III

Trade and Commerce

9. Answering the allegations in Paragraph 9, this Defendant admits that concrete building blocks and other concrete masonry units are utilized extensively in the construction of structures as alleged, and that machines described as concrete block machines produce the results described, but as to the allegation that the commercial production of such blocks and units is now almost entirely accomplished by machines, this Defendant having neither knowledge nor means of information sufficient to form a belief, neither admits nor denies such allegation, but leaves Plaintiff to its proofs thereof;

10. Answering Paragraph 10, this Defendant admits that there exists two types of machines respectively called "vi-[fol. 24] brators" and "tampers", that the operation of such two machines generally is as described in said paragraph, and that the highest production capacities have been obtained by automatic machines. As to the remaining allegations in said paragraph, however, this Defendant having neither knowledge nor information, or means of information sufficient to form a belief, neither admits nor denies such allegations, but leaves Plaintiff to its proofs thereof;

11 & 12. Answering the allegations contained in Paragraphs 11 & 12, this Defendant admits the same;

13. Answering the allegations in Paragraph 13, this Defendant admits that Stearns Manufacturing Company manufactures, sells and ships machines as alleged, but as to the allegation specifying the total dollars of sales, this Defendant having neither knowledge nor information sufficient to form a belief, neither admits nor denies the same, but leaves Plaintiff to its proofs thereof;

IV

Offenses Charged

14. Answering Paragraph 14 of Plaintiff's Complaint, this Defendant denies the allegations therein contained;

15. Answering the allegations in Paragraph 15, this Defendant admits the allegation that Besser Manufacturing Company purchased the capital stock of Consolidated Concrete Machinery Corp., but denies all remaining allegations in said Paragraph 15;

16. Answering the allegations in Paragraph 16, this Defendant admits the allegations therein contained;

17. Answering the allegations in Paragraph 17, this Defendant admits that "on or about the 29th day of October, 1938, Besser Co. entered into an agreement with one Stephen Flam, who was engaged in the manufacture and sale of concrete block machines at Van Nuys, California." As to the remaining allegations in said Paragraph, the same being only an interpretation of said Agreement, Defendant believes that such allegations do not require answering since interpretation of said Agreement will be the prerogative of this Honorable Court. Defendant, however, denies any [fol. 25] allegation or claim of illegality or impropriety in the making of said Agreement, and denies any violation of any of the laws of the United States in the making of said Agreement. Further answering said Paragraph 17, Defendant expressly denies that the making of said Agreement and that any of the terms of said Agreement were in any manner an attempt to monopolize interstate trade and commerce, were a combination and conspiracy, and were in fact monopolizing trade and commerce as elsewhere alleged in Plaintiff's Complaint;

18. Answering the allegations in Paragraph 18, this Defendant admits the allegations of fact as alleged in said paragraph, but denies that the same were a part of, were used in effectuation of, and were in any manner an attempt to monopolize interstate trade and commerce, were in any manner a combination and conspiracy and were in any manner actual monopolizing of trade and commerce in violation of the laws of the United States or otherwise;

19. Answering Paragraph 19, this Defendant having no personal knowledge whether Louis Gelbman and Hamlin F. Andrus have referred all requests from others as alleged, and having no knowledge or means of information or knowledge sufficient to form a belief, of the meaning and extent of use of the word "restricted" as intended and as used by the Plaintiff in said paragraph, neither admits nor denies such allegations, but leaves Plaintiff to its proofs thereof. Further answering said Paragraph, this Defendant admits that there have been instances when Besser Manufacturing Company has refused to grant permission for the issuance of licenses under certain patents. Further answering said paragraph, this Defendant denies that any of such facts, circumstances or conduct are in any way, or have been in any way, a part of and used in effectuation of any attempt to monopolize, any monopolization, and any combination and conspiracy to restrain and monopolize trade and commerce;

20. Answering the allegations in Paragraph 20, this Defendant admits that Besser Manufacturing Company on or about November 21, 1946 entered into an Agreement with one Stephen Flam and with Stephen Flam, Incorporated. As to the remaining allegations in said paragraph, the same [fol. 26] being a recitation of interpretation of said Agreement, since the interpretation of such Agreement if it ever becomes competent, material and relevent evidence, is the prerogative of the Court, this Defendant believes that such allegations do not require answer. Further answering said Paragraph, however, this Defendant denies that the making of said Agreement and the terms of said Agreement are or have been in any way any attempt to monopolize, any monopolization, and any combination and conspiracy to monopolize trade and commerce as alleged in Plaintiff's Complaint;

21. Answering the allegations in Paragraph 21, this Defendant admits that prior to the date of Plaintiff's Complaint Besser Manufacturing Company had purchased more than 85,000 shares of the capital stock of Stearns and has paid therefor in excess of $1,000,000.00. Further answering said Paragraph, this Defendant denies that Besser Manufacturing Company has acquired control of Stearns either by such stock purchases or otherwise, and denies that such stock purchases were in any manner any attempt to monopolize, any monopolization, and any combination and conspiracy to monopolize trade and commerce in violation of any of the laws of the United States;

22. Answering the allegations in Paragraph 22 of Plaintiff's Complaint, this Defendant denies the same;

23. Answering the allegations in Paragraph 23 of Plaintiff's Complaint, this Defendant admits that Besser Manufacturing Company has followed the practice and policy of leasing certain concrete block machinery to users thereof, but except for such admission denies the allegations in said Paragraph 23;

V

Effects of Violations

24. Answering the allegations in Paragraph 24, this Defendant denies the allegations therein contained.

[fol. 27]

VI

Relief

Wherefore this Defendant prays that he may have the judgment and decree of this Honorable Court dismissing Plaintiff's Complaint, and denying all prayer for relief as set-forth in said Plaintiff's Complaint.

Jesse H. Besser, by: Carl R. Henry, Attorney for Jesse H. Besser, Defendant, Alpena, Michigan, Telephone: Alpena 202.

Dated this 10 day of June, 1949.

[fol. 28] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF STEARNS MANUFACTURING COMPANY, INC.—Filed June 17, 1949

Now comes Stearns Manufacturing Company, Inc., defendant herein, by Fildew & DeGree, its attorneys, and answers the complaint as follows:

I

1. As to paragraph 1, defendant admits the Acts of Congress referred to but denies any violation thereof by this defendant.

2. The allegations of paragraph 2 are admitted.

II

3. As to paragraph 3, defendant admits the existence of a corporation known as Besser Manufacturing Company located at Alpena, Michigan, but denies any knowledge or information sufficient to form a belief as to the other allegations in said paragraph.

4. As to paragraph 4, defendant admits the corporate existence of the Stearns Manufacturing Company, Inc. of Adrian, Michigan, but denies that it has any knowledge or information sufficient to form a behalf as to the other allegations in said paragraph.

5. As to paragraph 5, not having knowledge or information sufficient to form a belief, defendant neither admits nor denies said allegations but leaves plaintiff to its proofs.

[fol. 29] 6. As to paragraph 6, not having knowledge or information sufficient to form a belief, defendant neither admits nor denies said allegations but leaves plaintiff to its proofs.

7. As to paragraph 7, defendant admits the residence of James H. Besser but has no knowledge or information sufficient to form a belief as to the other allegations in said paragraph.

8. As to paragraph 8, defendant avers that said allegations are too general and vague to permit answering and defendant, therefore, denies the same.

III

9. As to paragraph 9, defendant admits the use of concrete building blocks in construction but has no knowledge or information as to the remaining allegations of said paragraph sufficient to form a belief and, therefore, leaves plaintiff to its proofs.

10. As to paragraph 10, defendant admits the two types of concrete block machines referred to in said paragraph and the high production capacity of the automatic machines but as to the other allegations in said paragraph, defendant not having sufficient knowledge or information to form a belief leaves plaintiff to its proofs.

11. The allegations in paragraph 11 are admitted.

12. As to paragraph 12, defendant admits the allegation that the Besser Manufacturing Company manufactures block machines for shipment outside the State of Michigan but not having knowledge or information sufficient to form a belief as to the other allegations in said paragraph, defendant leaves plaintiff to its proofs.

13. The allegations in paragraph 13 are admitted.

14. As to paragraph 14, defendant having no knowledge or information sufficient to form a belief, neither admits nor denies the same but leaves plaintiff to its proof thereof.

15. As to paragraph 15, defendant having no knowledge or information sufficient to form a belief, neither admits nor denies the same but leaves plaintiff to its proof thereof.

[fol. 30] 16. As to paragraph 16, defendant having no knowledge or information sufficient to form a belief, neither admits nor denies the same but leaves plaintiff to its proof thereof.

17. As to paragraph 17, defendant having no knowledge or information sufficient to form a belief, neither admits nor denies the same but leaves plaintiff to its proof thereof.

18. As to paragraph 18, defendant admits the allegations of fact but denies that any of the acts of this defendant were improper or illegal.

19. As to paragraph 19, defendant not having sufficient

knowledge or information to form a belief, neither admits nor denies the same but leaves plaintiff to its proof thereof.

20. As to paragraph 20, defendant not having sufficient knowledge or information to form a belief, neither admits nor denies the same but leaves plaintiff to its proof thereof.

21. As to paragraph 21, this defendant not having sufficient knowledge as to the purchase of its stock, neither admits nor denies the same but leaves plaintiff to its proof. Defendant denies the allegation that said Besser Manufacturing Company and Jesse H. Besser have acquired or exercised any control over this defendant.

22. As to paragraph 22, defendant not having sufficient knowledge or information to form a belief, neither admits nor denies the same but leaves plaintiff to its proof thereof.

23. As to paragraph 23, defendant not having sufficient knowledge or information to form a belief, neither admits nor denies the same but leaves plaintiff to its proof thereof.

V

24. As to paragraph 24, defendant not having sufficient knowledge or information to form a belief, neither admits nor denies the same but leaves plaintiff to its proof thereof.

25. On information and belief, defendant denies that the [fol. 31] plaintiff is entitled to any of the relief prayed for.

Wherefore, this defendant prays that the complaint may be dismissed and the prayer for relief denied.

Stearns Manufacturing Company, Inc., by Fildew & DeGree, Its Attorneys, 3156 Penobscot Building, Detroit, Michigan, CA-9700.

Dated: June 16, 1949.

[fol. 32] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDMENT TO ANSWER OF STEARNS MANUFACTURING COMPANY, INC.—July 18, 1949

Now comes Stearns Manufacturing Company, Inc., defendant herein, by Fildew & DeGree, its attorneys, and amends its answer as follows:

1. Paragraph 14 of this defendant's answer is amended to read as follows:

"14. As to paragraph 14, defendant having no knowledge or information sufficient to form a belief, neither admits nor denies the allegation pertaining to other defendants but leaves plaintiff to its proof thereof; defendant denies all allegations contained therein in so far as this defendant is concerned."

2. Defendant's answer as filed is in all other respects affirmed.

Stearns Manufacturing Company, Inc., by Fildew & DeGree, Its Attorneys, 3156 Penobscot Building, Detroit 26, Michigan, WO 1-9700.

[fol. 33] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed June 2, 1949

Now come the defendants, Louis Gelbman and Hamlin F. Andrus and make answer to the Bill of Complaint in the above entitled case as follows:

1. The defendants have no knowledge as to the allegations contained in paragraph "1" and leave plaintiff to make such proof thereof as it may deem material.

2. The defendants have no knowledge of the allegations contained in paragraph "2" and leave plaintiff to make

such proof thereof as it may deem material, except that the defendants herein admit that Besser Manufacturing Company and Stearns Manufacturing Company, Inc. transacted business and those companies and Jesse H. Besser are inhabitants of said District, but expressly deny that the defendants herein are residents or inhabitants of this District.

3. The defendants herein have no knowledge as to the allegations contained in Paragraph "3" and leave plaintiff to make such proof thereof as it may deem material, except that they admit that the Besser Manufacturing Company has an office at Alpena, Michigan.

4. The defendants herein have no knowledge as to the allegations contained in Paragraph "4" and leave plaintiff to make such proof thereof as it may deem material, except that they admit that the Stearns Manufacturing Com-[fol. 34] pany, Inc. has an office at Adrian, Michigan.

5. Defendants herein admit the allegations contained in Paragraphs "5" and "6".

6. Defendants have no knowledge as to the allegations contained in Paragraphs "7" and "8" and leave plaintiff to make such proof thereof as it may deem material.

7. Defendants admit paragraphs "9" and "10".

8. As to Paragraph "11", defendants admit that concrete block machines are made by concerns located in various states of the United States but have no knowledge as to where they are sold and shipped or the purposes of utilization of such machines, and leave plaintiff to make such proof thereof as it may deem material.

9. As to Paragraph "12", defendants have no knowledge as to the manner or form in which Besser Manufacturing Company carries on its business, or the extent of its business and leave the plaintiff to make such proof thereof as it may deem material.

10. As to Paragraph "13", defendants have no knowledge as to the manner or form in which Stearns Manufacturing Company, Inc. carries on its business, or the extent of its business, and leave plaintiff to make such proof thereof as it may deem material.

11. As to Paragraphs "14", "15", "16" and "17", the defendants have no knowledge as to the allegations con-

tained therein and leave plaintiff to make such proof thereof as it may deem material, except that if it is intended by said allegations that said allegations refer to the defendants herein, the defendants herein deny the same.

12. As to Paragraph "18", defendants herein admit all the allegations contained therein except that an appeal was taken from the decision of the United States District Court for the Southern District of New York, and was discon-[fol. 35] tinued by reason of an adjustment and an entry into a contract by and between all the defendants named in this suit with the exception of Jesse H. Besser; and also as to the allegations concerning the terms of the said agreement, the defendants herein respectfully ask leave to interpose and refer to the said contract and the terms thereof.

13. As to Paragraph "19", the defendants herein admit that they have complied with all the terms of their agreement but deny that in all instances permission was not granted for the issuance of licenses to others.

14. As to the allegations contained in Paragraphs "20" and "21", defendants deny any knowledge and leave plaintiff to make such proof thereof as it may deem material.

15. As to the allegations contained in Paragraph "22", the defendants herein deny that they have harassed and oppressed actual and potential competitors in any manner and particularly as alleged in the sub-divisions of said allegation.

16. As to the allegations in Paragraph "23", defendants have no knowledge and leave plaintiff to make such proof thereof as it may deem material.

17. As to the allegations in Paragraph "24", the defendants herein deny the allegations contained therein, and more particularly allege that they have not conspired nor acted other than in good faith and lawful manner so that if the result of the exercise of their rights should have the effect, or to be used by the other defendants to have such effect, they should not be herein liable.

Wherefore, these defendants demand:

1) That the aforesaid action be dismissed as to them.

2) That the Court adjudge and decree that these defendants have not conspired and combined to restrain and

[fol. 36] monopolize interstate trade and commerce in the manufacture and sale of concrete block machines in violation of Sections 1 and 2 of the Sherman Act.

3. That the plaintiff be denied any right of injunction as against these defendants.

4. That the Court adjudge and decree that the defendants herein have used their patent rights lawfully and not in violation of any provision of the Sherman Act, Sections 1 and 2, or otherwise knowingly or intentionally.

5. That should the Court decree that the license contract applicable to these defendants a violation of the said Sherman Act, Sections 1 and 2, and permit and allow, order, adjudge or decree that the same be available to be used by the public, that the Court fix and determine a reasonable royalty to be paid the defendants herein.

6. That these defendants do recover the costs and disbursements of this suit.

Louis Gelbman, appearing in Person, Office & P. O. Address: 140 Elliott Avenue, Yonkers, New York; Hamlin F. Andrus, Appearing in Person, Office & P. O. Address: 650 North Broadway, Yonkers, New York.

Dated May 25, 1949.

[fol. 37] In United States District Court

[Title omitted]

Transcript of Proceedings

Proceedings had in the above entitled cause, before the Honorable Frank A. Picard, District Judge, at Detroit, Michigan, commencing Tuesday, May 16, 1950.

Appearances

Mr. John W. Neville and Mr. William E. Speer, Special Attorneys, Antitrust Division, Department of Justice, appearing on behalf of the Plaintiff.

Mr. John W. Babcock, appearing on behalf of Besser Manufacturing Co.

Mr. Edward G. DeGree, appearing on behalf of Stearns Manufacturing Co.

Mr. Carl R. Henry, appearing on behalf of Jesse H. Besser.

Mr. Morris Gelbman, appearing on behalf of Louis Gelbman.

Mr. Leo Goreff, appearing on behalf of Hamlin F. Andrus.

[fol. 38] COLLOQUY

Tuesday, May 16, 1950, 9:30 o'clock a. m.

The Court: The Government has furnished me with a trial brief. Have the attorneys for the defendant a trial brief ready?

Mr. Neville: If the court please, we are going to furnish the attorneys with a brief right now.

The Court: I wouldn't present them with one unless they exchange. I don't know why you should present them with a trial brief unless they have one for you. You don't have to present them with a trial brief unless they present you with a trial brief. I suppose they have one.

Mr. Babcock: Here is one.

Mr. DeGree: I have none, but I do have a preliminary matter to take up at this time in connection with the Besser case.

The Court: In going over your trial brief, and it is very good for the court to have—as a matter of fact I read it until after one o'clock this morning, so I paid some attention to it—but I have a case in which the Besser Company is interested, a patent suit, and there were certain things in here that struck me as interesting. As a matter of fact, I was almost ready to decide this patent suit, but I am not going to decide it right now because there are some questions I want to ask, and the Besser counsel are right here [fol. 39] and they may be able to tell me.

It appears there was a suit concerning part of the Gelbman and Andrus patents started in the state of New York. I don't know whether the claims that are involved had anything to do with the claims in the suit before me or not. I don't think you know anything about this, Mr. Babcock,

but I do think Mr. Henry ought to know. He was in the court part of the time. I would like to know if anybody can give me the citation of that case in New York.

Mr. Babcock: Did your Honor mean the claims in the patent suit pending before you in the Northern Division?

The Court: Yes, not the claims in this suit.

Mr. Babcock: I can say, your Honor, they are entirely different patents. They are not the same patents at all.

The Court: I anticipated that but, of course, I became interested when I saw it. I don't even know if it was the same named patents.

Mr. Gelbman: It is not the same patent, your Honor.

Mr. Neville: Your Honor, I have a copy of the judgment entered in that case in the Southern District of New York.

The Court: It was patent No. 1867144. Isn't that involved in the suit at Bay City?

Mr. Stark: That patent has expired already.

The Court: That is an older patent?

Mr. Stark: And it is expired.

[fol. 40] The Court: And that is involved in the Bell suit, isn't that right?

Mr. Neville: Yes, sir.

The Court: So either purposely or inadvertently I am not kept in the dark concerning some other lawsuit that involved these patents?

Mr. Stark: No.

The Court: All right. I anticipated that was the answer but I nevertheless became curious.

There was another suit started some place, but I think it involved the Darden and Link Belt patent. Wasn't that a suit that was started—Where was that suit started?

Mr. Stark: District Court of New Jersey.

The Court: What happened to that?

Mr. Stark: That was discontinued by stipulation.

The Court: That is one of the agreements that the government criticizes, isn't it?

Mr. Neville: Yes, your Honor.

The Court: The Scott patent, as I remember, was a mechanism for the suspension of the mold for vibration and the delivery of the finished product, afterwards, isn't that right?

Mr. Babcock: Pardon me, if the court please, I have just this suggestion to make: If we are going to be able to enlighten the court relative to these technical details of patents, I would ask an opportunity to contact Mr. Farley, [fol. 41] who is the chief counsel for Besser Manufacturing Company in connection with patent matters.

The Court: I am just trying to get this thing lined up in my mind on the patents. I just want to get these things straightened in my mind.

Mr. Babcock: I want to be of all the assistance to the court I can, but I would not want the Besser people, on this record, to be bound.

The Court: Wasn't that the main feature of the Scott patent?

Mr. Stark: Resilient mounting of the mold.

The Court: Resilient mounting of the mold, which has been claimed offset by Taylor and Ferguson patents. You see I can remember.

And then the first Gelbman patent, the first one that is involved in the suit at Bay City, was the transporting of the material from the hopper over the mold and dropping in of the material or wet concrete into the mold while the mold was still separate and apart from the feed box.

And the third Gelbman patent, being a method patent, also included both the Scott and the first Gelbman, but that was where the feed box started to empty the concrete into the mold as it traveled over the mold, and then the vibration—or the pressure; am I right?

Mr. Stark: Yes, pressure.

The Court: Afterwards, is that right? All right; I have [fol. 42] them in mind.

Now, what is your suggestion?

Mr. DeGree: I have a motion here I would like to serve on counsel interested, for the purpose of filing a cross-bill of complaint against the Besser Manufacturing Company on behalf of Stearns Manufacturing Company, for this reason:

We have been informed that about March 31 the Besser Manufacturing Company entered into a certain contract with one Ben Stone, president of Stearns?

Mr. DeGree: No. He had no connection, has no connec-

tion with Stearns Manufacturing Company. It provides for the purchase of stock of the Besser Manufacturing Company, or Mr. Besser, in the Stearns Manufacturing Company, and I believe a copy of the contract has been given to the government by the attorneys for Besser Manufacturing Company. Now, what we claim for that contract is that it is illegal, that it is an attempt on the part of the Besser Manufacturing Company to control the Stearns Manufacturing Company in that:

1. It would have the effect of excluding from Stearns Manufacturing Company the right to manufacture a three-at-a-time plain pallet machine which the Stearns Manufacturing Company has been manufacturing for a long time.

The Court: What do you mean three?

Mr. DeGree: Three blocks at a time.

The Court: Three blocks at a time?

Mr. DeGree: Three blocks at a time.

[fol. 43] The Court: I haven't seen that machine, have I?

Mr. DeGree: I don't know if your Honor has or not.

The Court: Have I seen that, Mr. Besser, to your knowledge? I haven't seen that, have I?

Mr. Besser: No, sir.

Mr. DeGree: So the contract is ingeniously worded, but it provides that the Stearns Manufacturing Company in effect will be unable to manufacture that machine.

The Court: Aren't you a defendant here?

Mr. DeGree: We are a defendant in this case. We filed an answer.

The Court: Hasn't it been alleged all the way through you are a coconspirator it this, or one of those people who has made this possible?

Mr. Degree: It has been alleged, yes, and it has been denied, and our position is that up until this time there has been no violation of law so far as Stearns Manufacturing Company is concerned until this matter has been brought to our attention.

The Court: Who owns the Stearns Manufacturing Company, or who owns the greater part of the stock?

Mr. DeGree: The stock is distributed generally, although

a block of stock held by the Besser Manufacturing Company——

The Court: How much?

Mr. DeGree: Amounts to approximately 45 per cent.

The Court: Forty-five per cent. How many men on the [fol. 44] board of directors?

Mr. DeGree: There are five.

The Court: Who put them on?

Mr. DeGree: Mr. Wright acquired stock about two years ago.

The Court: Who is Mr. Wright?

Mr. DeGree: Mr. Pierce E. Wright.

The Court: Is he of Stearns Company?

Mr. DeGree: He is a director of the Stearns Manufacturing Company now.

The Court: Please answer my question.

Mr. DeGree: I am trying to, your Honor.

The Court: Is he of the Stearns Company, or Besser Company?

Mr. DeGree: Stearns.

The Court: Wright is?

Mr. DeGree: Yes, your Honor. Wright is of the Stearns Manufacturing Company.

The Court: Isn't it true that three of the five directors are from the Besser Manufacturing Company?

Mr. DeGree: That is correct. Wright, Mr. Fildew, and Mr. Hultmark.

The Court: Mr. Fildew is one of the attorneys for Besser?

Mr. DeGree: For Stearns Manufacturing Company, your Honor.

[fol. 45] The Court: All right. Does this take you by surprise, or have you any objection to it, or is it right along your line?

Mr. Neville: If it please the court, the execution of the contract just referred to by Mr. Fildew is a surprise to the government. We didn't know any such contract had been executed. We had heard that there had been overtures looking toward such a contract.

The Court: When was this contract entered into?

Mr. Neville: I don't know, your Honor.

The Court: There is a date on it there, there must have been. Is there any objection on the part of the other defendants in this case?

Mr. Babcock: Yes, your Honor.

Mr. Henry: Yes, your Honor.

Mr. Neville: There is no date on this instrument, and it is captioned "A Memorandum of Agreement." It is a preliminary agreement looking toward——

The Court: Let me see it. Why wasn't this presented to the court before?

Mr. DeGree: Because of the fact that we hadn't learned of it until comparatively recently, and had hoped probably that it would be canceled.

Mr. Babcock: I don't want to deprive your Honor of having anything before you that you think might help you, but I do say I think this matter is not one that the court would consider at all. I am just trying to save your being confused [fol. 46] on the issues before you in this antitrust suit.

The Court: I anticipate I will be a good share of the time during this case.

Mr. Babcock: Perhaps I should say, keep the confusion down to a minimum then.

The Court: I am going to read this. There is no date on it. The government objects to it, or do you?

Mr. Babcock: I might say that document was supplied to government counsel some weeks ago by the attorneys for Besser Manufacturing Company before that——

The Court: Before it was executed?

Mr. Babcock: Yes, your Honor.

The Court: Then this document has been signed since the case started?

Mr. Babcock: Within the last 60 days.

The Court: Now, I have to read it. I will read it here if I can.

How many shares are there in the Stearns Manufacturing Company all together?

Mr. Neville: It is comprised, as I understand it, your Honor, close to 200,000 shares.

The Court: Close to 200,000?

Mr. Neville: Yes, your Honor.

The Court: This would be about 25 per cent—45,000 shares.

Mr. DeGree: There are 90,000 shares there, your Honor. [fol. 47] Two groups of 45,000 mentioned in the contract.

The Court: Well, it isn't dated.

Mr. DeGree: We allege on information and belief it was signed March 31, 1950.

The Court: What is the position of the government?

Mr. Neville: The position of the government, your Honor, is that the relationship of these two companies remains as it was, as of the time of the filing of the government's complaint.

The Court: I know that, and the court is not misled by what may have happened since. But what is your position on the motion here? They want to come in. Is there a question in your mind as to the good faith of Stearns in this proceeding?

Mr. Neville: I really don't know the answer to that, your Honor.

The Court: Or do you anticipate this is a smoke screen set up at this particular stage of the game?

Mr. Neville: At this point I don't know.

The Court: You have to take a position. I can't take it for you.

Mr. Neville: The government takes the position this contract does not affect at all the allegations made in our pleadings.

The Court: That isn't the question at all. The question is whether or not this motion for permission to file a cross-claim may be allowed in here.

[fol. 48] Mr. Neville: Under those circumstances the government is opposed to the motion.

The Court: What is the position of the Besser Company on it?

Mr. Babcock: The Besser Company opposes the granting of the motion:

First of all, because the motion does not present to your Honor sufficient facts on which you may consider the questions presented; and there are a number of facts they are presenting to you on so-called information and belief, which

will be disputed; and the only thing before you is the affidavit of Pierce Wright in which he says that he has read the attached motion and the facts therein set forth are true, and the only facts set forth in that is that he believes—there isn't any allegation of fact otherwise.

I object to the motion because, first of all, I don't think the court has jurisdiction to grant the motion. I don't think you have any discretion on that under the rules.

The Court: What rule, for example?

Mr. Babcock: Rule 14 is the only rule which permits the third party—the only rule which permits you to bring in a party not named a defendant. On request of the defendant you are being asked to bring in another defendant here.

The Court: Who is the other defendant?

Mr. Babcock: This Ben Stone. He is not now a defendant in the case. You are being asked to bring him in on a com-
[fol. 49] plaint against him and the Besser Manufacturing Company, which is not germane to the issue before you.

Mr. DeGree: Mr. Babcock has had an opportunity to read a copy of the proposed cross-bill that I served on him yesterday and in which we asked that Ben Stone be added as party defendant in this suit.

The Court: Not in this?

Mr. DeGree: Not in the motion. This is hurriedly drawn.

The Court: What rule do you say?

Mr. Babcock: Rule 14 covers the situation of when a defendant may bring in a third party.

The Court: I can tell you now, if this court will determine two weeks from now somebody should be made a defendant, he can be put in regardless of any rule. So there is no rule that prevents it. There may be a rule that indicates the court shouldn't do it. There is no rule, I anticipate, that prevents it. I didn't know, of course, Stone was being brought in here at all.

Mr. Babcock: Perhaps I am in error in making that statement to the court, because on looking at the motion this morning I notice the motion simply says against Besser Manufacturing Company. Now, if counsel have changed their minds since yesterday and decided to eliminate Stone, the situation is different.

Mr. DeGree: They haven't.

[fol. 50] The Court: They certainly haven't acted in time.

Mr. Babcock: I invite your Honor's attention particularly with reference to the rule, to the sentence which states:

> "A third party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third party defendant."

Now, as I understand that, if a defendant feels that a third party may be liable to him for his liability to the plaintiff, then he may bring him in, but there is no showing, no allegation here that if the court grants the government's prayer in this, that Ben Stone would in any way be liable to the Stearns Manufacturing Company.

The Court: That looks to me like a separate——

Mr. Babcock: It is entirely separate, and I would invite your Honor's attention to one more fact which appears right on the face of this pleading, on the face of the cross-complaint.

The Court: I haven't the cross-complaint.

Mr. DeGree: Would your Honor like to see a copy of the proposed complaint?

The Court: No. I am just looking at the motion.

Mr. Babcock: This information isn't questioned, your Honor, and is enough for what I am about to state to you. [fol. 51] The parties involved in that are Stearns Manufacturing Company in the position of plaintiff, Besser Manufacturing Company and Ben Stone in position of defendant. Those three parties are all citizens and residents of Michigan, so it is an entirely independent action, and one which a Federal Court would not have jurisdiction. There is no diversity of citizenship. It is simply an attempt to drag it in here in Federal Court when the court would not otherwise have jurisdiction, and there is no showing that if the court granted the damages prayed in this complaint, no showing whatsoever that Stone would in any way be responsible to the Stearns Manufacturing Company for the result of that finding by this court, and that is an essential element in this rule before you can do that.

Mr. DeGree: If the court please, I would like to finish what I started to say.

The Court: All right.

Mr. DeGree: We are not proceeding under any third party rule at all. This is a civil action. We are not responsible because we are here. It is merely a question of who is a necessary and proper party to this proceeding, which is an inquiry, or an equitable action, let us say, on the part of the government, for the purpose of restraining certain alleged violations of the law.

Now, it has come to our attention at this stage of the proceedings that the other company who is a codefendant with us has attempted to exert unlawful control over us. We are [fol. 52] now calling that to the court's attention, and by looking at this agreement, which they filed with the government, it will show conclusively that that is tried to be done, and Stearns Manufacturing Company is resisting that. In other words, up to the point that that happened, our position is that there hasn't been any attempt to control us. But now there has, and now we want the court—we are asking the court in event that we are permitted to file this, to restrain them from going through with that contract, because in two specific instances here is an attempt to control the Stearns Manufacturing Company through this man Stone. He purchases the stock from Besser, he undertakes to do certain things. If he doesn't do those things he is in default. No. 1 is to prevent the Stearns Manufacturing Company from manufacturing this three-in-one machine, the patent to which has expired, if they want to prevent us from making that machine.

The Court: Was this action authorized by the board of directors of Stearns Manufacturing Company?

Mr. DeGree: It was, your Honor.

The Court: This may get interesting if all these things are true, before I get through with this lawsuit.

Mr. DeGree: In this contract Mr. Stone is supposed to step in here and take control of this company with whatever stock he has got, and presumably with what he may buy or otherwise acquire to get control, to have us surrender [fol. 53] Stearns Manufacturing Company; surrender the patent license that it has from Gelbman, and which it enjoys jointly now with Besser Manufacturing Company, and for us to recognize certain allegedly valid patents of the Besser

Manufacturing Company which we have understood are nuisance patents, which have been acquired within the last sixty days.

Now, clearly if Stone should be permitted to control Stearns Manufacturing Company, Stearns Manufacturing Company will be limited in the manufacture of this machine.

The Court: Well, the government is trying to stop that very thing, as I remember. Here is something that has come up since the starting of this suit. It is a new action. To tell the truth, I was kind of surprised the government doesn't want it in.

Mr. DeGree: I was too.

The Court: But the government evidently feels that it can bring this in anyway during the course of this very lawsuit, as evidence of what the defendants are further doing to create a monopoly. They have objected. I think the objection is well founded. But that doesn't mean, gentlemen—I will tell you now, that doesn't mean that the court has ruled that this contract is out. It is evidence in this case at any time that the government may desire to put it in. I haven't ruled on that. So the contract may be in here just the same, and the court may become aware of this contract just the same.

[fol. 54] Mr. DeGree: What we had hoped, your Honor,——

The Court: This is a different lawsuit. You had plenty of time to make this motion. Why didn't you do it before?

Mr. DeGree: We had hoped they would cancel that contract.

The Court: Well, you could have consulted with attorneys for the government and they would tell you such hope was in vain. So far as the government is concerned, that is their attitude.

Mr. DeGree: Whether the government would be interested or not wouldn't necessarily help us. We had hoped the court would take cognizance of this contract that they had the audacity to submit.

The Court: I may.

Mr. DeGree: And also your Honor would characterize it by some adjudication here.

The Court: I may later on, I don't know. But you are bringing in somebody else as a defendant. The fair inter-

pretation of that rule anticipates that that should be done by permission of the court, or in some other way. That has not been done. The last minute it is attempted to be done. If you have erred in your gauging of what could be accomplished with your co-defendant, that is just too bad. I don't know whether the court should step in and throw you out a [fols. 55-84] life line, if you really want one, or not. I don't think so.

No, I am going to deny the motion. We will proceed without the cross-plaintiff.

[fol. 85] E. W. DIENHART, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Speer:

Q. Would you state your name and address to the court, please?

A. My name is E. W. Dienhart; address 38 South Dearborn Street, Chicago, Illinois.

The Court: What is the name?

A. Dienhart.

Q. Mr. Dienhart, what is your present occupation?

A. I am executive secretary of the National Concrete Machinery Association.

Q. And for what period of time have you held that job, Mr. Dienhart?

A. Since January 1, 1943. Prior to that I was assistant secretary for quite a few years.

Q. Is there any other national trade association of concrete block producers in this country?

A. No, I don't believe so.

Q. Now, what kind of firms, Mr. Dienhart, are there in this trade association?

A. They vary from small to large, but naturally the larger ones are the most progressive, and most of their people would be in the category above the average.

The Court: Do they make the bigger contributions to it?

[fol. 86] A. Yes, by all means. It is in proportion t production.

The Court: That is what I thought.

By Mr. Speer:

Q. Now, you have stated that since 1943 you have beer with the Trade Association. For what period of time have you been connected with the concrete block industry, Mr. Dienhart?

A. Since about 1918.

Q. In the Trade Association that we are discussing, could you tell the court what percentage of all block producers are in that association, that is what percentage of producers in these United States belong to your association?

Mr. Babcock: I object to this.

The Court: Just a minute now.

Mr. Babcock: As a conclusion drawn by the witness without there being given a background of fact. I think if that is to be developed through the witness he should name the number who are in the association and number who are not in the association, and let us make our own computations.

The Court: I don't see the importance of it. You are going to get the answer anyway. But if he can give the number, and how many do belong, then we can figure out our own percentage on that.

Mr. Speer:

By Mr. Speer:

Q. Mr. Dienhart, would you tell the court, what is the total number of concrete block plants in the United States? [fol. 87] A. I don't believe anybody can answer that question. The closest you can come to it is the census figures, because they vary from very small plants that are hidden away, that you couldn't ever find, to the large ones. I would roughly say that there are probably about three thousand producers of concrete machinery units, and that of that we have about 550 of the larger companies which are members.

The Court: Three thousand producers produce how many blocks? You have some idea on that, haven't you?

A. About one billion, the figure that the government used, and when we talk of products, your Honor, we are referring—

Mr. Babcock: There is just what I was objecting to, your Honor. He said, "One billion, the figure the government used." He isn't giving testimony based on his own personal knowledge. He is just reciting something that he found in some record that the government had.

A. I will quote the government report.

The Court: All right.

A. Shall I?

Mr. Babcock: Wait a minute.

The Court: I overrule you. I say he may answer.

A. According to the——

Mr. Babcock: Pardon me. He is reading from some document that hasn't been offered in evidence. I don't know what it is. It hasn't been offered as an exhibit.

[fol. 88] Mr. Neville: Refreshing his memory, your Honor.

The Court: He may answer.

A. In 1947, which is the last year for which we have adequate figures, the total production was 1,064,000,000 units.

The Court: 1947?

A. That is right.

The Court: Is that the last one you have?

A. Those are the last figures.

The Court: And you say you think there are about 3,000 producers of blocks?

A. That is right.

The Court: I suppose you are taking the little fellows in the back yard who may have a little tamping machine too, is that right?

A. That is right.

The Court: All right, now, go ahead.

You say they have how many, five hundred, that belong to the association?

A. We don't know exactly.

The Court: I understand that.

A. We don't collect those figures.

The Court: Of course there is no majority in number. Now, you gentlemen have some idea what it is in dollars, or in blocks. The court will listen to you if it becomes important.

Mr. Speer: All right, your Honor.

[fol. 89] By Mr. Speer:

Q. Now, Mr. Dienhart, these firms, these block producers that belong to your association, do they manufacture these blocks by hand, or do they manufacture them by a block machine?

A. By a block machine.

Q. Now, could you tell us what kinds of block machines there are in the industry?

A. Well, there are two general types of block machines, those which use vibration or jolting, and those which use tamping methods.

Q. Now, which of these two, Mr. Dienhart, is more important to the block industry?

A. Well, there is the vibration type of equipment by far.

Q. I see. And by that do you mean that that kind of machine is responsible for more block being produced than the other kind?

A. Well, by far, yes.

Mr. Speer: All right, that is all. I have no further questions.

The Court: Any questions?

Mr. Babcock: Yes, your Honor.

Cross-examination.

By Mr. Babcock:

Q. Mr. Dienhart, when you gave us that figure of 1,064,000,000 some units, are you reading from some document?

A. I was, sir.

[fol. 90] Q. And what was the document from which you were reading?

A. That is the Census of Manufacturers, 1947, published by the United States Department of Commerce.

Q. That figure then was not one that was computed from any records in your office?

A. That is right.

Q. And that figure is not one of which you have any personal knowledge?

A. That is correct.

The Court: Does he have any records in his own office that he could have computed that from?

A. No.

By Mr. Babcock:

Q. As a matter of fact, so far as your office is concerned, you would not be able to give any figure of that type, would you?

A. That is right.

Q. Do I understand correctly that that figure refers to concrete blocks, the number of concrete blocks produced?

A. That is right. And it should be conditioned by the unit size which is used in the industry. That is interpreted as the equivalent of an eight by eight by sixteen inch unit.

The Court: Wait a minute, now eight inches high?

A. Eight inches thick.

The Court: Eight inches wide and sixteen inches long, is that right?

A. Sixteen inches long.

[fol. 91] The Court: All right.

By Mr. Babcock:

Q. Did I understand you to testify a moment later that all of those blocks were manufactured by block machines?

A. I don't believe that I indicated that, but I believe that is true.

Q. Well, that is what I am getting at. If you did so tes-

tify, is that on the basis of personal knowledge, or just an opinion on your part?

A. It would have to be an opinion.

Q. And in expressing that opinion, when you speak of being manufactured by block machines, do you contemplate all types of machines?

A. Yes, sir.

Q. Including a little machine that would be no more than a mold and a hand lever to bring the pressure down, isn't that right?

A. I would presume so.

The Court: I think we will take a recess.

(Recess.)

By Mr. Babcock:

Q. Mr. Dienhart, you have told us that there are three thousand producers of concrete blocks?

A. My estimate.

Q. That too is merely an opinion on your part?

A. That is right.

Q. Not based on any figures that you have in your office?

A. That is right.

[fol. 92] Q. And you have told us that you have, as I recall it, 550 members of the association of which you are the executive secretary?

A. Approximately.

Q. That is an approximate figure too, is it?

A. Well, they resign from day to day and we get a few new ones from day to day, but the figure is between 520 and 550.

Q. Now, as members of your association, you have both manufacturers of concrete blocks and manufacturers of machinery for the manufacture of concrete blocks, do you not?

A. Yes. The figure I gave you was for regular members. We have associate members who are outside of that figure, and a few contributing members, we call them.

Q. How many of the 550 are manufacturers of concrete block?

A. All of them.

Q. And how many of them are manufacturers of machinery for the manufacture of concrete blocks?

A. A number of them are included in that figure. We have about 65 or 70 in that category.

Q. Sixty-five or seventy who manufacture machinery?

A. No, I beg pardon, as associate members, of which about ten would be manufacturers of machinery.

Q. And the other 55 or 60 would be what?

A. Aggregate producers, cement manufacturers, and so forth, suppliers to the industry.

Q. How many members of your association are there who [fol. 93] manufacture machinery for the manufacture of concrete blocks?

A. As associate members, about ten.

Q. Have you any regular members?

A. Well, we have, as I said, between 525 and 550 regular members who are in a category that manufacture the end product.

Q. Have you any regular members of your association who manufacture machinery for the manufacture of products?

A. I don't believe so.

Q. Now, do I understand correctly that you have told us that you know there are a number of small operators using small hand operated machines for the manufacture of concrete blocks?

A. Yes, sir.

Q. You have no idea how many of those there are in the United States?

A. No, I don't.

Q. Now, those small hand operated machines would use the tamping process, would they not?

A. Generally, yes, except some may use small vibrators.

Q. Do you know of any that do?

A. Yes.

Q. But you have no idea how many of those there might be?

A. That is correct.

Q. So that when you speak of the vibration type being more important to the industry, you mean more important to that part of the industry of which you have knowledge, is that correct?

[fol. 94] A. Well, I suppose so.

Mr. Babcock: I think that is all.

Cross-examination.

By Mr. DeGree:

Q. Do I understand from your testimony that there are ten associate members of your association who are manufacturers of concrete block machinery?

A. Yes, sir.

The Court: Any other questions?

Mr. Gelbman: No questions.

The Court: Anything further?

Mr. Speer: No, your Honor.

The Court: The court has. I don't understand this at all now. Is this case about the manufacture of machinery?

Mr. Speer: Yes.

The Court: Who are the ten that are associates?

[fol. 95] A. Well, there is Besser Manufacturing Company, the Stearns Manufacturing Company, the Lith-I-Bar Company.

The Court: Besser, Stearns, Lith-I-Bar.

A. The Darden Machinery Company, the Flemming Manufacturing Company.

The Court: Flemming?

A. Flemming, yes. The Columbia Machine Company. And that is all I can recall. But as I recall there are ten.

The Court: Well, do you know what part of the machines are manufactured by the Besser Company, the Besser and Stearns?

A. What proportion, your Honor?

The Court: Yes. I thought that was the question in this case. I don't know why it wasn't asked by the government.

Mr. Neville: This particular witness, your Honor, perhaps is not in position to answer that question.

The Court: I wondered about that, but he is here, and he is going to go, and let's get what we can.

A. I would say production-wise they manufacture machinery to produce at least 80 per cent of the total output of concrete machinery units.

The Court: What do you base that on?

A. Well, just my knowledge of the industry.

The Court: You have been there for how long?

A. A long time, since 1918.

[fols. 96-97] The Court: You said some of these people use small vibrating machines. You know of anybody using a small vibrating machine?

A. Oh, yes, there are a lot of them, your Honor. The producers of units who use the Flam machine were all in that category.

The Court: The what?

A. Flam machine.

The Court: What kind of vibrator is a Flam machine?

A. Well, I am not a technician in that regard. I look at them all as jolting machinery.

The Court: Is that controlled by Besser, the Flam machine?

A. To the best of my knowledge, yes.

The Court: There isn't any other vibrator on the market that you know of that is different from either the Flam or the——

A. Besser.

The Court: —the Besser, or the Scott.

A. I never heard of Scott, and there are some others. There was the Darden machine, was one. The Flemming machine is a vibrating type of machine, as I remember. The technical differences involved, I imagine, are above my knowledge.

The Court: All right. That is all.

[fols. 98-101] Redirect examination.

By Mr. Speer:

Q. Mr. Dienhart, on what do you base your opinion that the machines employing the process of vibration are more important to the industry? On what do you base that opinion?

A. That is based on the fact that the larger producing plants in the country use vibrating equipment.

[fol. 102] LAWRENCE E. MILLER, called as a witness on behalf of the United States, being first duly sworn, testified as follows:

Direct examination.

By Mr. Speer:

Q. Would you state your name and address to the court, please?

A. Lawrence E. Miller, Evansville, Indiana.

Q. What is your present occupation, sir?

A. I operate the Miller Block Company.

Q. And is that in Evansville, Indiana?

A. In Evansville.

Q. And approximately how long have you been engaged in this business?

A. Well, relatively, since I was sixteen. Of course, I have operated on my own since 1940.

Q. So that you have owned your own business?

A. It is a family business.

The Court: What is his name again, now?

A. Miller.

The Court: And what firm is he with?

A. Miller Block Company.

The Court: Whereabouts?

A. Evansville, Indiana.

The Court: All right.

By Mr. Speer:

Q. Now, at the present time what kind of a block machine do you employ in your plant?

[fol. 103] A. Well, I have a Besser tamper and a Lith-I-Bar vibrator.

Q. And approximately when did you install these two machines?

A. Well, the tamper I got in 1941, and the Lith-I-Bar machine, the vibrator, in 1948.

Q. Did you at any time discuss any patent questions concerning the Lith-I-Bar machine with anyone?

A. Yes.

Q. And will you tell us with whom and at what time?

A. Prior to the purchase of the Lith-I-Bar machine the Besser representative talked to me about the patents.

Q. Now, can you tell us who in particular this person was? You call him a Besser representative.

A. Well, his name was Leemon.

Q. How is that spelled?

A. G. E. L-e-e-m-o-n.

Q. And did he state to you and give you some identification that he was employed by the Besser Company?

A. Oh, yes.

Q. Well, now, when do you say this conversation took place?

A. February 3, 1948. I think I had two conversations with him. That is one in particular.

Q. And did they both take place in February, 1948, both conversations?

A. Frankly, I don't remember when I first talked to him. I remember seeing him twice, and last time we drew up a lease which I am referring to. The date was February 3, 1948.

[fol. 104] Q. And whereabouts did the conversations take place?

A. In Evansville.

Q. At your office?

A. In the office.

Q. Would you tell the court as best you can what the general topic of conversation was, that is, the topic concerned with patents?

Mr. Gelbman: Your Honor please, on behalf of the defendant Gelbman, I object to any conversation made with any representative of Besser not in presence of Gelbman as not being binding upon the defendant Gelbman.

The Court: He may answer.

A. Well, of course, I wanted a Besser, but they made the proposition that they wouldn't sell——

Mr. Babcock: Pardon me, just a minute. All the witness has been asked for the moment is the topic of conversation.

The Court: That is right. Answer the questions as they

are put to you. The court will rule on them as they are presented.

A. The topic of course was sale of a block machine. People wanted to sell me a block machine.

The Court: Who did?

A. Besser wanted to sell me one, and a lot of other people wanted to sell me one, and I wanted one. I was in the market.

By Mr. Speer:

Q. That was the purpose of this man's call then?

A. That is right, exactly right.

Q. To interest you in a Besser machine?

[fol. 105] A. That is right.

Q. And in particular, did he say at that time, what offers did he make to interest you in a Besser machine?

Mr. Babcock: I think I will object to it. There isn't anything up to the moment that makes this man competent to bind the Besser Manufacturing Company in any way on the witness' testimony he was a representative.

Mr. Speer: If your Honor please, he has testified that he has purchased a block machine from a competitor of Besser, and this conversation with the Besser representative has a direct bearing.

The Court: The suggestion is made that you haven't identified him as a Besser representative as yet.

Mr. Speer: I don't believe there has been any quarrel with that, your Honor, but in case there is.

The Court: Does he know who the man was?

Mr. Speer: Yes, your Honor.

A. I have his home address, telephone number, the Besser literature, his letters.

Mr. Neville: Those questions were asked a while ago, your Honor, and there was no objection made when the answers were made.

The Court: All right, he may answer.

Mr. Babcock: There seems to be some confusion in the record. Apparently this witness has stated the man was a Besser representative. That doesn't establish him as a

[fol. 106] Besser representative. It doesn't establish the man's authority.. It doesn't establish his power or capacity or authority to make any statements for the Besser Manufacturing Company. Even if the witness testified Mr. Leemon said he was a representative, you can't establish an agency by statement of an agent.

The Court: No, not when that is the point at issue. It is not the point at issue here. He may answer.

Mr. Speer: No, that isn't the point here.

The Court: He may answer. If it develops he isn't the Besser representative I will exclude it very quickly.

By Mr. Speer:

Q. Then, if you will please go on and tell us what the general conversation was at that time between you and this——

A. So I told this Besser representative I would buy a Lith-I-Bar machine because I could buy it outright. He advised me not to do it from several aspects, primarily that [fol. 107] it wouldn't make as good a block; secondly, that they were violating patents and I would be held responsible personally for that violation.

By Mr. Speer:

Q. Now, did he state what particular patents were involved?

A. Not specifically.

By Mr. Speer:

Q. Did this gentleman, when discussing these patents, did he tell you who the owner of the patents was?

A. No.

Q. Did he state in particular what specific methods he was referring to?

A. No.

The Court: What is the answer?

A. No.

[fol. 108] By Mr. Speer:

Q. Then was there anything else discussed at this time? You stated that he told you if you purchased this other machine that you would be—— What was that again?

A. That I would be liable, personally, and that they wouldn't permit me to operate it.

Q. Was that all then that was stated at this time?

A. Well, that I would not be able to buy parts. The manufacturer that was making this machine wouldn't remain in business.

[fol. 109] The Court: He said you couldn't buy parts for this other machine?

A. That is it. That they were going out of business, they wouldn't be in business long.

By Mr. Speer:

Q. Now, is that fact that they wouldn't be in business long, did he have anything else to say about that, or was that his opinion? What did he have to say on that?

A. I can't answer. I don't remember.

Q. He just told you that they were going out of business without any further comment?

The Court: Of course, that isn't what he said at all. What he said is they wouldn't be in business long. He didn't say they were going out. That looks like a voluntary going out. But there is no objection. It may stand.

By Mr. Speer:

Q. And after these conversations which you testified to, what was the outcome of the transaction?

A. I bought the Lith-I-Block machine.

Q. You bought the Lith-I-Block machine. Have you had any further experience with the gentleman?

A. None.

Q. Or with any other people from the Besser Company?

A. No.

[fol. 110] Mr. Speer: That is all I have, witness.

Just a minute, Mr. Miller.

As far as the employment of this individual is concerned, I want to read into the record at this time that a set of in-

terrogatories served upon the Besser Manufacturing Company, in particular 8-a, the answer to which states that Glen Leemon was employed from January 1, 1948 until June 19, 1949, as a salesman.

The Court: Is there, gentlemen, any reason to deny or to question that this man went there and was a representative of the Besser Manufacturing Company? Any question about it.

Mr. Babcock: We don't question the fact that we had a salesman by that name. I don't know whether he is the man that talked to him or not. I question, however, the capacity or authority of the salesman.

The Court: That part is something entirely different. I can see where you would object to that. But to object to the Leemon part, and that he was a salesman, is just putting the government to a lot of expense and trouble that is not necessary. Whether or not he could bind them is something entirely different, but this company ought to know whether Leemon was calling on this man or not. If he was, all right. If he wasn't, if there is some question, then I think your objection is well taken. Your objection is still well taken as [fol. 111] to whether or not he could bind them. Let's clear it up because if necessary this case will wait, if that becomes important, as to whether Mr. Leemon called on him. If you want to admit it, all right. If you don't want to admit it, and it becomes important, we will prove it. But, gentlemen, if that is necessary the expense of proving it will be on the defendants regardless of whether the case is in favor of the defendants or against them. It is just like a pretrial, as far as that is concerned.

Mr. Speer: That is all I have, your Honor, from this witness.

The Court: Is it admitted this man was employed and called on him, or do you desire to make further inquiry on that?

Mr. Babcock: At this moment I don't know——

The Court: All right.

Mr. Babcock: —whether our salesman called on him or not.

The Court: I will give you an opportunity on that.

Mr. Babcock: I am raising no question to the fact we had a salesman by the name of Leemon. We have so admitted it.

But my objection, as originally stated, your Honor, didn't raise this technical point that we are now talking about.

The Court: All right. If that is admitted, and he called on him, there isn't anything we have to worry about except the legal question. And I say now he can't bind them as to his agency except as they sent him out as a salesman, he certainly was an agent. Now, as to the scope of his agency, [fols. 112-114] that is something entirely different.

Mr. Speer: That is all.

The Court: The company can't be bound by a lot of things just because they sent a salesman out.

All right, cross-examine.

Mr. Babcock: I have no questions.

The Court: Any questions?

Mr. DeGree: I have none.

Mr. Speer: All right, Mr. Miller, that is all.

[fol. 115] Eugene F. Olsen, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Speer:

Q. Would you state your name and address, please?

A. Eugene F. Olsen, 19 Maumee Court, Adrian, Michigan.

The Court: Now, as I understand it, this man was at one time connected with the Stearns Company?

Mr. Speer: Connected with Stearns.

The Court: And also was connected with Besser at one time?

Mr. Speer: Yes, your Honor.

The Court: And now has his own company, or is interested in another company by the name of Gocorp.

Mr. Speer: Yes, your Honor, those are the facts.

The Court: That fixes him in my mind. All right.

By Mr. Speer:

Q. Now, what is your present occupation or business, Mr. Olsen?

A. Manufacturer of concrete block machinery.

Q. And approximately how long have you been affiliated with this industry?

A. More than thirty years.

Mr. Speer: More than thirty years. At this time, your Honor, I was going to ask this gentleman to give us a [fol. 116] brief description of concrete block machines and the various types.

The Court: Go ahead, put it in the record. I may learn something new about it.

By Mr. Speer:

Q. Would you describe to the court, in your opinion, what a concrete block machine is?

A. Device for making a concrete block.

Q. What is meant by an automatic concrete block machine?

A. That term in our industry is loosely used but strictly speaking it is one which makes a block without manual help.

The Court: Press the button and away it goes.

A. Yes, sir.

By Mr. Speer:

Q. What is meant by an automatic high production machine?

A. I believe no one has drawn a line on what a high production machine is. In general, the industry, in my opinion, accepts anything in the neighborhood of, or above four hundred blocks per hour as a high production machine.

Q. Now, Mr. Olsen, by that do you mean a machine that has a capacity of four hundred blocks per hour?

A. That is exactly what I mean. That does not mean you can multiply the hours in a day by four hundred and get your daily output.

The Court: Well, I know that.

A. I think a more reasonable description of a high production machine is one which makes more than two blocks at a time.

[fol. 117] The Court: Wait a minute, now, you confine high production machines to three blocks or more?

A. In the last several years that has come to be the practice, such that I think that is a reasonable definition.

The Court: I don't say it isn't, understand.

A. It would not have been true five years ago, perhaps not three years ago.

The Court: By the hand tamping machine, how many blocks could you get out in a day, that is an eight-hour day?

A. About two hundred.

The Court: About two hundred. I think those coincide with the figures I got, but with an automatic, or even semi-automatic machine you could get four hundred an hour, but you would turn out at least twenty-five hundred a day, would you not?

A. Yes, sir.

The Court: Now, with the three forms on the same machine, you are turning out more?

A. Yes.

The Court: Did you ever use the Shinn machine, or did you ever hear of it?

A. I have heard of it. I have never seen it, I believe.

The Court: All right. I am just wondering about that. All right.

By Mr. Speer:

Q. Before the advent, Mr. Olsen, of the machine making [fol. 118] three blocks at a time, would you state that a high production machine is one whose capacity is four hundred blocks per hour, but whose daily production approximated twenty-five hundred blocks per eight-hour day?

A. I would undertake to defend that statement, yes.

Q. But you feel now that since these new machines making three at a time come on the market that the trend might be up?

A. It goes up and up.

The Court: Just like the speed of an automobile. Some years ago five miles an hour was a high speed, wasn't it?

By Mr. Speer:

Q. Mr. Olsen, what do you understand to be, with respect to concrete block machines, the principle of vibration?

A. That principle of compacting a block by packing with rapid frequency the mold containing the material, as opposed to the older method or the other method of pounding it in.

The Court: Does that disassociate the mold, necessarily, from the feed box, in your opinion?

A. Yes, sir. It is possible to make a block by vibration without a feed box.

The Court: Oh, yes, I know that. But he asked you—Give me that answer again.

(Question and answer read.)

The Court: You go ahead. It may develop as we go along.

By Mr. Speer:

Q. Now, then, sir, what do you mean with respect to concrete block machines, what do you mean by the principle [fol. 119] of tamping?

A. Packing the material in a mold with even a stick or a mechanical dryer that strikes the material to compact it.

The Court: Is there any concrete block that is made at all by any one of these machines that is made by vibration alone, that you know of? If so, what is the name of it?

A. Vibration, you mean to the exclusion of a pressure head?

The Court: I mean vibration alone. You can take a mold and pour the wet concrete in there and tamp it and get a block.

A. That is right.

The Court: But can you now, by any machine that is on the market today, fill the mold and vibrate the mold and get a concrete block, that you know of?

A. Yes, sir.

The Court: What machine does that?

A. You do that with a very wet mix, and it is not commonly employed.

The Court: I mean that will turn out twelve hundred or two thousand a day.

A. I know of no such machine myself.

The Court: Either, as in the Lith-I-Bar machine, there is a tamping after the vibration, or during the vibration or as in the machine that Besser uses, there is a vibration and a pressure. It is either pressure or tamping that finally aids the vibration, isn't that true?

[fol. 120] A. That is correct.

The Court: All right.

By Mr. Speer:

Q. Now, do I understand you then, Mr. Olsen, to state that you mean the same thing when you refer to pressure and to tamping?

A. No.

The Court: Just tamping means the coming up and down, like this (demonstrating). This is your claim, and I don't think this is disputed. Pressure is the pressure without the tamping. Isn't that readily admitted as the difference? I think so.

Mr. Henry: That is right, your Honor.

Mr. Speer: Yes, your Honor. That was the impression I had, but I just wanted to get it straight here.

By Mr. Speer:

Q. Then I will ask this question again: Is there a block machine that makes blocks without the tamping principle?

A. Yes.

Q. At the present time, what kind of machines, that is vibrating or tamping, are being made by your company, the Gocorp?

A. The vibration only.

The Court: You mean with no tamping or no pressure?

A. When I say vibration——

The Court: You may have gotten the question wrong.

A. He said without tamping.

The Court: Read the question.

(Last question read.)

[fol. 121] The Witness: Now, maybe I misunderstood.

The Court: Don't let me confuse you. He merely gave you a choice between vibrating and non vibrating, and you chose vibrating.

A. But I mean to include that pressure in connection with vibration when I say "vibration."

Mr. Speer: I didn't ask you that.

By Mr. Speer:

Q. The trial is going to consume some days. When we talk about these two principles in the future, vibrating and tamping, are we only talking about the way in which the mix is compacted in the mold box?

A. Depends on what phase you are talking about. When you talk about the vibrating block machine to me, that means that that machine packs the concrete by vibrating the mold, and usually with pressure. Other features of the machine may be widely different but it is still a vibrator machine.

Q. But it is concerned with the way in which the mix in the mold is compacted?

A. That is the way the trade uses those terms.

Q. I want to get that straight. All right. Now, you have stated that the only kind of machines that you are presently making, the Gocorp, employ the principle of vibration. May I ask you why that is, Mr. Olsen?

A. I regard machines of the tamp type as obsolete?

Q. And on what do you base that opinion?

A. Well, long experience. Tests have been made by many [fol. 122] people, tests parallel between vibration and tamping, and the results are such that I at least come to the conclusion that vibration is the better process.

Q. As far as you know, Mr. Olsen, is there any tamping machine today that may qualify as a high production machine?

A. You mean currently offered as a new machine?

Q. Well, currently or at any time, as far as you know, has there been a tamping machine with a capacity of four hundred blocks an hour with a daily production of at least twenty-five hundred blocks?

A. Yes, there are. I believe no longer made or offered for sale, but there have been tamping machines of that capacity.

Q. And can you tell us approximately when they disappeared from the market?

A. Well, they started to disappear in 1939 or 1940.

Q. Then it is your testimony that since 1939 or 1940 there have been no tamping machines qualifying as high production machines?

A. I think that is not quite correct, but the market for tamping machines has rapidly gone down.

The Court: When he asks that question, do you get the impression that he is referring to tamping alone?

A. Yes.

The Court: Or do you mean tamping that might follow vibration?

A. No. My answers have all been based on an understanding that it was tamping alone.

[fols. 123-136] The Court: Is that what you intended him to say?

Mr. Speer: Yes.

The Court: There is a machine on the market that allegedly——

Mr. Speer: Has both.

The Court: Has vibration and tamping instead of vibration and pressure, isn't that true?

A. Yes, sir. But my remarks are based on tamping only.

The Court: All right.

Mr. Speer: That is correct. It is because of that fact—There are a few machines that combine both. It is because of that when I refer to tamping I exclude the other type.

[fol. 137] Q. I believe you completed your statements with a statement that at the present time the Gocorps is manufacturing only block machines of the vibrator type; is that correct, Mr. Olsen?

A. Yes.

Q. Approximately in what year did the block machine of the vibrator type first come in demand in the trade?

A. Approximately in 1939.

Q. In your opinion, what advantages does the vibrating machine have over the tamping machine?

A. I do not know how to put that briefly. It is a long story. It lends itself to the manufacture of a more diversified kind of block. The majority of the industry believes

it results in better texture, more uniform packing, more efficient use of cement, and can be built to a more highly automatic degree than we ever learned how to build tamping machines.

The Court: The strength is also added to, isn't it?

A. That is included in my comment of more efficient use of cement.

The Court: It is cheaper, more efficient?

A. Yes, sir.

The Court: It has every advantage over the tamped block?

A. Yes, sir, that fact was generally accepted.

[fol. 138] The Court: I believe everybody agrees on that in this case.

A. I believe we all agree on that.

By Mr. Speer:

Q. Then Mr. Olsen, in addition to your long experience in the industry, do you base that opinion on anything else?

A. If I see what you mean, I would say I base it on intelligent scientific tests of blocks. Is that what you mean?

Q. Now, do you refer to any test? What particular test do you refer to, if any?

A. The most generally recognized tests and the first ones controlled by unprejudiced interests is commonly known as the Wisconsin test, because it was run with the cooperation of the University of Wisconsin.

Q. Do you know of any other way in which concrete blocks are produced other than by a concrete block machine?

[fols. 139-143] By Mr. Speer:

Q. Can you tell us approximately when those tests of the University of Wisconsin were conducted?

A. That would be approximately 1939.

[fol. 144] The Court: All right. Now, if there is a report [fol. 145] made by the University of Wisconsin, it should at least be offered for admission. They probably would object to it. The court would probably admit it. I don't say I would. I would listen to the objections. But all this man knows is something—he hasn't even seen the report, and if

you are seeking to prove through him the efficiency of the vibrating method over the tamping method, so-called, there hasn't been anything in the proof so far on that.

Mr. Neville: Except, your Honor, his opinion as an expert.

The Court: Oh, yes, as an expert, that part, but nothing about the University of Wisconsin.

Mr. Neville: Correct.

The Court: All right. Gentlemen, don't let's make a mistake on that. The court is pretty well convinced on that, not from the evidence in this case but from the evidence in another case. I don't know as I have to carry my evidence from one case to another here. The Court of Appeals may never see one of these cases, and they may see them both—which I think will probably happen.

Mr. Babcock: I hope I am not being too meticulous, or over-meticulous about this, but in view of the developments, in order to make sure the record is complete, I will move to strike all the witness' testimony referring to the Wisconsin test.

The Court: Well, except the fact that he heard that [fol. 146] they made a test there.

Mr. Speer: That is all.

The Court: I think that is true. If you want the report of the Wisconsin test in there so as to add to the government's case, you will have to put it in by something besides this man whose only knowledge on the Wisconsin test comes from a report he now doesn't have.

Mr. Speer: All right, your Honor.

The Court: However, that does not shut out his testimony gleaned from his experience that the vibrating is the better method. I doubt whether that will be challenged; will it, gentlemen? Should we have to spend a great deal of time on that? Certainly Andrus and Gelbman aren't going to challenge it, are you?

Mr. Gelbman: No. We concede the vibrating method is superior.

The Court: In other words, you concede your patent was extra good?

Mr. Gelbman: That is right.

The Court: All right.

Mr. Henry: I think, your Honor, I should make a statement to this effect, as bearing upon the legal issues before the court: The fact is that either the tamping machine or a vibrating machine does produce a block of the same size, and useful for the same purposes, and that the blocks produced [fol. 147] by the tamping machine are of as much use in the industry as a whole as the blocks produced by the vibrating machine.

The Court: Anything else you care to add to that?

Mr. Henry: No, your Honor.

The Court: That is at variance with your testimony in other cases, the testimony of your clients. The testimony of your clients is not that at all. The testimony of your clients in the Bay City case was that there is a difference in the block. Now, they can all be used for the same purpose, just like an automobile.

Mr. Henry: I am afraid your Honor misunderstood me.

The Court: No. I listened very carefully. Not only do I know that isn't true, but I can see by the expressions of the other gentlemen around the table, that that position taken exactly as it is, is not exactly true.

Mr. Henry: I do not mean, your Honor, that the vibrator block is not a superior block. I didn't say that it was.

The Court: But you said the same purposes. There are places, as I understand it, or conditions under which it would not be advisable to use a tamped block where you could get a vibrator block, isn't that right, gentlemen?

Mr. Henry: True. I agree with your Honor. But there are places where a tamped block may be used.

The Court: Oh, certainly. The tamped block, insofar [fol. 148] as I know up to now—I would be glad to be illuminated—as far as I know there is no block made exclusively by vibration, is there? Is there any block that is made exclusively by vibration?

Mr. Henry: There is either tamping or pressure applied.

The Court: Yes. Vibrating performs a function. After it is vibrated, so far as any invention I have seen up to now, in order to get the result it must be either pressed or tamped. And that is in the Lith-I-Bar machine. There is a tamping, according to the manufacturers of the Lith-I-Bar machine. In the Besser or the Gelbman type, it has

become a pressure. That is the difference between these blocks, as I understand it. And if I am wrong, I start out on a wrong premise. But there is no question raised by anybody that the vibrator, in that method, has added to the efficiency of the block, the number that they can get out, the cost of them, and in every way it made them better.

Mr. Henry: That is true.

[fol. 149] Mr. Babcock: However, I invite your Honor's attention to the fact that there are in manufacture in the United States today a number of machines for manufacture of cement block which are using exclusively the tamping process.

The Court: I haven't any doubt about that.

Mr. Babcock: Now, whether the combined and composite opinion of the men who are manufacturing that machine would be in agreement or disagreement with this witness, or with the conclusions stated by your Honor, I don't know.

The Court: You mean that they are getting out a building block such as is made by Besser by tamping entirely?

Mr. Babcock: We don't admit it is as good, but it is intended to serve the same purpose.

The Court: What company have you reference to?

Mr. Babcock: I can find a number of them for your Honor. I haven't them at my fingertips at the moment.

The Court: You mean by the hand method or tamping? I mean, outside of these small places that grow up in somebody's backyard, or something like that.

Mr. Gelbman: Your Honor please, I am informed some of the mail order houses, like Sears Roebuck, and other places of that nature, sell machines providing for tamping, and, of course, they are manufactured, sold and designed [fol. 150] to furnish block on a small scale. Possibly that is what Mr. Babcock has reference to. Those machines are in use.

The Court: I suppose for some man who desires, out on the farm, or in some place, to put up his own—to make his own blocks.

Mr. Gelbman: Possibly even for sale around a limited locality.

Mr. Babcock: I will go one step further than that, your Honor. We expect when we get through showing your

Honor the evidence produced by the government's own interrogatories, that forty per cent of the production of blocks in the United States is by machines that are exclusively the tamping process. Now, I don't want to have it appear in this record that the men who are manufacturing those machines are ready to make the concessions that we are ready to make here, and to color the whole industry by the same thing.

The Court: Well, I will have to wait for that testimony. That hasn't been my understanding at all. It wasn't as I got the testimony of Mr. Besser and others in the other case. As I remember it, great stress was laid by the plaintiff in that case on the great efficiency, and the fact that the tamping method had practically gone out of commercial use. So I think I better hold my opinion in this other case for some time now. I was almost ready to give it, but I guess I better wait. All right.

Mr. Speer: As long as we are on this point now, your [fol. 151] Honor, the government intends to offer its Exhibit No. 7, which has been stipulated to by the Besser Manufacturing Company.

The Court: Any objection to it?

Mr. Babcock: I object to it on the ground it is immaterial and irrelevant and makes no contribution whatsoever to the proof of the issues involved in this case. [fol. 152] It cannot in any way contribute to the charge of conspiracy, and with that eliminated, it cannot contribute in any way to the charge of monopoly, or attempted monopoly.

The Court: Any other objection?

The Court: All right, it may be admitted.

Mr. Speer: There are just one or two parts in here.

The Court: The entire exhibit is in for admission, and either side may use any or all of it as that side may desire.

Mr. Henry: Mr. Speer has included the defendant Jesse H. Besser.

[fol. 153] Mr. Speer: Yes.

Mr. Henry: That is purely a corporate exhibit and not binding upon the defendant.

The Court: The position of the government on that is that the Besser Manufacturing Company is the alter ego of Mr. Besser, and for the time being the court takes that

view of it, and therefore it is as against Besser and the Manufacturing Company. I mean that that will be the ruling of the court on that.

Mr. Henry: Subject to the general objection I may make.

The Court: What percentage of the stock does he own?

Mr. Speer: Well, practically 100 per cent, and the other shares are owned by his wife, Mrs. Anna Besser.

The Court: All right. If that isn't an alter ego case, I [fol. 154] don't know what would be.

Mr. Speer: Now, if I may proceed, your Honor, then I would like to quote from this government's exhibit. It is entitled: "Bessergram. Besser Manufacturing Company, Alpena, Michigan, dated March 12, 1943."

And I am now quoting the fourth paragraph: (Reading)

> "Tamper sales, as you know, have dwindled down to almost nothing and vibra-packs in the various models and capacities have taken their place. Due to the almost complete changeover and demand by the trade, we have found that it is no longer profitable business to continue the manufacture of the Champion camber. Therefore, from now on the manufacture of this machine will be discontinued."

Mr. Babcock: I did not know until just now just what particularly government counsel had in mind, but in view of that specification as to the exhibit, I have the further objection that the exhibit is dated in 1943 and relates to conditions at that time, and the testimony of the witness up to the moment and our discussion relates to tampers and vibrators related to the present time, which is some seven years subsequent to the date of that exhibit.

The Court: Well, is it your claim that since that there has been a resurrection of the tamping business over the vibrator? Is that going to be the position of the defendant?

Mr. Babcock: I would not say resurrection, no.

The Court: Has there been a rejuvenation?

[fol. 155] Mr. Babcock: I do say this, that in view of the wartime conditions, the devotion of various manufacturing plants to the manufacture of the products of war in 1942

and 1943, and the other war years, that they are no criterion of the normal condition of the industry.

The Court: Is it your position, Mr. Babcock,—and you might as well put it on the record now—that since 1943 the tamping machines have come back so that this statement is no longer true? Is that your position? I would be interested and I think others would be interested in knowing what your position is on that.

Mr. Babcock: Well, I certainly think there are more tamping machines made in 1949 and 1950 than there were in 1943.

The Court: Well, that does not prove anything, does it? I am asking you whether your position is as you have intimated to the court. Now, gentlemen, I am not going to allow you just to make objections here and throw them into the air. It happens that I know something about these machines as a result of another case, and I have heard certain testimony. If that testimony is to be changed, I want to know it, and if the position of the defendant is to be changed, I want to know it,—not to be changed in this case, but to be taken that way, I want to know it, because I am going to permit the government to make their proof here.

[fol. 156] Mr. Babcock: The only way this question arose was the general assumption in some comments that were made, the general term of "anybody" and such references to the whole industry. All I am trying to do is to prevent the getting of opinions or conclusions or ideas in the record on the part of the court that such is a general reflection of the condition of the industry.

The Court: May I see that paragraph you read?

(A document handed to the court.)

Mr. Babcock: I am not receding one minute from the——

The Court: No, and neither is the court. You object to it because you say that this is in 1943 and does not represent the situation today. If you take the position that it does not and that there is a change, I want to know it.

Mr. Babcock: I am inviting the court's attention to the fact that in the examination of this witness by government counsel up to this present moment, figures that he has given and opinions that he has expressed, have been about

the condition of the industry today and the changes that have occurred in the industry over the last three years. If that is offered as support or corroboration of the witness' testimony, I challenge that it does not corroborate it because he has been talking about conditions in the last three years.

The Court: There is not any question but what he has been talking about that, and there is no question but what this refers to the situation as it was in 1943, and if there [fol. 157] has been a change, his testimony not only corroborates what it was in 1943, but what it is today. Is that right, witness?

A. Yes, sir.

The Court: If you are taking the position that there has been a change, it is no more than fair to the court that the court be made aware of that.

Mr. Babcock: I am taking the position that the government's interrogatories, the subject matter of their complaint, and everything up to the moment related to the years 1946, 1947 and 1948.

The Court: The court is just as aware of that as you are, but here is a man who says that this was the condition in 1946, 1947 and 1948; and then here is an exhibit that says the same condition existed in 1943, and you object to it because it is in 1943, intimating to the court that the situation has changed. Will you answer that quesion, Mr. Babcock? Do you intimate that the situation has changed, or don't you know?

Mr. Babcock: I do not know.

The Court: All right, I have that on the record.

Mr. Babcock: But my point is, your Honor, that I challenge the court's conclusion of just a moment ago that this witness has testified to anything as to 1946, 1947 and 1948.

The Court: I thought you said he had.

Mr. Babcock: No, your Honor, I said he had not. He has testified to the present date and the last three years.

[fol. 158] Mr. Speer: And in addition he has testified that beginning in 1939 there was a changeover in the field of these two types of machines and the purpose of this was to show that one of the defendants in this case, an important factor in the industry, discontinued completely the manufacture of tampers in 1943.

The Court: The position of the court on this is, if you have a valid objection or a valid reason for something I want you to put it on the record, but this in my opinion is not a valid reason for an objection at all, because by your own admission you do not know the difference, and I am telling you now that no witness that I have ever heard in connection with the difference between tamping and vibrating even claimed anything to the contrary. So gentlemen, confine yourselves to material objections. All right, you may proceed.

By Mr. Speer:

Q. I believe I asked you this, but I will ask it again, Mr. Olsen: In what business were you engaged in the year 1929?

A. The manufacture of concrete block machinery.

Q. And with what concern in the industry were you affiliated at that time?

A. The Consolidated Concrete Machinery Corporation.

Q. And whereabouts was that company, Mr. Olsen?

A. Adrian, Michigan.

Q. And what was your title with that company, title or position?

A. I was the president.

[fol. 159] Q. What was the chief business of the Consolidated Concrete Machinery Corporation?

A. The manufacture of concrete block machinery.

Q. Did that company manufacture any other products besides concrete block machines?

A. Only those that supplement block machines and for use to support the production of blocks, and perhaps I should add that there was a wholly owned very small subsidiary that made farm light plants and was called the Stearns Manufacturing Company.

The Court: What did they make?

A. Farm light plants; they employed three men, I believe; very small.

By Mr. Speer:

Q. But the entire business of the Consolidated, its business was the manufacture of concrete block machinery?

A. That is right.

Q. Now, what position in the concrete block machinery industry did Consolidated occupy in the year 1929?

A. I have no——

The Court: May I have that question again, please? Will you read it?

(Whereupon the reporter read the last question.)

The Court: All right.

A. My information is to the effect that it was either first or second position.

The Court: Well, now what does that mean? In the number of people employed, or the number of blocks manufac- [fol. 160] tured, or the dollar value?

A. Dollar sales.

The Court: The question means nothing, and the answer means nothing unless you let the court know what you mean by "position."

Mr. Speer: All right, your Honor.

By Mr. Speer:

Q. With respect to the actual production of concrete block machinery, what place in the industry did Consolidated occupy, in your opinion?

A. Do you mean dollar sales or in number of machines?

Q. No, the actual production of machines is the question.

A. Number of block machines? I believe it was first place.

The Court: When was that?

Mr. Speer: This is for the year 1929.

By Mr. Speer:

Q. You say that as far as actual production you believe it was No. 1.

A. In number of machines.

Q. With resepct to dollar value of machines, what is your opinion as to its position?

A. It would have been No. 1 or No. 2.

The Court: This is in 1929.

Mr. Speer: Yes, your Honor.

The Court: That was before the Scott patent, the Gelb-

man patent, or the Gelbman-Andrus? This was in the beginning days; is that right?

[fols. 161-162] By Mr. Speer:

Q. Is that right, Mr. Olsen?
A. That is correct.

The Court: All right.

Mr. Babcock: I will ask for a little clarification for that last question. What is meant or intended to be meant by dollar value, whether he means sales price or what?

The Court: I had the same question in mind but I felt that perhaps I was the only one in the room that did not understand it. But there must be others, so let us find out what he means; dollar sales, dollar value, dollar price or what does he mean?

A. Dollar sales.

(Whereupon a publication of the Department of Commerce, "15th Census of the United States for the Year 1929", was marked by the reporter as plaintiff's Exhibit No. 108.)

Mr. Speer: I offer into evidence at this time Government's Exhibit No. 108, which is a government publication published by the Department of Commerce, "15th Census of the United States for the Year 1929", part of which will be referred to in the government's case. This particular exhibit No. 108 is intended to be used primarily against the defendants, Besser Manufacturing Company and Jesse H. Besser.

[fol. 163] The Court: Well, the court is going to admit it.

Mr. Speer: I will now quote from Plaintiff's Exhibit 108, entitled "15th Census of the United States Manufacturers, [fol. 164] 1929, Table 1. For the year 1929, total cement and concrete block machines—Value $1,147,021."

Mr. De Gree: Is that the total cement and concrete block machines?

Mr. Speer: Yes.

The Court: It begins with—this is the year 1929. And I [fol. 165] think you better show it to the gentlemen here. It is that paragraph that begins—it is that part of the census report on April 4 of the "15th Census of the United States

Manufacturers: 1929 machinery," gotten out by the United States Department of Commerce, Bureau of Census, bearing the imprint of "Washington, 1931," purporting, of course, to be the census of 1929, and is that part of the report on page 4, beginning with "Cement and concrete machinery total," and ending with "Other cement and concrete machinery:" It also gives the value, the number, and in some instances the value of 1929, 1927 and 1925. Evidently they get it out every two years, is that right?

Mr. Speer: Yes. It is published in the odd year.

The Court: Anything in there besides that that you want? Shouldn't you also have what appears on page 3 beginning with "description of tables"?

Mr. Speer: Yes, I think so.

The Court: Objection is made here that there is no explanation of the word "value."

Mr. Speer: Yes, your Honor, that is a good suggestion. It should be in there.

[fols. 166-167] Mr. Speer: The court has stated that the third paragraph on page 3 of this exhibit should be included.

The Court: Anything else, gentlemen, on that statement? All right, you would like to have that paragraph in there, would you?

Mr. Babcock: That is all right.

The Court: I think it ought to be in view of the objection because that may become important later on, I don't know.

By Mr. Speer:

Q. Now, in the year 1929, Mr. Olsen, what company was the chief competitor of the Consolidated Concrete Machinery Company, in your opinion?

A. The Besser Company.

The Court: What year is this?

Mr. Speer: 1929, your Honor.

The Court: All right.

Mr. Speer: I offer at this time Plaintiff's Exhibits 102, 103, 104, 105, 106, and 107.

[fol. 168] The Court: Any other objection?

Mr. Babcock: With reference to Exhibits 102, 104 and 106, they are the corporate income tax returns respectively

for the years 1929, 1930 and 1931, of the Consolidated Concrete Machinery Corporation.

[fol. 169] They can have absolutely no relevancy or materiality to the issues involved in this case. And with reference to that point your Honor mentioned a moment ago in discussing with other counsel the fact that the evidence in a conspiracy could go back a number of years, of course that is a general rule. In this instance, however, we have in this complaint a specific allegation that the combination and conspiracy began in 1942. It is so specific an allegation that there is only one possible interpretation of it and that is that these so-called co-conspirators were not in any sense in a conspiracy or a combination prior to that time. So that this type of evidence and evidence as remote from 1942 as this, could not possibly make any contribution to proof of the combination and conspiracy, and as a proof of monopoly it certainly is not material, relevant or competent proof of monopoly or an attempt to monopolize.

The Court: What is the object of this proof?

Mr. Speer: The object of this proof, your Honor, is to attempt to show what particular part in the concrete block machine industry the Besser Manufacturing Company occupied and the Consolidated Concrete Company occupied. We intend to show that Jesse H. Besser or the Besser Manufacturing Company purchased the Consolidated Company in or about the year 1931, and that they were the only—the important people in this field at that time. That is the purpose of these.

The Court: To show the condition in 1929, the relative [fols. 170-171] position of the parties?

Mr. Speer: Of the two parties.

The Court: And to give a chronological history?

Mr. Speer: Exactly.

The Court: I think it may be admitted for that purpose.

Mr. Babcock: In that connection, may I just add this: If your Honor please, all that these documents are, are income tax returns. While it might show a *comparison* of gross income, it might show a comparison of deductible expenses, it might show a comparison of net taxable income, but it could not make any contribution toward showing any

relative position in the industry. It would just compare the two as to those income features.

The Court: If they have other testimony as to the comparative positions in the industry, this is corroborative and helps to substantiate the other testimony that is before the court. It may be admitted.

[fol. 172] Mr. Speer: I will quote then, your Honor, from Plaintiffs' Exhibit 102, which is a photostatic copy of the corporation income tax return for the fiscal year 1929 of Consolidated Concrete Machine Corporation, Adrian, Michigan:

> "Gross income, item 1, gross sales, from trading or manufacturing less returns and allowances, $860,608.90."

I now quote from Plaintiffs' Exhibit 103 which again is a photostatic copy of corporation income tax return for the calendar year 1929, Besser Manufacturing Company, Alpena, Michigan:

> "Gross income, item 1, gross sales from trading or manufacturing, less returns and allowances $281,338.10."

In order to conserve time, I might state that the next four government exhibits from which I intend to quote are also photostatic copies of income tax returns and covering the same items as Exhibits 102 and 103.

Government's Exhibit 104 is the return for the fiscal [fol. 173] year 1930 of the Consolidated Concrete Machine Corporation. The total reported therein in gross sales is $388,862.58.

Exhibit 105 refers to the Besser Manufacturing Company for the calendar year 1930, $266,773.71.

Exhibit 106 refers to the Consolidated Company, total $182,006.63.

Plaintiff's Exhibit 107, Besser Manufacturing Company, $187,120.81.

Those last two exhibits, 106 refers to the fiscal year of 1931, and 107 refers to the calendar year of 1931.

Will you mark this document as Exhibit 109.

(Whereupon a copy of report by the United States Department of Commerce Census of Manufacturers 1931, was marked by the reporter as Plaintiff's Exhibit No. 109.)

Mr. Speer: At this time, I wish to offer in evidence Plaintiff's Exhibit 109, which again is a report published by the United States Department of Commerce, Bureau of the Census, "Census of Manufacturers 1931."

The Court: You mean the next publication, next report?

Mr. Speer: Yes, your Honor.

The Court: Have you all the other reports there, too?

Mr. Speer: No, these are the only two that we intend to offer.

The Court: All right. I suppose there is the same [fol. 174] objection?

Mr. Speer: I do not believe there will be the same objection on this one, in that there is an explanation in here.

The Court: You mean an explanation of value?

Mr. Speer: Yes, sir.

[fol. 175] The Court: Is there any objection, gentlemen?

Mr. Babcock: Yes, your Honor. I do waive further proof of this document being further identified as an official publication of the government printing office. I note that there is in this document a subdivision called, "General Explanation," which does purport to define this term "Value of Products," but I note, if your Honor please, that for example the year 1931 to which reference is made, purports to show as the number of establishments reporting as 18, and the total value, which under the general explanation paragraph has been determined as sales value, as $416,823, and the evidence which the court has just received of the same figure would show the Consolidated Concrete Machinery Corporation as $182,006, and some odd cents, and the Besser Manufacturing Company as $187,120.81. So these two are something like $370,000. I just wonder how [fol. 176] valuable the figures are. I think it is entirely incompetent and irrelevant.

The Court: I think that is entirely a matter of argument, don't you, Mr. Babcock, later on?

Mr. Babcock: Perhaps it is, but I think it is entirely incompetent proof.

The Court: In your opinion it almost becomes a farce, as to value.

Mr. Babcock: That is right.

The Court: I think that is a matter or argument. I think the other is a matter of admissibility and the court will admit it.

Mr. Babcock: I should include, if I may——

The Court: Are you objecting to this as not being a government document?

Mr. Babcock: No, but I should include the same objection I stated before as being too remote, from 1942, to be a contribution to the conspiracy.

The Court: Well, it is, unless they are going to connect this up in some way with the history. The object of this, if I understand it correctly, is to show the position of people in the industry and the condition of the industry in 1929 and 1931, is that it?

Mr. Speer: That is it, your Honor. We will go on with the proofs to show just what happened.

[fols. 177-183] The Court: All right. You can't put on your proof all at one time.

Mr. Neville: May I point out now, your Honor, in the government's complaint we have allegations that go back to 1931. This is merely background information.

The Court: Even if you didn't have, it would be competent in order to start from some basis. You could even begin, as a matter of fact, with the first tamping machine if you could trace it back that far, but how much value it would be, I don't know.

Mr. Babcock: Unless the court be misled by that statement of counsel, and I am sorry to say inadvertently, of course, while what counsel says is true that the complaint does say that, in or about the year 1931 there was begun an attempt to monopolize. The point we have been making is relative to the charge of conspiracy, and that very definitely says, "Beginning in or about the year 1942."

The Court: Yes. Well, both charges are made here, are they not?

Mr. Babcock: Yes, your Honor.

The Court: All right.

Mr. Babcock: But as I stated a while ago, with the conspiracy in combination eliminated, which I confidently

expect your Honor to do after a while, then that eliminates the proof.

The Court: All right.

[fol. 184] Mr. Neville: I merely want to point out, by this testimony, what the government is trying to do is to prove Paragraph 15 of its complaint which pertains to the year 1931 specifically. This is pertaining to 1929 and merely background.

The Court: That is what I understood. All right.

Mr. Speer: If I may proceed, your Honor, I will quote from Planitiff's Exhibit No. 109, which is a pamphlet published by the United States Department of Commerce, "Census of Manufacturers: 1931"—page 3, Table 1—— "All the figures for 1931 and a minor part of those for 1929 represent production, but the major part of the 1929 figures refer to manufacturers' sales (shipments or deliveries) for the year 1931. Total cement and concrete block machines—value $416,823."

Now, your Honor, I had intended at this time to go into the figures which we found in the income tax returns, and attempt to show their importance to the industry through the figures in the Department of Commerce pamphlet, but in view of your suggestion, that is a point of argument which we will defer at this time.

The Court: Well, they are in, aren't they?

[fol. 185] Mr. Speer: Yes.

The Court: Mr. Babcock takes the position that even if they are admissible, they are of such nature as to make absolutely no impression, or should make no impression upon the court at all. That is a matter of argument, gentlemen. But they are in. At least, as I understand it, they are in.

Mr. Speer: Well, then, all I will do then at this time, your Honor, is to state that the gross sales of the Consolidated Company in 1931 amounted to $182,006, or 44 per cent of $416,823, which was the total value of machines produced in the year 1931.

Mr. DeGr[illegible]e: What was that percentage?

Mr. Speer: 44 per cent. The gross sales of Besser for the year 1931 were $187,120, or 45 per cent.

The Court: And what was the other one?

Mr. Speer: 44 per cent.

The Court: For those two years?

Mr. Speer: Your Honor, I was only referring to the year 1931.

The Court: Yes.

Mr. Speer: In the year 1930, the gross sales of Consolidated were $338,000 and some odd dollars. And the gross sales of the Besser Company were $266,000.

The Court: Where did you get those figures?

[fol. 186] Mr. Speer: From these income tax returns that were just introduced.

The Court: All right.

Mr. Babcock: May I inquire if these percentage computations are counsel's own computations?

Mr. Speer: They are counsel's own computations, Mr. Babcock.

The Court: They will be accepted and you will have an opportunity to contest them if you so desire.

Mr. Speer: I determined that $182,000 is 44 per cent of $416,000.

By Mr. Speer:

Q. Now then, Mr. Olsen, for what period of time were you associated with the Consolidated Concrete Machinery Corporation?

A. From 1927 at its formation, until 1932.

Q. Now, will you tell us, please, what occurred, what event occurred in 1932 to cause the change?

A. That caused my dissociation?

Q. From the Consolidated Company.

A. Well, various events had happened, but to answer your question, I was discharged or released and my services were no longer necessary.

The Court: What year was that?

Mr. Speer: The year 1932, your Honor.

A. I think I am incorrect, or I would like to correct or qualify that.

[fol. 187] The Court: Did you quit? Is that it?

A. No, not in that manner. Consolidated was dissolved, which meant there were no jobs for anybody with it.

By Mr. Speer:

Q. Now, was the corporation dissolved in the year 1932?

A. That is my recollection, and I also worked for the Besser Company at that time, which gave rise to my confusion.

Q. Well, just a minute. In the year 1931, and the year 1932, until the time of your discharge, did you own any common stock in this company?

A. In Consolidated?

Q. In Consolidated?

A. In 1931, I did.

Q. Approximately how many shares, and what per cent of the total outstanding stock did you own in 1931?

A. Oh, it would not have been over four per cent.

Q. Four per cent, and what disposal did you make of the stock in 1932?

A. That was made in 1931.

Q. All right then, in the year 1931, what disposal did you make?

A. I sold it.

Q. And to whom did you sell the stock?

A. To the Besser Manufacturing Company.

Q. At this time, or just prior to the sale had you been on the board at Consolidated Concrete Machinery?

A. Yes.

[fol. 188] Q. The board of directors. After the sale of your stock, did you continue on the board?

A. Yes.

Q. Approximately what period of time transpired between the sale of your stock and your dismissal or resignation from the company?

A. From Consolidated?

Q. Yes, from Consolidated.

A. Oh, as I recall that was perhaps nine or ten months.

Q. Now, can you tell us what percent of the outstanding Consolidated stock did the Besser Company acquire?

Mr. Babcock: May I have that question again, please?

(Last question read by the reporter.)

The Court: At that time, I suppose you mean?

Mr. Babcock: I was going to ask him to have the time fixed.

By Mr. Speer:

Q. In the year 1932, I believe you said?
A. 1931.
Q. In the year 1931.
A. I cannot tell you accurately. It was a large majority of it.

The Court: Wait a minute now. A large majority of the outstanding stock; that would be over fifty per cent.
A. Yes, sir, of the common stock.
Q. Was there a preferred stock?
A. Yes, sir.
Q. Non voting?
[fol. 189] A. Right.
The Court: All right.

By Mr. Speer:

Q. Was there a change made in the personnel of the board of directors about that time, that is, after the purchase of this stock by the Besser Company?
A. Yes.
Q. And could you tell us what persons then composed the board after the sale of the stock?

Mr. Babcock: Is this still 1931, please?
The Court: After the purchase.
Mr. Speer: This is just after the purchase in 1931.
A. I believe I can.

By Mr. Speer:

Q. All right, would you go ahead?
A. I believe there were Mr. Besser, Mrs. Besser, F. R. Oakes, and myself.
Q. After these stock acquisitions by the Besser Company, and the change in the personnel of the board of directors, did the Consolidated Company continued to operate as a block machine plant in Adrian?
A. Yes, for some time.
Q. For what period of time after the acquisition of the stock, did it so continue?
A. Four or five months, I believe.

Q. And at the end of four or five months, what occurred, Mr. Olsen?

A. The operation of Consolidated was moved to Alpena and the Adrian operation abandoned.

[fol. 190] Q. Were you employed then by the Besser Manufacturing Company?

A. What period are you talking about?

Mr. Babcock: May I have it fixed with reference to the use of the pronoun "then"?

By Mr. Speer:

Q. Mr. Olsen, could you tell us when in 1931 this change in the board of directors occurred?

A. It was shortly after the purchase, but I cannot tell you in days or weeks.

Q. Can you tell us approximately what date the corporation was dissolved?

A. I am quite sure it was in June, early June of 1932.

Q. So you state the corporation was dissolved in approximately June of 1932?

A. Yes.

Q. After the corporation was dissolved, were you then employed by the Besser Manufacturing Company?

A. Yes.

Q. What was your title with the company, and what was the nature of your duties?

A. I was vice president and sales manager.

Q. Did you continue with your work in Adrian, or did you go to Alpena?

A. No, I think I am confused again. I was vice president and sales manager. You asked me what was my capacity after Consolidated was dissolved in June of 1932.

Q. That is the question.

[fol. 191] A. I lived in Alpena at that time. I had moved from Adrian in December of 1931 to Alpena.

Q. Then can you tell us why in December of 1931 you moved from Adrian to Alpena?

A. Because the operation of Consolidated had been moved to Alpena and I was vice president and sales manager of the Consolidated Company.

Q. Well then, was the Consolidated plant in Adrian in

about December of 1931, was it in a condition to continue to manufacture concrete block machines there at Adrian?

A. No.

Q. Would you give us an explanation of that?

A. That is because a large part, substantially all of the inventory had been moved to Alpena, and some of the machine tools, and other machine tools at Adrian had been sold, when it was not operable after the fall of 1931 at Adrian.

Q. After you entered the employ of the Besser Company in the early part of 1932, for what period of time——

Mr. Henry: Wait a minute; he did not testify he entered the employ of Besser in the fall or summer of 1932.

Mr. Speer: I will have to get that straightened out.

By Mr. Speer:

Q. I believe you stated, Mr. Olsen, that the corporation, the Consolidated Corporation, was dissolved in June of 1932?

A. That is my recollection.

Q. From December of 1931 until June of 1932, what was [fol. 192] your occupation, where were you employed?

A. At Alpena, and as vice president and sales manager of both companies, although I cannot tell you just when my employment by the Besser Company commenced. I believe they coincided for some months.

Q. Well, would you say they coincided from December of 1931?

A. Yes, from about the time I went to Alpena or just the time, until Consolidated was dissolved in June of 1932, which of course, ended my employment by Consolidated, and I remained in the employ of the Besser Company.

Q. All right, that is my next question. At what time did you end your employment, your affiliation, with the Besser Manufacturing Company?

A. About the middle of July, 1932.

Q. Then after you ended your employment, what occupation did you then assume, or what did you then do?

A. I went back to Adrian, Michigan.

Q. And in what business did you engage?

A. I manufactured and sold farm light plants.

Q. Did you own the plant or factory in which these articles were manufactured?

A. Yes.

Q. From whom did you acquire this property?

A. Besser Manufacturing Company. It was a part of the property that Stearns had had in Adrian and that [fol. 193] Stearns operated in Adrian.

The Court: Stearns?

A. Yes, sir.

The Court: Are they in the picture yet? I mean at this time in 1931?

A. That was the little subsidiary company I referred to a while ago. I should have said a part of the property Consolidated occupied at Adrian, which included this little subsidiary known as Stearns Manufacturing Company.

The Court: Then was that a subsidiary of Consolidated?

A. Yes, sir, unincorporated.

The Court: Then you went back to Adrian and purchased that from the Besser Company?

A. From the Besser Company who had acquired it from the Stearns Company upon the dissolution of Consolidated.

The Court: You are talking about the plant?

A. Yes, sir.

The Court: And not equipment?

A. Some.

The Court: All right, you may proceed.

By Mr. Speer:

Q. Now, would you give us the details of this transaction? I refer to the purchase by you of this Adrian property from the Besser Manufacturing Company.

Mr. Babcock: Pardon me. If there were written documents setting out the transaction, I think they are the [fol. 194] best evidence.

The Court: Are there any?

By Mr. Speer:

Q. Have you, Mr. Olsen, any deeds to the property, or any other contracts?

A. I have no deed with me. I do have them, of course. The only paper I have with me that establishes there was a

contract is a paper in which that contract was altered, and removes an earlier restriction on the use of the property.

The Court: The question is, is there a written agreement? If so, no objection has been made, but the objection may be made that that is the best evidence. Is there a written agreement?

A. Yes.

The Court: Do you raise the objection that this is not the best evidence?

Mr. Babcock: If he purports to testify to the contents of it, yes, or the terms of it.

The Court: Yes, this is an agreement between you and Besser?

A. In connection with the purchase of this property, yes, sir.

The Court: Well, you have not got it, and you have given no notice to the other side to produce it, so I sustain the objection as to what the contract contained.

By Mr. Speer:

Q. Mr. Olsen, have you any paper which at all refers to this contract?

A. That is the one I hold in my hand.

[fol. 195] Q. What is that paper that you have, Mr. Olsen?

A. It is an agreement whereby the Besser Company removes a restriction they had put on the property at the time it was sold to me.

The Court: All right. It is an agreement between whom?

A. Besser Manufacturing Company and myself.

The Court: Show it to them before you start testifying about it. You may mark it for identification.

(Whereupon the agreement referred to was marked by the reporter as Plaintiff's Exhibit 110.)

The Witness: That is my original and only agreement. They have a copy of that.

The Court: They have a copy of it?

The Witness: I presume so.

The Court: Do you offer it?

Mr. Speer: Yes, your Honor, I do offer it.

The Court: Any objection?

Mr. Babcock: I have none.

The Court: Of course, it is not worth a great deal unless it contains the whole contract. Isn't that true?

Mr. Neville: I think, your Honor, that it can have only one meaning. It refers to another agreement and this other agreement either did exist or did not exist, and I think that the probative value of the instrument perhaps is in question, and I think that the inference is clear that there was [fols. 196-197] another agreement.

The Court: Oh, I guess there is no objection that there was another agreement.

Mr. De Gree: No objection.

The Court: If there is no objection, it may be introduced but the value of it is curtailed by the fact that you do not know what was in the other agreement yet.

Mr. Speer: That is true.

[fol. 198] By Mr. Speer:

Q. Then, Mr. Olsen, in the year 1932, after you returned to Adrian, did you then again enter the concrete block machine industry?

A. Not in 1932.

Q. Did you re-enter it in 1933?

A. I think it was 1934. I couldn't have until the date of this release of property that I just handed you.

The Court: I believe we will take a recess now, gentlemen.

(Recess.)

[fol. 199] The Court: You may proceed.

By Mr. Speer:

Q. I believe you have testified, Mr. Olsen, that you were employed for a period with the Besser Manufacturing Company, approximately December 1931 through June 1932?

A. July 1932.

Q. July 1932. And that your title was vice president, is that true?

A. Right.

Q. During the time of this employment with the Besser Company, did Jesse Besser ever discuss with you business tactics to be used against any competition in the field?

A. We must have discussed that kind of thing on various occasions.

Q. Well, can you recall, as a matter of fact, did you discuss that subject on occasion?

A. I couldn't give you any dates.

Q. I didn't ask you for that, Mr. Olsen. At any time during your employment did you discuss this topic with Mr. Besser?

A. Topic of tactics to be used against competitors?

Q. Tactics to be used against competitors.

A. I couldn't be specific, unless it would be in one item at that time, a much discussed and alive situation was whether or not the Besser Company should bring infringement suits against Industrial Brownhoist, who we were convinced was infringing Besser patents. I believe Brownhoist admitted it, and they wanted the case tried. That was discussed.

Q. Can you give us a little more in detail what was dis-

[fol. 200] cussed about that topic?

Mr. Goreff: May we have the date fixed, approximately?

Mr. Speer: This was during the employment, from December 1931 to approximately July 1932. That is as close as we can come to the date.

[fol. 201] By Mr. Speer:

Q. Did Jesse Besser discuss any plan to be used in connection with the Industrial Brownhoist Company?

A. Yes. The policy, as told to me, was that it would not be to the advantage of the Besser Company to start a suit because it couldn't be assumed that we could win that suit, whereas the threat was always there and was proving quite effective.

Q. Could you give a little fuller explanation than that? You said that it was the policy of the company to refrain from instituting suit against the Industrial Brownhoist, but rather to use the threat?

Mr. Babcock: Oh, no.

Mr. Speer: I don't know what he said. I am just trying to recall.

The Court: That is the impression I have. I don't know whether it is. As I understand, he said this, and if I am

mistaken, why I need further light. I thought he said that they threatened the suit.

Mr. Babcock: No.

The Court: That the policy was to threaten Brownhoist with a suit but not to go through with it because they didn't feel they could win it and they were getting better results [fol. 202] without going through with a suit. That is what he said.

Mr. Babcock: Pardon me, what he said was the threat was there. He didn't say Besser threatened, or anybody threatened, or used a threat. He said the threat was there.

The Court: All right. The threat wouldn't be there unless somebody had told them.

Mr. Babcock: The very conditions—— In view of the fact Brownhoist admitted the infringement, the very conditions would constitute——

Mr. Neville: He said the threat had been effective. If I recall he used that expression.

The Court: Was a threat made? You can answer that.

Mr. De Gree: I think also, if the court please, it just indicates the danger of leading questions on a pertinent matter here because they have inadvertently got the word "policy" mixed up. There is only one thing mentioned here and that is Brownhoist, and because of counsel's leading question the word "policy" has come in there.

The Court: And that would indicate it applied to more than Brownhoist. I think you are right there.

Mr. De Gree: Yes.

The Court: What does he intend to say now? Let him say what he intends to say.

A. It was common knowledge around the block industry at that time. How it got there, I couldn't prove. It was [fol. 203] common knowledge that if you bought an Industrial Brownhoist machine you were likely to be sued by Besser.

Q. Did you have any conversations with Mr. Besser about that understanding in the industry?

A. I can't remember definitely such. I do definitely remember of being informed that that was his attitude that it was worth more to keep that potential than to risk the outcome of a case.

Q. Did he specify any instances to you in which such conduct was employed?

A. I can't remember the name of any company specifically, no.

Mr. Babcock: I will ask that be stricken unless we have more definitive the reference to "such conduct." I don't know what conduct that means. There hasn't been any testimony of any conduct up to the moment.

The Court: Well, of course, the answer is not responsive and I am going to strike it out on my own. The answer is not responsive, which is an objection you can take advantage of Mr. Babcock can't, but I am taking advantage of it and striking it. It is not an answer to your question at all.

Mr. Babcock: If your Honor is just striking the answer on that ground, then I object to the question.

The Court: Let's hear what the question is.

(Question read.)

The Court: Well, reframe your question. That word "conduct" calls for some explanation.

[fol. 204] By Mr. Speer:

Q. During your period of employment with the Besser Company, did Jesse Besser ever discuss with you a policy or plan to be employed by the Besser Manufacturing Company against the Industrial Brownhoist Company?

[fol. 205] A. Yes, such a plan as I have already stated.

Q. Well we seem to have some confusion——

The Court: Well he said there was.

Mr. Speer: I am going to ask him about that.

The Court: He said, "yes there was." Go ahead.

Mr. Speer: Yes, he said there was a plan.

Mr. Babcock: No, he said there was discussion.

By Mr. Speer:

Q. Was the plan itself discussed?

The Court: He said, yes, they did discuss a plan. Or did he? I think he did say that there was some discussion of the policy to be followed. Wasn't that what you asked?

Mr. Speer: That is what he has testified to.

The Court: Then go ahead and develop it.

Mr. Babcock: Pardon me; I think we are going a little too far in this analysis of the testimony. All that he has been asked so far is whether there was a discussion about a plan.

The Court: All right.

Mr. Babcock: It does not necessarily follow that it was to be followed or that they agreed to follow it.

The Court: He said "Yes". Let us find out about it.

By Mr. Speer:

Q. Did Mr. Besser state what that plan was?

A. Yes, that is what I have been trying to say.

The Court: You just say "yes"; now go ahead.

A. Yes.

[fol. 206] The Court: What was it? That is your next question.

Mr. Speer:

Q. What was the plan, as you recall?

A. That it was smarter for the Besser Company to not risk a suit.

Q. A suit against whom?

A. Industrial Brown Hoist.

Q. And is that all that there was in the plan, or was there anything else?

A. That is all. There was that explanation of the reason why it was not smart, which I have already given.

The Court: Well give it again, because there seems to be some question about that.

A. Because it was rather common knowledge that the suit was imminent and the trade felt that Industrial Brown Hoist did infringe, and to me it was quite obvious that it did.

The Court: Were they told that they infringed?

A. I believe so.

The Court: Well do you know so?

A. No, I will say I don't know.

The Court: You don't know whether they were told? Were they told that they would be prosecuted? Was a threat of prosecution held over their head?

A. Oh yes, it must have been, because they came to me as an officer of the company and tried to get me to bring about a suit.

[fol. 207] Mr. Babcock: I object to that.

The Court: Who came to you?

A. An officer of Industrial Brown Hoist.

The Court: Came to you and asked your company——

A. Asked me as an officer of the Besser Company would we not bring suit.

The Court: Oh, that you would refrain fron. bringing suit?

A. That is correct.

The Court: So it is your conclusion that they were threatened?

A. Yes.

The Court: Do you know whether or not they were threatened?

A. I don't know, no, that they were threatened.

The Court: All right, then, we have got it.

Mr. Babcock: I will ask that his conclusion be stricken.

The Court: No, I will let it rest there, in view of the testimony; but the mere fact that somebody comes over and says, "Do not sue us" does not mean that they have been threatened with a suit. That might be inferred, but it is not necessarily true.

A. I said they came over and said, "Please sue us."

Mr. Speer: That is it, "Please sue us."

The Court: Oh, "Please sue us"?

[fol. 208] A. Yes.

The Court: That makes it worse. I will let it stand. It doesn't mean now that they have been threatened. As far as I can see, there is no testimony that they had been threatened by Besser.

Mr. Speer: None at all, your Honor.

The Court: All right; we have got it straight. Instead of the witness saying that they told him to refrain from suing, they said "Go ahead," "Please sue us." That is right, isn't it?

A. Yes, sir.

The Court: The only conclusion that could be drawn from that would be opposite to any idea of a threat. All right.

By Mr. Speer:

Q. When, Mr. Olsen, was the Stearns Manufacturing Company organized?

A. As a corporation?

Mr. DeGree: May it be made clear which Stearns Manufacturing Company?

Mr. Speer: The present defendant in the case here.

By Mr. Speer:

Q. When was it incorporated?

A. It was incorporated in 1946,—no, 1936.

Q. In 1936?

A. I think that is correct.

Q. Was it at this time that it began the production of concrete block machines?

[fol. 209] A. It had begun such about two years earlier.

Q. So that in about 1934 Stearns Manufacturing Company, unincorporated, had begun the production of block machines?

A. Right.

The Court: Well that is two years earlier than he put it, but it is all right. Didn't he say it was incorporated in 1936?

Mr. Speer: Yes, and I said in about 1934 they started——

A. They were unincorporated for several years there.

The Court: I see, all right.

By Mr. Speer:

Q. What kind of block machines was Stearns Manufacturing Company making from 1934 until 1939? By that I mean tampers or vibrators?

A. Tampers, except I think we established our first vibrator in 1937 or 1938, and perhaps made two or three more before 1939 was over.

Q. Was the vibrator to which you refer, in 1937, was it made under any patent?

A. Yes, under the Gelbman patents.

Q. What was the affiliation between the Stearns Company with Gelbman and Andrus until December 7, 1942?

A. The relationship of patentee and licensee.

Q. And when was that agreement entered into making the patentee and the licensee?

[fol. 210] A. I believe in 1936.

Q. And that condition continued until December 7, 1942?

A. That general contract did. We were still licensees after 1942.

The Court: Wait a minute now. You say that they manufactured the first vibrator under the Gelbman patent?

A. Yes, sir.

The Court: Who had the Scott patent?

A. I don't know.

The Court: Well the Scott patent was the first machine that provided for a vibrator, wasn't it?

A. I don't know that, sir.

The Court: The Gelbman patent as I remember,—I don't know but the Gelbman patent, as I remember——

Mr. Gelbman: We don't know anything about the Scott patent, your Honor.

Mr. Stark: Charles Thomas was the owner of the Scott patent and a man by the name of Ephriam Scott was working for him and at the time it was issued it was assigned to Charles Thomas. The patent itself was issued in 1938. It was filed in 1937. Probably some of the confusion that arises here is because of the number of Gelbman patents that are existing that were not included in the suit at Bay City. There were a number of previous Gelbman patents under which these parties were licensed, that have now expired in some cases, but the patents in suit at Bay City [fol. 211] were the later issued patents. I believe Gelbman has some fourteen patents.

The Court: The Scott patent was owned later on by Besser, wasn't it?

Mr. Stark: That is correct.

The Court: They own it now?

Mr. Stark: Yes, sir.

The Court: So far as my knowledge at Bay City is concerned, I never heard about the other Gelbman patents, did I?

Mr. Stark: No; that is correct.

The Court: And I supposed the Scott patent was the first patent that showed the vibrator. Evidently that is not true.

Mr. Stark: No, other types of vibrators were in effect at that time.

The Court: Well that is the vibration of the cam.

Mr. Gelbman: The Gelbman patents were issued about 1932, I believed.

The Court: And that was the up-and-down vibration.

Mr. Gelbman: That is the primary one.

The Court: And that is the patent he is talking about,—the up-and-down one?

Mr. Gelbman: That is what he is talking about now.

The Court: All right; I understand it.

Mr. Speer: May I proceed?

The Court: Yes, you may proceed.

[fol. 212] By Mr. Speer:

Q. Then Mr. Olsen, what transaction took place in 1942 to change the relationship between Stearns and Gelbman and Andrus?

A. Gelbman and Andrus brought suit against an alleged infringer, Bell, which was tried in New York; the patent claims were not upheld and Besser was held not to infringe.

The Court: They brought suit against Bell who had purchased some machines made by the Besser Company; is that true?

A. That is correct, sir. There was nothing in the Stearns contract with Gelbman to give Stearns relief under its——

Mr. Goreff: May I interrupt, your Honor? If there is any contract extant or any contract to which he is referring, if it is a written contract and is in existence I would like to have it referred to rather than have a witness make his own statements and interpretations.

The Court: I think so.

Mr. Goreff: And I move the answer of the witness to the question objected to be stricken.

The Court: I am with you.

By Mr. Speer:

Q. Is this the contract to which you refer, Mr. Olsen (handing a paper to the witness)?

A. That is the contract made in December of 1942.

Mr. Gelbman: That is not the one you are referring to?
[fol. 213] A. No, that is the contract I started to refer to.

Mr. Gelbman: He is talking about the 1936 or 1940 contract I believe.

A. And I was asked what caused the change.

Mr. Gelbman: In which Stearns was the sole party with Gelbman and Andrus. We have a copy of that if you want to put it in evidence.

Mr. Speer: I would like to; I didn't intend to but——

(A document is produced.)

By Mr. Speer:

Q. I will ask you, Mr. Olsen, are these copies of the agreement, which you are referring to?

A. Yes, they appear to be.

The Court: Has anybody got the citation of that Bell patent? Was it decided in the District Court?

Mr. Neville: I don't know there was an opinion on that, your Honor. There was a final judgment. I don't think there is an opinion on it so there wouldn't be a citation.

The Court: I would like to read the bill of complaint in that case.

Mr. Speer: I have that here, your Honor, and I was going to offer it into evidence.

The Court: All right, go ahead.

Mr. Speer: I have the bill of complaint and answer.

[fol. 214] (Plaintiff's Exhibits 111 and 112 marked.)

Mr. Speer: I offer Plaintiff's Exhibits 111 and 112.

Then, your Honor, without introducing these into evidence, I have the complaint, the answers and judgment in that case.

The Court: Well, the reason I want them is in connection with this other case, so you better give them to me later on. But I want them in connection with the other case, not necessarily with this case. It is strange I never even heard about that.

Mr. Gelbman: It has nothing to do with the other.

The Court: It may not, but still I am interested in knowing what the prior art was.

Are you waiting?

Mr. Speer: Yes. I have offered two exhibits.

The Court: What contract is this?

Mr. Speer: These are the agreement between Gelbman and Andrus and the Stearns Company.

The Court: On the Andrus vibrating machine, is that right?

Mr. Neville: Yes, your Honor.

The Court: And that didn't provide what they call orbitally. What did they call the other patent?

Mr. Stark: Orbital vibration. This was a limited amplitude, an interrupted vibration,

[fol. 215] The Court: Where does the vibration take place, incidentally, in the mold in that first Gelbman patent?

Mr. Louis Gelbman: That is in the mold.

The Court: How did it differ from the Scott patent?

Mr. Morris Gelbman: He doesn't know what the Scott patent is, your Honor.

The Court: Oh, I see.

Mr. Speer: We understand that that patent was acquired in 1947.

The Court: Yes, that is all right.

Is there any objection to the contract? It is a contract entered into between Stearns and the inventors in——

Mr. Speer: 1938.

The Court: —1938, by which they produced the first vibrating machine, according to them.

Mr. Goreff: It is a license agreement.

The Court: Well, that is a contract, isn't it?

Mr. Goreff: Yes.

The Court: Is there any objection, Mr. Babcock?

Mr. Babcock: I haven't completed my examination of one of the exhibits yet, your Honor.

The Court: I don't think you can hold up the court to complete the examination of an entire license agreement, unless there is objection to the agreement itself. Is there any reason why you have to read it all?

Mr. Babcock: I am sorry. I can't acquaint myself with [fol. 216] its contents to observe whether I have an objection.

The Court: Well, it is a license agreement between these

two and purports to be. Go ahead. If you think you have to read it, go ahead.

Mr. Babcock: I might observe by way of explanation this document includes the third party, Mr. Olsen himself, and I don't know where or how he is involved as yet, and it may affect the materiality or relevancy of the document.

Mr. Speer: I believe the witness has testified that at this time—I will ask him.

The Court: Well, wait a minute. We will wait for the objection.

Mr. Speer: If your Honor please, in order to answer that objection, I could ask Mr. Olsen at this time what——

The Court: Just wait.

Mr. Babcock: I don't know whether these have any importance or not, your Honor. I would like an opportunity—it is within a half hour of closing time now—of considering them during the afternoon and preparing myself to form a judgment between now and tomorrow morning.

The Court: It will be admitted and you will be given the right to ask that it be withdrawn upon showing of objections. Go ahead.

Mr. DeGree: May I get a look at that other exhibit?

The Court: Have you any objection to it?

Mr. DeGree: I believe not, but this is the first I have [fol. 217] seen of it.

There is no objection on our part.

The Court: It may be received under the condition stated by the court.

By Mr. Speer:

Q. Mr. Olsen, were you employed by the Stearns Manufacturing Company on April 1, 1938?

A. Yes.

Q. And what was your title, or title of your position?

A. President.

Q. President. Were you employed by the Stearns Manufacturing Company on March 1, 1940?

A. Yes.

[fol. 218] Q. And what was your title?

A. President.

Q. Were you employed by Stearns Manufacturing Company on December 7, 1942?

A. Yes.

Q. Did you at that time, on behalf of the Stearns Manufacturing Company enter into a patent license agreement with Hamlin F. Andrus, Louis Gelbman, and the Besser Manufacturing Company?

A. Yes.

Q. Is this a copy of that agreement? (Document handed to the witness.)

A. Yes.

Mr. Speer: I offer Plaintiff's Exhibit No. 10.

The Court: It may be received.

By Mr. Speer:

Q. Now at about this time, Mr. Olsen, in 1942, what position in the industry, in your opinion, did the Besser Manufacturing Company and the Stearns Manufacturing Company occupy?

A. Numbers one and two.

[fol. 219] Q. What was that? I did not hear it.

A. First and second position; in which order I do not know.

Q. Now is that with respect to total machines manufactured or is that with respect to dollar volume of sales?

A. I believe it is true on both basis.

Mr. Speer: I offer into evidence at this time plaintiff's exhibit No. 113. Will you mark it, please.

(Whereupon a document entitled, "Manufacturers 1939, General Industrial Machinery", was marked by the reporter as Exhibit No. 113).

Mr. Speer: Plaintiff's Exhibit No. 113, which is a Government's publication of the United States Department of Commerce, 16th Census of the United States, taken in 1940, for the year 1939; the information contained in Table 5 on page 31 is the part of the exhibit upon which the Government intends to rely.

The Court: Didn't somebody yesterday give me a copy of the Gelbman patent of 1932; that is the patent involved in the Bell suit?

Mr. Speer: Here it is, your honor; that is 1,867,14:. (Handing document to the court:)

Mr. Speer: I have offered to introduce Exhibit No. 113.

[fol. 220] The Court: It may be received.

Mr. Speer: This is a United States Department of Commerce publications, "16th Census of the United States, 1940. Manufacturers 1939". I refer to Table 5 on page 31 of this document and with respect to the year 1939 I quote: "Total cement and concrete block machines, value $1,092,006.00."

Mr. Babcock: Does the document not also show the number reporting?

Mr. Speer: It does.

Mr. Babcock: To create that value?

Mr. Speer: It does. Would you care to have that in, Mr. Babcock? Again quoting from the document, the same table, 1939, under "Aggregate, 1627".

Now at this time I offer plaintiff's Exhibit No. 1, which is a list of machine sales prepared by F. C. Burnett, Assistant Secretary, Besser Manufacturing Company.

The Court: Any objection?

Mr. Henry: I would like to ask Mr. Speer what that figure 881 means. Does that mean the number of producers of blocks, or number of producers of block machinery?

Mr. Speer: I believe that means the number of machines that were produced in that year.

[fol. 221] Mr. DeGree: You changed that figure from 881 to 1627, didn't you?

Mr. Speer: Yes, I did, it is 1627.

Mr. Babcock: I interpret it as meaning the number of concerns or persons who have made a report of their product.

The Court: Let me see what my interpretation is.

Mr. Babcock: Which indicates how helpful the thing is.

Mr. Speer: Well, I think we can find an explanation in there for that.

The Court: What number have you in mind?

Mr. Speer: 1627, your Honor, which I interpret to mean the number of block machines produced.

The Court: Well, I would take it that is what that would mean. It says, "cement or concrete block machines reported by number," and then gives the number in 1937; is that right?

Mr. Speer: Well, that is in there, but we are only concerned at this point with 1939.

The Court: Well, that shows that in 1939 there were 881 machines produced, as I understand it, in the industry. There were 746 produced in other industries in the machinery group, including electric, and that total ought to be 1627. I don't think there is any question about that, gentlemen. I don't know: It looks that way to me. However, I am not [fol. 222] going to foreclose you from finding another interpretation if there is one.

Mr. Gelbman: Mr. Speer, I believe Mr. Babcock asked you whether or not there was any indication on that record as to the amount of manufacturers that reported in to the Bureau of Commerce, and I think you said, yes; I believe now the answer to that is, no; isn't that right?

Mr. Speer: Thank you. I believe that was Mr. Babcock's question, and if it was I should change that answer.

The Court: I think so too, and I think that was his question. Your answer is, no, because at least I looked at it and I couldn't see anything.

Mr. Speer: Well, I could take the time, your Honor, to make a study.

The Court: Take it on your own time.

Mr. Speer: It is in evidence.

Was there any objection on plaintiff's Exhibit No. 1?

Mr. Babcock: I have none.

Mr. Gelbman: None.

The Court: No objection. It may be introduced.

Mr. Speer: This exhibit is entitled, "List of Machine Sales Prepared by F. C. Burnette, assistant secretary, Besser Manufacturing Company."

It states that for the year 1939, total machines numbered 52—valued $243,856.

[fol. 223] The Court: What does that mean?

Mr. Speer: Well, again it is an interpretation, your Honor, that the 52 machines produced by the company——

The Court: Which company?

Mr. Speer: The Besser Company.

The Court: In——

Mr. Speer: 1939.

The Court: 1939, produced.

Mr. Speer: Produced 52 machines, at a value of $243,856.

The Court: All right.

Mr. Speer: Now, concerning the figures of the Stearns Manufacturing Company for that year, we asked the company in an interrogatory which is on file, and signed, the answer is signed by Pierce Wright, vice president, dated October 7, 1949, interrogatory No. 3, and the answer is as follows:

> "The dollar volume of sales of concrete block machines by Stearns Manufacturing Company, Inc., was as follows: 1939, $279,919.60."

The Court: How many machines?

Mr. Speer: We didn't ask for the number of machines in the interrogatory.

However, I think it a plausible time then to offer Plaintiff's Exhibit No. 2, which is a table prepared by the Stearns Manufacturing Company, which gives us the number of [fol. 224] machines produced for the fiscal year ending August 15, 1939.

Mr. DeGree: No objection on the part of Stearns.

Mr. Babcock: No objection.

The Court: It may be received.

Mr. Speer: This exhibit indicates that a total of 105 block machines were manufactured by the Stearns Company in the fiscal year ended August 31, 1939.

The Court: Now, the government report shows about 1600 machines, doesn't it, for that year?

Mr. Speer: 1627 machines.

The Court: And that would give about 160 machines divided between these two companies?

Mr. Speer: Approximately 160 machines, or ten per cent of the total.

The Court: I see. What is the total in value there?

Mr. Speer: I am just coming to that, your Honor.

Mr. Babcock: I wonder if your Honor's question indicates your Honor feels, or that the government is contending that these printed documents will purport to report every block machine manufactured in the United States, reports from every manufacturer?

The Court: Well, I consider it, perhaps, almost on the same basis that I would accept the census has reported everybody in the United States.

Mr. Babcock: Your Honor recognizes the fact even when they are taking a census, even when they are taking the [fol. 225] census today——

The Court: Yes.

Mr. Babcock:—when they get outside the question of counting the number of people, the check they make is only a spot check.

The Court: I know. This is even better, and I will accept it, unless you have some evidence of somebody that wasn't reported at that time. So I will accept the government's figure as being the number of machines in this country, produced at that time, unless I can be shown that is not even approximately true. I think that is all I can do.

What is the total?

Mr. Speer: In answer to your Honor's question, the total of $1,092,006. The percentage of that represented by the 1939 sales figure of Besser amounted to 22.4 per cent. That is our computation.

The Court: They had ten per cent of the number of machines that were supposedly sold that year?

Mr. Goreff: No.

Mr. Speer: What is that again?

The Court: They had about ten per cent of the number of machines. Is that the machines sold that year or in operation?

Mr. Speer: Those again are number of machines which were produced, according to the figures.

The Court: I mean produced, I don't mean sold.

[fol. 226] Mr. Speer: And we have ascertained the Besser and Stearns percentage amounted to ten per cent of that.

The Court: All right.

Mr. Speer: But the total value of Besser in that year was 22.4 per cent.

The Court: All right, I have it.

Mr. Speer: And for Stearns about 25 per cent.

The Court: What is the total of the two?

Mr. Speer: The total of the two is around 47 per cent.

The Court: If that is true—and if it isn't true the figures can be challenged—in 1939, as I understand the testimony, according to the census of the United States, the number of concrete block machines produced was about 1600 and something; of this number about 60 were produced

by the two firms, Besser and Stearns, but the dollar value of Besser and Stearns is approximately, or was approximately at that time 47 per cent of the total dollar value in the United States reported.

Mr. Speer: That is the way I understand it, your Honor.

The Court: All right.

By Mr. Speer:

Q. Now, you have testified, Mr. Olsen, that at the present time you are no longer employed by the Stearns Manufacturing Company?

A. That is right.

[fol. 227] Q. When did that employment terminate?

A. May 1, 1948, approximately.

Q. Would you tell the court what in your opinion prompted your resignation?

Mr. Gelbman: I object to that. I think he ought to testify to what the facts were, rather than an opinion.

The Court: Well, all right, let him give the facts about his termination. I think that the question means the same thing, but it is all right.

A. I had sold my stock in the Stearns Company and did not choose to remain in a company which I did not control.

By Mr. Speer:

Q. How much stock of the Stearns Company did you dispose of?

A. Substantially all that I had, all but several hundred shares.

The Court: That means nothing. He might have had two shares. What percentage of the company was it?

A. Myself and family?

The Court: Yes.

A. Immediate family?

By Mr. Speer:

Q. Yes, your family.

A. Some thirty to thirty-five per cent.

Q. And on what day did you make the actual sale?

A. March 26, 1948.

Q. And to whom was the stock sold?

A. Smith Hague & Company.

[fol. 228] Q. What is that company? Is that a firm of stock brokers?

A. That is a Detroit stock broker.

Q. How much were you actually paid for this stock?

A. $12.69 plus per share.

Q. $12.69 a share?

A. Right.

Q. Do you have information of what other shares of Stearns stock was selling for at about that time?

A. Yes.

Q. What is the answer then, what information do you have?

A. Between eight and ten dollars.

Q. Between eight and ten dollars a share?

A. Per share.

Q. And what is the basis of that information?

A. Stock brokers who dealt in it and of whom I occasionally inquired.

Q. Did you deal only with the Smith Hague & Company for the stock transaction?

A. No. I only dealt with them at the closing.

Q. With whom did you deal prior to the closing?

A. A man named Henry Sells.

Q. Did he identify himself to you?

A. He said he was an agent, or he represented a party who would like to buy my stock, and that he was not permitted to reveal the name of his principal.

[fols. 229-232] Q. Did you deal with him here in Detroit, Mr. Olsen?

A. I met him here at least on one occasion before the closing, but mostly he came to my office in Adrian.

[fol. 233] Q. I believe at the conclusion of yesterday's testimony, Mr. Olsen, we were discussing an agreement between the Besser Manufacturing Company and yourself, dated July 16, 1932, in which certain real estate and personal property in Adrian, Michigan, was transferred to you. Is this the agreement or a copy of such agreement?

A. It appears to be.

(Plaintiff's Exhibit 114 marked.)

Mr. Speer: I offer Plaintiff's Exhibit 114.

Mr. Henry: Exhibit 114, your Honor, is an unexecuted copy of an agreement made July 16, 1932, between the Besser Company and Eugene F. Olsen, that I found in the file of papers in connection with the purchase of stock in [fol. 234] Consolidated by Besser in 1931. The signatures are in my handwriting, in pencil, and are scratched out. Either an agreement similar to this or one substantially the same, I believe, was executed, and I have no objection to it being received.

The Court: All right. May be admitted with those explanations.

Mr. Speer: Plaintiff's Exhibit 114 is an agreement dated July 16, 1932, which conveys certain real estate and personal property to Eugene F. Olsen from the Besser Manufacturing Company. I will quote from paragraph 7 of such agreement:

> "Second party agrees for himself, his representatives, and assigns to not permit the property herein described to be used for the manufacture of concrete product machinery or hot process cold block machinery for ten years from this date, and the real estate is hereby impressed with such a restriction."

By Mr. Speer:

Q. Now, Mr. Olsen, was that contract agreement—was that changed at any time, the terms of such contract?

A. Yes, in 1934.

Q. Is this paper the one that changed the terms of the contract in July 1932?

A. Yes.

Q. That is Plaintiff's Exhibit 110. In what particular respect was the contract of July 1932 changed, Mr. Olsen?

Mr. Babcock: I think the two agreements will advise us about that as the best evidence.

[fol. 235] The Court: Well, I think perhaps that is true, but in order to save time I think he could state it and if it is questioned in any way then the court will have to look into it.

The Witness: Shall I answer?

The Court: Yes, I think you may answer.

A. It removed the restriction as to the use of those assets and that real estate in return for my assuming certain taxes that Besser had in the original agreement agreed to pay.

By Mr. Speer:

Q. Now, I will proceed to the Stearns stock transaction of 1948, which we were discussing. I believe you stated yesterday that the sale was made through the Smith Hague Company of Detroit. Could you tell us whereabouts the final transaction occurred, where the stock changed hands?

A. In the offices of Smith Hague in Detroit.

Q. And what was that date?

A. March 26, 1948.

Q. And what persons were present at that time, Mr. Olsen?

A. Mr. DeGree, Mr. Pierce Wright, Mr. Sells, Mr. Grant Cook, my attorney, and myself.

Q. In addition to your attorney, did these other parties in any way tell who they were or had you been acquainted with them before this time?

A. No, I had not met them before except Mr. Sells.

Q. Except Mr. Sells?

A. Whom I had met.

[fols. 236-238] Q. And did Mr. Wright or Mr. DeGree identify themselves

A. No. It was obvious or perhaps they said that they were associated with Mr. Sells in this deal.

Mr. Babcock: Pardon me. I will ask that that be stricken because the witness has preceded that by saying it was obvious, which is his conclusion, and "perhaps," which is just a speculation.

The Court: He can tell whether or not they knew whom they were representing. That answer may be stricken. Now, can you answer the question?

A. I should say they did not identify who they were.

By Mr. Speer:

Q. Did either Mr. Wright or Mr. DeGree make any comments to you at the time the stock was sold?

A. Yes, there were comments.

Q. Were there any comments made about your continuing in the block machine industry?

A. Yes.

Q. By whom?

A. Mr. DeGree and Mr. Wright.

Q. Could you tell us what comments they had to make?

[fol. 239] Mr. Babcock: I am objecting to Mr. Olsen testifying to statements made, if any were made, by Mr. Pierce Wright and Mr. DeGree, relative to his participation in the concrete block business. As I recall that is the subject matter of the question because there is no showing of any kind, either presumptive or prima facie or actual that either Mr. Pierce Wright or Mr. DeGree had any authority whatsoever to bind any of these defendants in the making of such statements.

I am further objecting to the answer on the basis of the question as framed because it does not distinguish between them as to which of them might have made the statement.

The Court: If he can tell, he will be permitted to testify. Do you question that Mr. Fildew was representing Besser [fol. 240] Manufacturing Company at that time, or Stearns? Who was he representing, supposedly?

Mr. Speer: Your Honor said again, Mr. Fildew. Did you refer to Edward DeGree?

The Court: Yes.

Mr. Speer: Well, I don't know. I can't say. He and Mr. Fildew are in the same firm, but we do have an answer by the Besser Company that Pierce Wright was authorized to purchase.

The Court: I am not talking about Pierce Wright. I am talking about——

Mr. Speer: DeGree?

The Court: —DeGree.

Mr. Speer: Well, I will ask this gentleman if he knows who he is.

The Court: All right.

By Mr. Speer:

Q. Mr. Olsen, did you know who this Mr. DeGree was, what firm he was with?

A. I don't remember whether I knew at that time or not.

Q. All right. At this time what statements were made,

did Mr. Wright make any statements about your continuing in the concrete block machine industry?

A. Yes.

Q. And tell us what they were, please.

Mr. Babcock: May I have my objection without repeat-
[fol. 241] ing?

The Court: You may have your objection. He may answer.

A. I was asked to what I agreed in connection with this sale. I inquired as to what they meant by that.

The Court: By what?

A. When they asked the question, What do you agree to? in connection with this sale. And I asked them what they meant by that question. They then said as to——

Mr. Babcock: Just a moment, pardon. In stating this; in presenting this question to the witness counsel has limited it to Mr. Pierce Wright. The witness is now using the pronoun "they."

A. They both took part.

The Court: Just a minute. What about it, gentlemen, are you able to prove at all that Mr. DeGree was representing either Stearns or Besser?

By Mr. Speer:

Q. Did you know what part in this transaction Mr. DeGree was playing?

A. No.

The Court: Who was he representing? Does he know it or doesn't he? I anticipate you would be able to prove it, but if that is made a point of issue I am going to rule with the defendant at this time.

By Mr. Speer:

Q. Mr. Olsen, do you know what parties to this transaction Mr. DeGree was representing?

[fol. 242] A. The purchasers of my stock.

Q. The purchasers of your stock. Did he say, or did he give you any indication who the purchasers were?

The Court: Why don't you find out who the purchasers of his stock were?

Mr. Speer: That is what I was going to ask.

The Court: Did he say purchasers or purchaser?

Mr. Speer: I believe he said purchasers; isn't that correct?

A. Yes.

By Mr. Speer:

Q. Did Mr. DeGree tell you who the purchasers of your stock were?

A. No.

Q. What statements did Mr. Pierce Wright make concerning your continuing in the concrete block industry?

Mr. Babcock: With the understanding my objection continues, your Honor please, or shall I restate it?

The Court: You have an objection to that question and I overruled it, so I don't know as it is necessary to make another objection. He may answer.

A. He asked me how long I was agreeing to stay out of the concrete block machinery business.

By Mr. Speer:

Q. And what was your answer to that?

A. That I made no agreement of any kind in that connection.

Q. Was there anything else said at this time in that connection?

[fol. 243] A. I don't remember any such.

By Mr. Speer:

Q. Could you tell us approximately at what time you had such conversation with Mr. Besser?

A. November 1948.

Q. And where did it take place?

A. In Detroit.

Q. And what was the general topic of the conversation?

A. It was the opening remark of Mr. Besser at a con-

[fol. 244] ference in which we discussed the matter of

whether I would be interested in repurchasing the Stearns' stock.

The Court: When was this? How long after the other?

A. In November, and the sale was in April.

The Court: Up to this time, did you know who bought your stock then?

A. No, sir.

The Court: All right, go ahead.
The Witness: Does that answer your question?
Mr. Speer: No, I don't think so, Mr. Olsen.

By Mr. Speer:

Q. Did he tell you at that time that he had actually bought the Stearns' stock?
[fol. 245] A. All right, his words as I remember them were, "I do not think I need to apologize for having purchased the the Stearns stock."

By Mr. Speer:

Q. All right. Now at the present time, Mr. Olsen, you say you are the owner and president of the Gene Olsen Corporation.

A. I am not the sole owner; I am an owner with my son of approximately 75 per cent of the stock and I am the president.

Q. Now, could you tell us when the Gene Olsen Corporation was organized?

A. June 1st, 1948.

Mr. DeGree: The date please?
Mr. Speer: June 1st, 1948.
Mr. DeGree: Thank you.

By Mr. Speer:

Q. Now, Mr. Olsen, between the time that you sold your stock in Stearns and June 1st, of 1948, did you have any conversations with manufacturers of concrete blocks concerning your continuing in the concrete block machine industry?

A. Yes.

Q. And could you tell us at what time you had such conversations?

[fol. 246] A. I cannot tell you as to all of them. There were many. The most significant one I can tell you something specific about.

Q. But they are conversations that took place between the sale of the Stearns stock and the organization of the Gene Olsen Corporation?

A. Right.

Q. Now, could you tell us where the conversations were held?

A. The more significant conversation I can tell you specifically about where I made some notes at the time. The scattered ones I cannot remember just with whom or just the date. But on April 14, 1948, I was called to Chicago to a meeting that was said to be a little meeting of concrete block manufacturers.

Q. Let me interrupt for a moment. By whom were you called, Mr. Olsen?

A. Mr. Dienhart.

Q. Is that the same gentleman who was in the court the other day?

A. Yes.

The Court: Was he on the stand?

Mr. Speer: He was on the stand, your Honor.

The Court: All right.

By Mr. Speer:

Q. All right, continue.

A. I want to say that he made it very clear he was not speaking——

Mr. Babcock: Pardon me just a moment. I interpret this now to be testimony of a conversation between the witness and Mr. Dienhart. Dienhart has not been identified in any [fol. 247] way with any of these defendants.

The Court: He may answer. Is he connected with any association?

A. Mr. Dienhart is executive secretary of the National Concrete and Masonry Association.

The Court: He may answer.

Mr. Babcock: Your Honor has in mind the evidence that the manufacturers of concrete blocks have been identified only as associate members of this association of which Dienhart is the representative.

The Court: I do not think it makes any difference what they might call themselves. He may answer.

A. I went to Chicago at his request and found some twelve or fourteen owners and operators of that many of the biggest concrete block plants scattered across the United States. Do you want me to go on?

By Mr. Speer:

Q. Yes, go ahead.

A. With what took place?

Q. Yes, what actually took place at this conference.

A. It was explained to me——

Mr. Babcock: Pardon me, may we first have identification of who was there?

A. I can tell you I believe eleven of the people. There were others whose names I find I did not note. Do you want those?

By Mr. Speer:

Q. I do not care. It is up to Mr. Babcock.

[fol. 248] The Court: Well, he is your witness.

By Mr. Speer:

Q. If you can.

The Court: I sustain the objection.

By Mr. Speer:

Q. If you can tell us what persons were there, Mr. Olsen, we would like to have that information.

A. Walter Manhart, Milwaukee; Henry Buchholz, of Chicago.

The Court: Do you know the firms they represent?

A. I do, but I am afraid I could not give you accurately the firm name.

The Court: You mean the legal name?

A. That is what I could not give you from memory.

The Court: I don't know as we are about that. I do not know whether the name of Besser is Besser Manufacturing Company or Besser Manufacturing Co., or Besser Co., or whatever it is. I know when they talk about Besser who they are talking about.

A. The trade all know who these men are.

The Court: Well, just labeling them Chicago does not help very much, except that I know there is a Chicago in Illinois and I think there are two or three others in the country.

A. The first name is Best Block Company, Mr. Manhart; Henry Buchholz, Illinois Brick Company, Chicago; Fred Reinhold, Anchor Concrete Stone Company, Buffalo; George Catterjohn, whose firm name I do not recall, Paducah, Ken-[fol. 249] tucky; Dean Lyde, Cinder Block Company, Denver, Colorado; Harve Kilmer, Iowa Crib and Silo Company, Des Moines; John Stranburg, whose firm name I cannot give you, Kansas City; Les Schalbe, Economy Block Company, Milwaukee; Harold Spate, Cedar Rapids, Concrete Products Company, Cedar Rapids, Iowa; Paul Bohm, Concrete Products Company, South Bend, Indiana; Elmer Deanhart, who has already been identified. Those are the only names I found on my notes of that time.

The Court: Can you remember anybody else that was there?

A. I cannot.

The Court: All right.

By Mr. Speer:

Q. Now, Mr. Olsen, can you recall what each of those individuals had to say at this conference?

Mr. Babcock: I object, if your Honor please. Perhaps I should let that question be answered as to whether or not he can recall. I will withdraw the objection for the moment.

A. Do you mean, can I tell you which man said which remark?

By Mr. Speer:

Q. That is what I have asked you, if you can.
A. No, I cannot remember that.
Q. Can you tell us again what the purpose of the conference was and what the general topic of discussion was?
A. Yes.
Q. All right, go ahead.

[fol. 250] Mr. Babcock: I object, if your Honor please. There is no evidence that anybody present at this meeting had any connection with any of these defendants. There is no evidence that anything that was said could in any way bind these defendants or relate materially to the subject matter involved in any of this litigation, and there is no evidence that indicates that any of them in any way were part of any combination or conspiracy.

The Court: He may answer.
A. They had heard the rumor that I had sold——
The Court: I am even going to object to that.
A. All right.
The Court: Strike it out. Tell what you know. You say they had heard the rumor. How do you know whether they had heard the rumor about anything.
A. They told me that.
The Court: Well, why don't you say what they told you?
A. I do not understand——
The Court: Instead of what you determined they had heard. It may be stricken and you can start over again. You asked him to tell the purpose of the meeting and the general trend of the conversation, what it was about.
Mr. Speer: That is it, yes, sir.
A. They said they had asked me to come to Chicago to tell [fol. 251] them what I could——
The Court: May I get this date again, about? November, is it?
A. No, sir, April 14.
The Court: April 14.
A. 1948.

The Court: 1948, and at that time you had your own company, had you?

A. I had sold the stock.

The Court: I want to get your——

A. No, I did not have my own company then.

The Court: With whom were you connected, either Stearns or Besser, or did you have stock in either one of them at that time?

A. I had no stock. I was still at the Stearns Company.

The Court: Being paid by the Stearns Company for services?

A. Yes.

The Court: All right.

By Mr. Speer:

Q. All right, go ahead. I have forgotten where I was.

The Court: You were in Chicago, I guess, the last thing you said.

By Mr. Speer:

Q. I believe you just started to say that you were called to Chicago and they told you that they had heard——

[fol. 252] A. And they wanted to know if it was true I had sold my Stearns stock and to whom. I told them I had sold it to a representative who declined to identify his principal. They stated that they believed the principal was the Besser Company or Mr. Besser, and if that was true, they were taking steps to start a concrete block machinery company of their own, because they were not willing to be put in a position where they would have to go to one concern for high production block machinery. They asked me if I was going to start again and I told them, as I had told the representative of the purchaser of my stock before he bought it, that I did intend to start again. Before the meeting closed, they said that in view of the fact that I professed to be going to start again that they would not go ahead with their plans to start a company, because what they wanted essentially was more than one source for high production block machinery.

By Mr. Speer:

Q. And that was all that was discussed at that time?

A. Yes.

Q. Now, approximately what time did the Gene Olsen Corporation begin the manufacture of concrete block machines?

A. Toward the end of 1948.

Q. And what kind of a machine did you begin to build at that time, that is, a tamper or vibrator?

A. A vibrator.

Q. And is that the only kind of machine that is being built [fol. 253] at the present time by Gene Olsen Corporation?

A. Yes.

Q. Now, I wonder if you would give us a brief description of this concrete block machine?

A. You mean the mechanical aspects of it?

Q. Yes, of course——

A. It is what we regard as a high production machine. It makes three blocks at a time on one single pallet. The blocks are packed by vibration. No feed drawer is utilized but instead the mold is taken back under the main material supply hopper. While the vibration still continues a pressurehead is applied, then the units are stripped. Does that answer your question?

The Court: Is that your machine, the one you use, you say?

A. It is the one we are making, sir.

The Court: The one you are making?

A. Yes, sir.

The Court: It has the vibration?

A. Yes, sir.

The Court: There is no feed drawer that goes over the top of it at all, it is fed from the hopper?

A. Yes.

The Court: Does it vibrate the hopper when it vibrates the mold?

A. No.

[fol. 254] The Court: The mold vibrates all alone?

A. Yes.

The Court: By something connected on the inside of the mold or the outside?

A. Exterior.

The Court: Exterior. And then there is a pressure?

A: Yes, sir.

The Court: How long have you been manufacturing that?

A. Since late 1948.

The Court: Are you manufacturing it under any patents?

A. Yes, sir.

The Court: Whose patents?

A. John O'Connor is the patentee.

The Court: I see, all right.

A. That is as to the vibrating device, however sir, not the overall machine.

The Court: The vibrator device, the vibrator and the pressure?

A. The means of setting up the vibration is peculiar.

The Court: What is it? What kind of a movement is it?

A. We call it a resonant vibration. It is rather an involved principle.

The Court: It is not the up-and-down vibration?

[fol. 255] A. Yes, sir.

The Court: It is the up-and-down. Does it also go around?

A. No.

The Court: Just up and down?

A. Yes, sir.

The Court: That was declared unpatentable, those claims, in the Bell suit, weren't they?

A. No, sir. It is the means by which we develop this up and down movement that is patented.

The Court: I see, all right.

A. Not the fact that it moves up and down.

The Court: All right, go ahead.

By Mr. Speer:

Q. Now, at any time since you have entered upon the manufacture, have you requested a patent license from Gelbman, Andrus, or Besser, or Stearns?

A. Yes.

Q. Now, from which of those parties have you sought a patent license?

A. In the summer of 1948 I discussed the patent problem and asked Mr. Gelbman to take up with Besser and Stearns

the matter of whether they would permit him to issue a license to me.

Q. And what was his answer?

A. He said he would, but that I ought to know that, what would happen, because I had, of course, been president of Stearns and there had been several such applications.

[fol. 256] Q. Is that the only occasion that you have made an application for a patent from Gelbman?

Mr. Gelbman: May we have the date fixed on this?

By Mr. Speer?

Q. What was the date of that, Mr. Olsen?

A. I can't tell you. Perhaps Mr. Gelbman's notes will show. It was on one of his trips to Adrian to see the Stearns Company, in the summer of 1948. I think he was there on several occasions, and did come to see me.

Q. After you had——

A. Oh, yes, it was after.

Q. After you had organized the Gene Olsen Corporation?

A. Yes, sir.

The Court: It was after the patent you do have had been obtained?

A. It was before we had this O'Connor patent.

The Court: After the application and before issuance, or before the application?

A. It was before my arrangement with O'Connor as patentee.

The Court: I see.

A. However, that would not affect my interest in the license from Gelbman because, as I stated, O'Connor's patent did not cover a machine but a method of inducing vibration.

The Court: Well, the Gelbman patent, one patent is a method patent, the other patent is an apparatus patent, did you know that?

A. I believe that is correct.

[fol. 257] The Court: Which one did you want?

A. License on all of them that we could get in preference to risking fighting infringement litigation if they felt we infringed.

The Court: I see.

A. Our counsel told us we did not infringe but——

Mr. Gelbman: I object to that.

The Court: I take it for granted that happened, but it may be stricken anyway.

Mr. Goreff: Your Honor, could we get the time and place fixed with reference——

The Court: He has given it as close as he could.

Mr. Goreff: —with reference to the date which he commenced manufacture?

The Court: Has he told that?

Mr. Speer: I thought that question had been answered.

The Court: All right.

A. Late 1948.

Mr. Goreff: This was late 1948?

A. No. Machine was changed in 1948.

Mr. Goreff: I am trying to fix with reference to date of organization of Gene Olsen Corporation.

A. That corporate existence started June 1, 1948.

Mr. Goreff: And with reference to that, would you tell us whether it was before or after that date that you applied [fol. 258] for the first time to Mr. Gelbman?

A. It was after that June 1st date.

Mr. Goreff: After you had organized the Gene Olsen Corporation?

A. Oh, certainly.

By Mr. Speer:

Q. Was that the only occasion, Mr. Olsen, on which you requested a patent license from any of these parties?

A. No.

Q. What was the date and place of the next request for patent license?

A. December 1, 1948.

Q. And to whom was the request made at that time?

A. Mr. Ralph Bailey, of Besser Company, who was in my office in Adrian. I asked him to see what Mr. Besser's attitude might be on licensing.

Q. And what statements did he make at that time?

Mr. Babcock: I object, if your Honor please, to the authority of Mr. Bailey to discuss for the Besser Company the matter of licensing for patents established. Mr. Bailey might have been a shop foreman for all that appears in the record, and he certainly couldn't presume to speak for the board of Directors or executives of the Besser Manufacturing Company as to their attitude on an application for license.

The Court: He may answer.

A. He said that he would tell Mr. Besser of my request.

By Mr. Speer:

Q. Is that all he had to say?

[fol. 259] A. Well, at the date of that conference——

Mr. Babcock: Does my objection continue to the balance of this?

The Court: If you desire it to, it does.

The Witness: Might I answer that question?

The Court: Yes.

A. Mr. Bailey told me that Besser Company was going to have to sue Gocorp for patent infringement.

Q. Do you know what job Bailey has with the Besser organization?

A. No.

Q. At the time that he made this statement that if you produced a machine Besser would sue, did he inspect your block machine?

A. There weren't any at that time. Had one under assembly back in our shop.

Q. Did he state under what particular patents Besser would sue?

A. No.

Q. Have you ever requested a patent license from any of these parties on any other occasion.

A. Yes.

Q. All right. Would you tell us from whom, and at what time, and where?

A. On January 13, 1950, had a conference with Ralph Bailey, who suggested that I confer with——

Mr. Babcock: Pardon, just a moment. I not only repeat the objection previously made to a conference with Mr. [fol. 260] Bailey, but this is now fixed as a time some eight or nine months subsequent to the filing of the complaint in this case, entirely immaterial and irrelevant.

The Court: What about it?

Mr. Speer: If your Honor please, we intend in this trial to offer other transactions that have occurred after the filing of the complaint.

The Court: Have you any authority on that? I don't know, I am frank to say to you.

Mr. Speer: I don't at the time but I would be glad, if your Honor so desires, to check some authority on that.

The Court: If I decide and leave it in, how am I going to get it out?

Mr. Neville: Your Honor, if I may inject myself into the discussion, the evidence, even though it pertains to events and transactions which occurred following the date of the filing of the complaint, throws some light on the intent and purpose.

The Court: I think you are right. I am going to permit it.

Mr. Neville: Thank you, your Honor.

The Court: I think it must be.

Mr. Speer: All right, Mr. Olsen, will you continue?

A. January 13, 1950, conference with Ralph Bailey, it was suggested I confer with Mr. Besser regarding a license [fol. 261] arrangement under particularly the Gelbman and Scott patents.

On January 19, 1950, met Messrs. Besser and Bailey in Detroit, discussed license agreement for Gocorp. Mr. Besser agreed to license Gocorp.

Mr. Babcock: I object, your Honor please, because this too is a date subsequent to the filing of the complaint.

The Court: Well, of course, "agreed" is a conclusion on your part. You can tell what happened. The objection is overruled except as the court has modified it on the word "agreed."

[fol. 262] A. Mr. Besser said he would license Gocorp at $75 per eight-inch cavity, which $75 was to go to Gelbman,

plus a like amount to Besser if Lith-I-Bar Company would agree on similar license, and provided further Lith-I-Bar's license would be limited to two-cavity machines. And at Mr. Besser's request, I phoned Mr. Milewski of Lith-I-Bar Company, who agreed to be in Detroit the next morning, January 20, 1950.

The Court: I don't know as I understand just what you mean by that; do you mean per machine, $75 per machine?

A. Per eight-inch mold cavity, three molds.

The Court: That is for that eight-inch concrete block isn't it, so-called?

A. Yes, sir.

The Court: Not for every block that went out?

A. No, sir, if it was a mold that made three eight-inch at a time, it would be three times $75 royalty on the machine.

The Court: That is what I said, on the machine?

A. Yes, sir.

The Court: You were asked to pay, as I understand it, on the regular two-block machine $150 to Gelbman, $150 to the——

A. To the Besser Company.

The Court: To the Besser Company. Is that what you say?

A. Yes, and on three-block it would be 50 per cent more than that.

The Court: I see. And then you said something about somebody else giving up some patents—Lith-I-Bar?

[fol. 263] A. No, Mr. Besser was not willing to answer my question as to whether he would license me even if he could not make an arrangement with the Lith-I-Block.

The Court: Is that Lith-I-Block, or Lith-I-Bar?

Mr. Babcock: Unless the witness says that is what Mr. Besser said, I object to it and ask it be stricken.

The Court: It may be stricken. Just tell what happened and what he said, and we will judge whether he was lo-th about this or anxious about it.

A. That is what I was trying to do.

The Court: All right.

A. He would not give Gocorp a license except if he could also make an arrangement with Lith-I-Block Company.

The Court: To the same effect?

A. Except that the Lith-I-Block Company was to be limited to two at a time machines, to which they would not agree.

The Court: And you were not?

A. And I was not.

The Court: That is the biggest machine that they make, is it?

A. Yes, sir, you mean Gocorp, or Lith-I-Bar?

The Court: I mean anybody in the business. Isn't that true?

A. I understand Mr. Besser makes one six at a time.

The Court: Why doesn't he build the house all at one time?

[fol. 264] Mr. Babcock: He may if permitted to proceed with his developments in the industry.

Mr. Neville: Perhaps somebody else would, too.

The Court: I was waiting for the retort courteous there. All right.

A. On January 20, Mr. Milewski—this is 1950—he came to Detroit with his attorney to discuss this matter, Mr. Milewski was unwilling to agree to be limited to the two at a time machine. On April 21, 1950, Mr. Rosenthaler of the Besser Company, was in my office in Adrian. Among other things I asked him if there was any change in Besser's attitude toward licensing Gocorp to make three at a time machines. "Answer"——

Mr. Babcock: I object, if your Honor please, for reasons previously stated; there is no showing that Mr. Rosenthaler has authority to bind Besser Manufacturing Company in the discussion about licensing, and it being in April of 1950, at least a year subsequent to the filing of the complaint in this case.

The Court: He may answer.

A. "Answer: Not in one hundred years will *he* grant such a license;" also that Gocorp was No. 1 on their list of

infringers to be prosecuted. I think that is all I can tell you about applications for license.

By Mr. Speer:

Q. Now, with respect to the April 21st conversation with Mr. Rosenthaler, did he offer any kind of a proposal to your concern, the Gene Olsen Corporation?

[fol. 265] The Court: Mr. Rosenthaler has been identified, has he not?

Mr. Henry: No, your Honor.

Mr. Speer: No, your Honor.

A. I understand he is treasurer of the Besser Company.

The Court: Is there any other evidence you have on that?

By Mr. Speer:

Q. Is this gentleman in the court here, Mr. Olsen?

A. Yes.

Q. Would you please point him out?

A. Second from the back row, second in from the center aisle.

Mr. Henry: Let him stand up and be marked as an exhibit.

The Court: The gentleman there that does not know whether to sit down or get up? All right. I think I know whom you mean.

By Mr. Speer:

Q. At that conference with Mr. Rosenthaler, did he say anything else in addition to the fact that Besser would not give you a license in one hundred years?

Mr. Babcock: May my objection continue to the remainder of this conversation?

The Court: Yes, it may continue if you desire to have the objection, and the court will rule the same. He may answer.

A. He added that Gocorp was No. 1 on their list of in-

[fol. 266] fringers to be prosecuted.

Mr. Babcock: I ask that be stricken as repetition.

The Court: It may stand.

A. Mr. Rosenthaler insisted that there was no intimidation intended in his visit to Adrian, according to my notes.

The Court: I did not get that.

A. Mr. Rosenthaler insisted that there was no intimidation intended in his visit to Adrian.

The Court: To Adrian?

The Court: You mean to your place?

A. Yes, in my office.

The Court: All right.

A. He stated the purpose of his visit was to inquire if I would be interested in putting money or property in a new corporation to be organized for the manufacture and exploitation of sinter equipment for making aggregate for concrete block. Mr. Rosenthaler stated that Besser would be willing to turn over the sinter development of his to a new corporation such as suggested. I asked would Gocorp have to agree to go out of block machine business or drop the three at a time machine? His reply, "Did I say anything about your dropping any block machine? But maybe you would make so much money on sinter equipment you could not afford to bother with block machiner-." That is all of my notes on that trip.

[fol. 267] By Mr. Speer:

Q. Did he state who the persons of this proposed corporation would comprise?

A. I remember that he did not profess to know, but suggested that——

The Court: ~~Why do~~n't you answer the question as given to you?

A. All right, he stated he thought the personnel should be——

Mr. Babcock: Pardon me just a moment. The question should be answered yes or no first.

A. All right, yes.

By Mr. Speer:

Q. And what persons did he say would comprise this proposed corporation?

Mr. Babcock: In addition to my previous objections I now add the additional objection that this subject matter now under discussio. has no possible connection or relationship with the issues presented in this case. It is entirely a new project that he is now undertaking to talk about, and right on the face of the testimony of the witness thus far, it has no connection with the business of manufacturing concrete block.

The Court: Well, I guess I will have to hold with you. The government does not object in any way.

Mr. Speer: Well, yes——

The Court: Well, gentlemen, speak up. If he makes an objection and makes an argument and you do not say something, I take it for granted you agree with him.

Mr. Speer: No, we do not agree at all.

The Court: Well, what do you say?

[fol. 268] Mr. Speer: I say this, I am going to ask Mr. Olsen after the conversation ended, what his attitude was. The question of the continuation of the concrete block machinery industry was there. It was in the conversation. It is true that this other gentleman did not say anything that Olsen would have to keep out of the industry, but perhaps the inference was there.

The Court: Is this the same day——

Mr. Speer: The same day.

The Court: The alleged statement of Mr. Rosenthaler was made?

Mr. Speer: That Mr. Besser would not issue a patent license in one hundred years.

The Court: But he also said, "Did I say anything about your dropping a block machine?"

Mr. Speer: That is right.

The Court: This is all of the same conversation.

Mr. Speer: This is all part of the same transaction.

The Court: He may answer.

Mr. Babcock: I would like to add as part of my objection that for all that appears from the testimony of the witness, this was a conversation between two individuals representing no one but themselves, in which they were discussing the possibility of going into a new business venture. As a matter of fact, the witness has said that Mr. Rosenthaler said [fol. 269] to him that Mr. Besser would turn over to the new

corporation whatever interest he had in this process, so obviously it was not to become a subsidiary or any project of the Besser Manufacturing Company, or Mr. Besser.

The Court: Well, the statement of counsel that these two people were representing nobody but themselves is a matter for this court to determine later on.

Mr. Babcock: My statement, your Honor, was that from all that appears from the testimony of the witness——

The Court: Well, if the treasurer of the company came over to see him, I may draw some different conclusions on that. The conversation will be permitted. You may continue with the examination?

A. His idea was that the make-up of this new corporation——

By Mr. Speer:

Q. No, do not tell us that.

Mr. Babcock: I object.

The Court: It may be stricken.

By Mr. Speer:

Q. Did he tell you what persons were to comprise this proposed corporation?

A. He told me the persons he thought should comprise it. He did not undertake to dictate.

Q. All right, then you tell us what persons he thought would comprise it.

Mr. Babcock: May my objection continue to all of this conversation?

The Court: It may. No, not to all the conversation. I [fol. 270] am going to have you make your objections as you go along, because I want the record to show your objections and what you are objecting to.

Mr. Babcock: Then I object to the question and the proposed answer for the reasons previously stated.

The Court: What are those reasons? Then we will have them on the record. Gentlemen, if we are going to have these objections they are going to be in there the way they should be,——

Mr. Babcock: I am objecting for the reason that there is

no evidence that Mr. Rosenthaler represented Besser Manufacturing Company in this conversation with this witness; there is no evidence of the authority of Mr. Rosenthaler to speak for the Besser Manufacturing Company; there is no evidence of the Besser Manufacturing Company being a party to either the actual conversation or the proposed corporation; and the entire transaction occurring at least one year subsequent to the filing of the bill of complaint in this case is entirely remote to the issues, and consequently the whole conversation is immaterial, irrelevant and incompetent.

The Court: Objection overruled. He may answer.

A. The people were to include Mr. Besser or the Besser Manufacturing Company, Mr. Ben Stone, and myself.

Q. Did he give any identification of Mr. Ben Stone?

Mr. Babcock: I object for the reasons previously stated. [fol. 271] The Court: You mean all of the reasons previously stated?

Mr. Babcock: Yes, your Honor.

The Court: You object. The court will make the same ruling. You may answer.

A. Yes.

By Mr. Speer:

Q. What identification of Mr. Stone did he give you?

Mr. Babcock: I object for all the reasons previously stated.

The Court: Wait a minute, now, what is the question?

(Question read.)

The Court: He gave you—who is "he"?

A. Rosenthaler.

Mr. Speer: Yes.

The Court: He may answer.

A. That Mr. Stone was the gentleman who had acquired control of the Besser block of Stearns' stock.

Q. Was there anything else discussed at this time between you and Mr. Rosenthaler?

A. I remember nothing else.

Q. Now, Mr. Olsen, what was your personal opinion of this call by Mr. Rosenthaler, how did it impress you?

Mr. Babcock: I object, if your Honor please.

[fol. 272] The Court: You may reframe that question, I think the way you have it it is objectionable.

By Mr. Speer:

Q. Did you receive the impression from this call that the Besser Manufacturing Company wanted you to, your company to discontinue the manufacture of concrete block machines?

Mr. Babcock: I object.

The Court: Sustain the objection.

By Mr. Speer:

Q. Mr. Olsen, what did you understand the purpose of this visit to be?

Mr. Babcock: I object, if the court please. That asks the witness to draw the conclusion which the court is expected to draw after hearing the conversation.

The Court: Does that apply to whether Mr. Rosenthaler was also representing the Besser Company? The court would draw his own conclusion of that.

Mr. Babcock: I think not.

The Court: He may answer.

The Witness: Will you ask it again, please?

(Question read.)

A. I had no way of knowing the purpose except as he told me, and which I have stated, the thing that impressed me most was that he protested so much that there was no intimidation intended, yet I was No. 1 on the list to be sued.

Mr. Babcock: I ask that all be stricken as repetitious and argumentative.

[fol. 273] The Court: It may stand.

By Mr. Speer:

Q. Now, did you at any time have any conversation with Jesse Besser concerning your continuing in the block machine industry?

A. I had conversations on occasion with a Besser representative. I recall none with Mr. Besser direct.

Q. So that at any time since you disposed of your interest in the Stearns Company, you have had no direct conversations with Mr. Besser concerning your continuing in the industry?

A. I thought I had but I fail to find a memorandum on that.

Q. After the sale of this Stearns' stock, were you or anyone in your family ever offered employment by the Besser Manufacturing Company?

A. Yes.

Q. And would you tell us when such offer was made and by whom?

Mr. Babcock: If your Honor please, whether an offer of employment was made, I think is a conclusion for the court to draw from a conversation relative to employment, and I ask that the previous question and answer be stricken and I object to this question on that ground.

The Court: I think you are asking for a conclusion. You can reframe the question.

By Mr. Speer:

Q. Have you at any time, Mr. Olsen, had any conversations with Mr. Besser, or anyone connected with the company, with respect to employment in the Besser Manufacturing Company?

[fol. 274] A. Yes.

Mr. Babcock: Will you pardon me just a moment. Did I understand the court's ruling on my previous motion to strike to be——

The Court: Yes, that question and answer was stricken. I asked him to reframe the question and he has reframed the question. I think it is proper, and the answer has been given. He said, yes.

Q. Now, could you tell us when such discussions were had and with whom and where?

A. January 31, 1950, met Ralph Bailey at Detroit Club, at his request. He renewed Besser's previous offers.

Mr. Babcock: Pardon me just a moment. Is counsel intending to ask for the conversation? Up to the moment he has asked just to have the time, place and identity of the individual fixed.

Mr. Speer: I will ask the question.

The Court: All right.

By Mr. Speer:

Q. The conversations took place between you and Ralph Bailey in Detroit?

A. Right.

Q. Is that correct?

A. Right.

Q. What did Mr. Bailey say?

Mr. Babcock: I object, if your Honor please, because there is no evidence of any authority of Mr. Bailey to speak [fol. 275] for the Besser Manufacturing Company in the matter of employment of anybody.

The Court: Is Mr. Bailey a representative of the——

Mr. Speer: Yes.

The Court: All right, he may answer.

Mr. Speer: Yes, your Honor.

Mr. Babcock: The witness has said he is a representative.

The Court: That is the testimony before me. Is it denied?

Mr. Babcock: He is an employee, but whether he is a representative in the capacity stated by this witness is denied.

The Court: That may be a distinction without a difference. He may answer.

A. He wanted to discuss the subject previously discussed between us, which was the matter of Besser's buying Gocorp, or paying me as an individual to get out of the block machinery business.

Mr. Babcock: I don't think I included in my objection, but I would like to do so, the further objection that this is

another instance of a conversation in January 1950, some several months after the filing of the complaint, and consequently too remote to be material, relevant and competent.

The Court: Overruled.

The Witness: Does that answer your question?

Mr. Speer: What was the answer?

(Answer read.)

[fol. 276] By Mr. Speer:

Q. Now, Mr. Olsen, in this present conversation with Mr. Bailey, he referred to an earlier discussion. Do you have any information about that one?

A. I can't tell you when the date of that is because I can't remember it and I have no note on it.

Q. Was it in the year 1948?

A. Yes. I know there was some time in 1948 such a discussion.

Q. So it was after the sale of your interest in the Stearns Company?

A. Oh, yes.

Q. Was it after the organization of the Gene Olsen Corporation?

A. Yes.

Q. So that it was somewhere in between June 1, 1948, and December 31, 1948?

A. Yes.

Q. Now, could you tell us what Mr. Bailey said at that time with respect to employment?

A. The subject matter was discussed——

Mr. Babcock: Pardon me. I am willing to state my objection, although the question is whether or not the witness can tell it. I object to his reciting the conversation because there is no evidence of authority of Mr. Bailey to speak for or represent the Besser Manufacturing Company in the matter of employment.

The Court: He may answer.

A. I can tell you the subject matter, not the exact words, naturally.

[fol. 277] Mr. Speer: We don't expect that, I don't believe.

A. That the Besser Company would be interested in buying out Gocorp before we got too much invested, and that there would be some kind of satisfactory position offered me, as well as my son, should be dispose of our Gocorp Company.

By Mr. Speer:

Q. And what comments did you have to make in regard to such proposal?

A. I declined the offer.

Mr. De Gree: I didn't hear the answer.

A. I declined the offer.

By Mr. Speer:

Q. Have you had any conversations with any customers or prospective customers with respect to the fact that they had been approached by employees of the Besser Company concerning the Gocorp concrete block machine?

A. Will you ask that again?

Mr. Speer: That was rather a long question. Will you read that, Mr. Reporter?

(Question read.)

A. Yes.

Q. Who was the customer, when was the conversation had, and where?

A. The most striking example perhaps was——

Mr. Babcock: Pardon me, just a minute, I ask that the witness' comment about the characterization of the conversation be stricken. He has been asked to identify the time and place.

The Court: Identify the time and place.

[fol. 278] A. At Ironton, Ohio, conversations with a Mr. Goldcamp, who had purchased one of the Gocorp machines.

By Mr. Speer:

Q. You have told us who and where. Approximately when, Mr. Olsen?

A. Between March and June of 1949.

Q. What statements did Mr. Goldcamp make to you at that time?

Mr. Babcock: I object to it, if your Honor please, being purely hearsay; and also as not being conversation by any representative, officer, employee, or agent of any of the defendants, or in any capacity having any authority to bind any of the defendants.

[fol. 279] The Court: Mr. Babcock, if I were to cater to your request on these motions and objections, and if that is the law of conspiracy, they would never be able to prove a conspiracy at any time.

Mr. Babcock: Pardon me. This man is not a co-conspirator. This witness is reporting a conversation.

The Court: I do not mean on this particular question. This may be objectionable. But your objections all morning have been—well, I don't know why you are making them because I am sure that you must know that they are not good objections. But if you desire to make them, you may continue to do so. This may be one that is good.

Mr. Speer: On that particular point, your Honor, I respectfully call your attention to the case of Steketee vs. Kimm in this state; the citation of the case is 48 Mich. and the pertinent part is found on page 324.

The Court: 48 Mich.?

Mr. Speer: Yes, your Honor, a case which was approved by the court in Cincinnati in the Sixth Circuit.

The Court: Do you mean 48 Mich.?

Mr. Speer: Yes, your Honor.

The Court: And approved by the court at Cincinnati?

Mr. Speer: Yes, your Honor.

The Court: In another case?

Mr. Speer: And it is on this very point.

The Court: When was it approved by the Federal Court?

[fol. 280] Mr. Speer: In the Court of Appeals, in the case of J. D. Randall Company vs Fogelsong Machine Company, found in 216 Fed. page 601 and 603. The court is referring to exactly the same situation that we have here, your Honor, and it says as follows, on page 603, I quote:

"The substance of the several conversations was given in a most general form. In only one instance

was the date of the conversation fixed. And but twice were the persons named with whom conversations were had. But the objections did not go to such matters. The evidence was admissible, its purpose being to show the mental attitude of the manufacturers in question and why they did not purchase the plaintiff's machine."

Then there are other cases in there, one of which is this:

"Its truth or falsity, as well as its probative weight are for the Master."

Mr. Babcock: Well, if your Honor please, in my judgment these cases are easily distinguishable from our present situation. If the government were producing Goldcamp and Goldcamp were giving his reactions from conversations with representatives of the defendants, that would be one thing. But for this witness, who is not a party to this litigation, as were the parties testifying in these cases, to come here merely as a witness and to state his conclusion [fol. 281] on the other man's conclusion of the conversation had, we are having conclusion upon conclusion without our being given any opportunity to cross-examine the party who has inititated the chain of events.

The Court: What was the exact question? I do not think it makes any difference, but I would like to know what the question is. Suppose you reframe the question.

By Mr. Speer:

Q. What statements did Mr. Goldcamp give to you concerning his conversations with employees of the Besser Company?

The Court: That question as put is objectionable. You can reframe the question.

By Mr. Speer:

Q. Have you had any conversations with any of your customers or potential customers with respect to the fact that such customer had been approached or contacted by the Besser Manufacturing Company or its employees with respect to the Gene Olsen Corporation concrete block machine?

A. Yes.

Q. Now, what was the name of the customer with which you had such conversation?

A. Goldcamp at Ironton, Ohio.

Q. When did you have such conversation?

A. Between March and June of 1949.

Q. What did he say?

Mr. Babcock: I object, if your Honor please, for the [fol. 282] reasons previously stated. It is the same question again and the same background.

The Court: No, it is not the same question, and this question is permissible as I understand the cases. He may answer. I am frank to admit that I would have been under the impression that it was not admissible, but I can see the purpose of the court in admitting it.

Mr. Babcock: The purpose of what court, if your Honor, please?

The Court: The Michigan Supreme Court and the Federal Court. Have you any case to the contrary?

Mr. Babcock: No, your Honor.

The Court: All right.

Mr. Babcock: I am just trying to be sure on the record that that is the authority on which your Honor is ruling.

The Court: Not only that authority; but added to that, the authority of the court itself that believes that under the circumstances the question is a proper one, and the answer should be received, so you are not limiting me to the two authorities given. But if you have any authority, I would be happy to put it in, any authority at all, I will be very happy to put them in at this time. He may answer.

A. Mr. Goldcamp stated that from approximately the time that the Gocorp machine went into his plant that there was scarcely a day went by that there were not representatives of the Besser Company there trying to get him to [fol. 283] throw that machine out and lease a Besser machine.

The Court: Of course, the court is not taking this in any way as proof of the fact itself.

Mr. Speer: No.

The Court: There is a distinction.

A. He said they had at one point told him that if he did not do that, they would——

Mr. Babcock: Well, I assume from the witness' testimony that Goldcamp did not identify to him the representatives but I would like a little inquiry into that, and if the representatives were identified in the conversation, I would like to have them fixed, please.

The Court: That might properly be cross-examination but I think they are entitled to it right now.

Mr. Speer: All right.

By Mr. Speer:

Q. M.. Olsen, in this conversation did Mr. Goldcamp tell you who these persons were from the Besser Company?

A. Yes.

Q. All right, what persons were they?

A. The only one I can remember definitely was Mr. Philip Park.

Q. Did Mr. Goldcamp tell you what Mr. Park's job or duties were with the Besser Company?

A. No.

Mr. Speer: I would like to state to the court at this time that I do not believe there is any dispute that Mr. Philip [fol. 284] Park is the vice president of the Besser Company.

Mr. Babcock: Certainly we will admit it.

[fol. 285] A. Mr. Goldcamp stated that Mr. Park made him increasingly attractive offers if he would put in a Besser machine and take out the Gocorp. At one point Mr. Goldcamp asked Mr. Park how many of these give-away propositions can you afford to make? The reply was, "We will only have to make two or three and Gocorp [fol. 286] will be out of business."

A further method used to get that Gocorp machine out was the representatives threatened to start a competitive plant.

Mr. Babcock: Just a moment.

The Court: That may be stricken. You are telling the court what this man told you. Ordinarily, in the ordinary suit that would not be permitted, but I think in this suit it is permitted not as proof of the fact that they did it but as proof of what was told to you by one of your customers.

By Mr. Speer:

Q. Now, did Mr. Goldcamp tell you that Mr. Park told him that the Besser Company would install a competitive machine? Was that statement part of the conversation between you and Mr. Goldcamp?

A. Yes, but it wasn't just the way you put it. The substance was the same.

Q. That is what we are interested in is what Mr. Goldcamp told you. Don't give us anything else.

A. I think that is all that is significant that I can say on that subject.

Q. Was this the first installation of a Gocorp machine?

A. Yes.

Q. Did Mr. Goldcamp in fact return the machine to you, Mr. Olsen?

A. Yes.

Q. At the time of the return, did he state why he was returning the machine?

[fol. 287] A. Yes.

Q. What did he say?

Mr. Babcock: I object, if your Honor please, for the reasons previously stated.

The Court: All right. He may answer. Has the government taken the deposition of Goldcamp?

Mr. Speer: The story on Goldcamp, he was served with a subpoena and was supposed to appear. We have got an FBI agent in the court who took some statements from Mr. Goldcamp, and we are trying to secure Mr. Goldcamp in court.

The Court: Have you the power of subpoena where he is?

Mr. Speer: Oh, yes, your Honor.

The Court: All right, bring him in.

[fol. 288] By Mr. Speer:

Q. So the question now, Mr. Olsen, was what did Mr. Goldcamp say when he returned your concrete block machine?

Mr. Babcock: It is clear on the record, isn't it, I objected to that and the court has overruled the objection?

The Court: Yes.

A. He said that in the light of the trouble he had had with the Gocorp machine, he had decided to send it back and put in a Besser.

Q. Was this the first indication from Mr. Goldcamp that he had encountered trouble with the Gocorp machine?

A. No.

Q. What particular kind of trouble did he state, if he did state?

A. He had considerable trouble.

Q. Is that the only occasion, Mr. Olsen, of a customer of yours who has been approached by the people from the Besser Company?

Mr. Babcock: Pardon me.

The Court: Sustain the objection. You don't even have to make it. The question will be stricken.

By Mr. Speer:

Q. Is Goldcamp the only customer with whom you have [fol. 289] had a conversation with respect to the fact that he had been approached or contacted by an employee of the Besser Company with respect to the Gocorp machine?

A. Yes.

Q. Have you had any conversations with any customer with respect to the fact that he had had conversations with the Besser Company that if he did not purchase a Besser machine the Besser Company would install a machine in his area?

A. Yes.

Q. What is the name of that customer?

A. John Chase, Fort Worth.

Q. Fort Worth?

A. Texas.

Q. And when did you have such conversation?

A. In January or February of 1948.

Q. And could you tell us what the conversation was?

A. Mr. Chase wanted me to—my company, Stearns, to finance him in a sharply enlarged plant because he said Besser was going to finance, or themselves put in a large plant to compete with him because Chase would not purchase or lease Besser machines.

Q. Did he state that he had been so advised by an employee of the Besser Company?

A. Oh, yes.

Q. What was the person who so advised him.

A. I can't remember that name, and I made no note of it.

Q. Now, Mr. Olsen, have you received any correspondence?

[fol. 290] Mr. Babcock: This is not a similar kind of conversation as the Goldcamp situation. This is a conversation occuring at a time when Mr. Olsen was still with the Stearns Manufacturing Company, and in the light of the last development, since there is no evidence before us at all except the conclusion of this man in Texas that the party he was talking with was a representative of the Besser Manufacturing Company, without having that individual identified so we can inquire into that, I think the matter is entirely incompetent as presented, and in addition to that being immaterial and irrelevant, and I ask that it all be stricken.

Mr. Speer: Again in this type of testimony we don't seek, your Honor, to rule on whether or not this actually took place, but we do wish to present to your Honor the fact that Mr. Olsen had a conversation with this man Chase, and that Chase told Olsen that he, Chase, had been advised by some other employee of the Besser Company.

The Court: I think he may answer. In this type of case I think he can.

Mr. Henry: And the further objection, your Honor, that the witness should not be permitted to answer unless the government proposes to produce Chase as a witness and permit us the opportunity to examine or cross-examine.

The Court: Well, there is no jury here and I am going to take the testimony. He doesn't even remember the man in this case. But this is a conspiracy case, and when people [fol. 291] are in a conspiracy and doing things through agents, there generally isn't any sign on their back, "I am operating for so-and-so." They just don't do that. They don't send messages in advance when they are in a conspiracy. I don't say that they are, but when they are in a conspiracy they may do something by the nod of the head, the wink of the eye, or the position of the elbows on the

table. There is any number of ways a conspiracy may be carried out, and in this particular case he makes this statement. It doesn't prove it, I mean the fact itself. But he can report as to what has been told to him. I am going to permit the question and answer.

Mr. Babcock: Of course, while your Honor has made a correct statement of the law as to the conduct of co-conspirators and their agents, there is no evidence here identifying this individual at all except Mr. X came along and said, "I am representing the Besser Company."

The Court: That might be competent in some cases, and it is in this particular one, right at this point.

Mr. De Gree: If the court please, rather than to wait until cross-examination, I would like to clear up a little confusion here, have it cleared up for me. I understood counsel's question to relate to similar instances in which the Gocorp machines were concerned.

Mr. Speer: No. That question was changed. The question as it stands now is, any conversations wick employees of Besser with respect to the fact that the Besser Company [fol. 292] would put in a competitive block machine.

Mr. De Gree: I see. I got lost in the change.

Mr. Speer: Yes. I asked a different question.

I have just about one or two more questions to ask this witness, your Honor.

The Court: All right.

By Mr. Speer:

Q. Mr. Olsen, have you any correspondence from any of your customers concerning any experience they had with the Besser Company?

The Court: With?

By Mr. Speer:

Q. With Besser Company or any of its employees, or with the Stearns Manufacturing Company or any of its employees?

[fol. 293] A. Yes.

Q. Have you got such correspondence here?

A. I have one such letter.

Q. Would you tell the court who it is from and the date?

A. The letter is from Taylor Concrete Products, Inc., Watertown, New York, May 9, 1950.

The Court: Mark it for identification.

Mr. Speer: Yes. Would you mark that 115.

(Plaintiff's Exhibit 115 marked.)

Mr. Speer: I offer into evidence Government's Exhibit 115.

The Court: Any objection?

Mr. DeGree: Yes, your Honor. This is objected to unless the person who wrote the letter is intended to be produced by the government so we will have an opportunity to cross-examine him.

Mr. Speer. On that point, your Honor, I have authority.

The Court: Just a minute.

Mr. Babcock: I have further a different objection.

The Court: All right, just put your objections on the record also, Mr. Babcock, at this time, if you desire to.

Mr. Babcock: I object to the exhibit for the reasons, additional to those stated by counsel for the Stearns Manufacturing Company, because, like the report of the Gold-[fol. 294] camp conversation, it is hearsay evidence, for those reasons there stated I object to it; and also it is reporting an incident occurring in 1950, so far subsequent to the filing of the complaint in this case as to be too remote, immaterial and irrelevant, as well as incompetent.

The Court: It may be received. Do you care to read it now?

Mr. Speer: Yes, your Honor, and then that is all we will want from this witness.

The Court: All right, because I want to take a recess here.

By Mr. Speer:

Q. Mr. Olsen, I will ask you to quote from Plaintiff's Exhibit 115:

A. You want me to read the letter?

The Court: Why don't you read the letter into the record yourself. It is admitted.

Mr. Speer: I will read it.

The Court: I don't think there is any objection by counsel to your reading the letter in the record.

Mr. Speer: (Reading.) Dated May 9, 1950.

"Central Gocorp, 403 Grace Street, Adrian, Michigan.

"Attention: Mr. T. H. Merriam.

"Dear Ted,

"Today, Mr. C. F. Rowell, of the Stearns Manufacturing Co. called on us and when we told him how impressed we were with the operation of your senior [fol. 295] machine, he told us some disturbing news. That the machine you had in Benton Harbor was thrown out very recently because of broken corner posts and trouble with hydraulic cylinders.

"Also that Crandall had purchased two Stearns '15' to replace your Gocorp. Please let us know the facts in this case as we intend to soon place an order for equipment which we hope will be trouble-free and increase our production.

"Mr. Rowell further stated that they could give delivery in two to three weeks, which is very nice as we are completely out of blocks and have many orders on hand.

"Awaiting your explanation of this Benton Harbor trouble, we are

"Very truly yours, Taylor Concrete Products, Inc., (Signed) Leland F. Taylor."

The Court: That letter on somebody's letterhead?

Mr. Speer: It is on the letterhead of the Taylor Concrete Products, Inc., Watertown, New York.

The Court: All right. Are you going to produce this man? Have you taken his deposition?

Mr. Speer: No, your Honor.

The Court: Not going to take it?

Mr. Speer: No, sir. We don't intend to take it.

The Court: What?

[fol. 296] Mr. Speer: No, I don't believe we will, your Honor.

The Court: All right. I should think the government would make an effort to corroborate this kind of testimony.

I have been around long enough to know not to believe everything I hear through hearsay, and this is not the best testimony, and doesn't prove it at all.

Mr. Speer: I agree to that, your Honor, but if we were to call every man in the concrete block industry who has been approached by these defendants, the courtroom would be filled and the trial of this case would take a long time.

Mr. Babcock: Your Honor please——

The Court: That may be stricken entirely from the record. If you have witnesses, produce them. The courtroom is big, if you want to produce them. If you don't want to, all right. You may be able to make out a case without them. I don't say you can, and I am not telling you, but don't let the fact that you think there are so many of them deter you. If there are so many of them, then perhaps you ought to have a few of them, I don't mean everybody, but a few of them.

Gentlemen, you are proving your case, and the court has been very lenient with your testimony, but here is an instance— Have you taken the deposition of any of these men you say there are so many of them that you would fill the room?

Mr. Speer: No, your Honor, we——

The Court: I think you better before this case is over. [fols. 297-298] I am interested to get at the facts, and I am going to get at the facts if I have to outline the testimony in some things. You may be all right. I don't know. I haven't examined all the law. But on a question like this where you say there are so many, I should think the government would have taken some depositions. And, as a matter of fact, in order to get at the truth of the matter, if there is anybody that you feel you ought to have a deposition of, the court will give you plenty of time, and give the other side plenty of time too.

[fol. 299] Cross-examination.

By Mr. Gelbman:

Q. Now, Mr. Olsen, you were president, I believe you have testified that you were president of Stearns at the first time you met Mr. Louis Gelbman?

A. I was head of Stearns. I believe it was not incorporated then but I was the general manager.

Q. Well, can you tell us about when you first met Mr. Gelbman?

A. Probably in 1935.

Q. And that first meeting was relative to a discussion of Mr. Gelbman's patents on vibrating machinery?

A. He first asked me to inspect his first machine and I presume we did discuss patents.

Q. And thereafter an exclusive license was granted to Stearns. Is that correct?

[fol. 300] A. Yes, sir.

Q. And you, at that time were a principal stockholder of Stearns. Is that correct?

A. Yes, sir.

Q. And you were also an officer of that corporation?

A. Yes.

Q. And you continued, I believe, as sole licensee of the Gelbman patents down until 1942?

A. Yes.

Q. Now, can you tell us very briefly what the consideration or royalty was that was to be paid to Mr. Gelbman in the prior agreements to 1942?

A. Originally the royalty rate was 20 per cent of the price of the machine, but between the original agreement and 1942 the rate was changed. I cannot tell you to just what extent from memory.

Q. Was there also a royalty that was to be paid to Mr. Gelbman on replacement parts on any machines?

A. I think the royalty covered parts at the rate of ten per cent.

Q. And did it also cover foreign exports?

A. I cannot remember.

Q. Now, in 1942, or just prior thereto, an action was instituted against Bell for infringement. Isn't that correct?

A. Yes, sir.

Q. And Stearns was interested in that suit?

A. Yes, sir.

[fol. 301] Q. As a matter of fact, you participated in it on behalf of Stearns?

A. I recall that I was there. I cannot remember whether Stearns paid any of the costs of the suit.

Q. Well, isn't it true that the firm of Emory, Wittemore and Dix represented both Stearns and Gelbman on that suit?

A. They were the only counsel I knew of for the plaintiffs, and what I cannot remember is whether technically Stearns was one of the plaintiffs. I think they were.

Q. Well, isn't it a fact that Stearns paid a portion of the legal expenses in that suit? Do you recall that?

A. I do not. My impression is that they did not. By the contract, I believe the patentee was to pay that.

Q. Now, in 1942, plaintiff's Exhibit 10—that is this new license agreement—was entered into between the Stearns Corporation and Besser, and Mr. Gelbman and Mr. Andrus. Is that correct?

A. Yes.

Q. And you represented Stearns at that time. Isn't that correct?

A. Yes, sir.

Q. Did you conspire on behalf of Stearns with Mr. Besser——

Mr. Speer: If your Honor please——

Mr. Gelbman: Will you allow me to finish my question, please?

Mr. Speer: I thought you had finished. Go ahead.

By Mr. Gelbman:

Q. Did you conspire on behalf of Stearns with Mr. Besser or the Besser Company, or Mr. Gelbman with respect [fol. 302] to obtaining a monopoly in the field of manufacture of concrete block machinery?

Mr. Speer: I beg your pardon, your Honor. I offer an objection. It draws a conclusion from this witness as to whether or not he conspired, which is a point of law.

The Court: Isn't it a well recognized rule that in the cross-examination of a witness, he may give his conclusion?

Mr. Neville: This is a conclusion, however, that is practically a solution of the whole case.

The Court: Well, may I have the question, please?

(Last question read by the reporter.)

The Court: Well, the use of the word "conspire" I think may be objectionable. I think you will have to reframe the question, but you will be permitted to show that there was a conspiracy, if there was one.

Mr. Gelbman: Well, let me put it this way——

The Court: Incidentally, I have the parties in that suit. I have them right handy here. Andrus and Gelbman and Stearns vs. H. W. Bell Co. But I do not see any place—I think it was either here in court or I got the idea somehow that that was defended by the Besser Manufacturing Company—the Bell people who were using the Besser Manufacturing Company machine.

Mr. Farley: That is correct. Besser took over the defense and I represented Besser in that case in New York.

[fol. 303] The Court: I did not think Besser appeared. They did not intervene, did they—I mean Besser—in the New York case?

Mr. Farley: As I recall it, there was a statement made on the record that Besser was taking over.

The Court: There is no secrecy about it anyway.

Mr. Farley: No.

The Court: All right.

[fol. 304] By Mr. Gelbman:

Q. Did you intend to conspire on behalf of the Stearns Corporation with Besser and Mr. Gelbman and Mr. Andrus to obtain a monopoly in the field of manufacture of concrete block machinery?

Mr. Speer: If your Honor please, I again object on the same ground—"did you intend to conspire".

The Court: I think you could reframe it and it would be proper.

Mr. Gelbman: No, your Honor; I believe this gentleman is the person best qualified to tell us what they intended to do. He was an owner who participated——

The Court: Well the word "conspire", has a legal significance. I can suggest the proper question to you.

Mr. Gelbman: I also can, your Honor, but——

The Court: Then go ahead with it. If you have it there is no need of my suggesting it to you.

By Mr. Gelbman:

Q. Did you have any discussion relative to a conspiracy——

Mr. Speer: Same objection, your Honor, to the word "conspiracy".

The Court: I sustain the objection. I am not shutting out the intent of your question. It is merely the form and the words that you are using.

Mr. Gelbman: This is cross-examination, your Honor. And I think the examiner is allowed a great deal of [fol. 305] latitude.

The Court: I am going to give it to you, and I am giving you so much leeway that I offered to state the question as you could use it. You had one of your own and I didn't suggest it.

Mr. Gelbman: Your Honor has ruled on mine so may I have your view on it?

The Court: I would suggest you ask him if he intended to enter into an agreement that gave him a monopoly of some kind. I think that is a proper question. But to have him say that he intended to conspire—unless this man knows what "conspiracy" means or he has been given a definition that is wrong—he knows what a contract or an agreement is and you may ask the question given to you by the court. And do not intimate that I have not helped you out. All right.

By Mr. Gelbman:

Q. Did you intend to enter into a contract which would create a monopoly on behalf of Stearns and Besser?

Mr. Speer: If your Honor please, I object to that question, on the ground that what constitutes a controlling of an industry or a monopoly is best testified to by the other facts.

The Court: The "monopoly" should have been left out, but it is in there and I will let him answer the question. I haven't got a jury here, and I know what he intends to say. And I will not be swayed by the word "monopoly",

except as to what they intended to do. All right; he may [fol. 306] answer.

A. I am reluctant to answer that yes or no, because I am not clear as to the term "monopoly". The intent was to enter into an agreement whereby the two companies would, unless they changed their mind, be the only licensees.

By Mr. Gelbman:

Q. In other words, you were to be given an exclusive license; is that right?

A. The two of us and it was to remain exclusive until we both agreed to admit someone else. The terms of the contract are clear on that, I think.

Q. And was there any discussion or any further discussion at that time between you and the representative of the Besser Company, Mr. Gelbman, or Mr. Andrus, with respect to keeping out other manufacturers?

Mr. Speer: I object, your Honor. We have offered this patent agreement into evidence and I believe the agreement speaks for itself and is the best evidence in this case.

The Court: The question is, was there any other discussion——

Mr. Gelbman: Was there any other discussion with respect to keeping them out.

The Court: He may answer.

A. Certainly, we discussed the terms of the agreement and the fact that no others could come in except with our consent. The agreement was not just drawn and put in front of us. We discussed those matters.

[fol. 307] The Court: I do not think that is the question.

Mr. Gelbman: I don't think it is either, and I move to strike it out as not responsive.

By Mr. Gelbman:

Q. Was there any other discussio.——

The Court: Wait a minute; do you want me to rule on your motion?

Mr. Gelbman: Yes, your Honor; I am sorry.

The Court: I will strike it out. I do not think it is responsive. Ask him the question you want him to answer.

By Mr. Gelbman:

Q. Was there any other discussion relative to keeping out other manufacturers other than this license agreement?

A. No.

Q. And you continued, I believe, as an officer of Stearns down until 1948?

A. Yes.

Q. And during that time, Mr. Olsen, did it come to your attention that there were infringements by manufacturers of these patents of Gelbman and Andrus?

Mr. Speer: I object to that, your Honor. Again he is asking the witness for a legal conclusion as to whether there were infringers. As far as we know, there has been no testimony that these patents have been before a court and have been passed upon.

[fol. 308] The Court: The first part of the question is important. May I have it, please.

(The last question was read by the reporter.)

The Court: I think that you would have to amend that or alter that—"alleged infringers". That is what you mean, isn't it?

Mr. Gelbman: Yes, your Honor.

The Court: All right.

By Mr. Gelbman:

Q. With the court's amendment, will you answer the question?

A. Yes.

Q. And did you ask Mr. Gelbman to bring infringement suits?

A. Yes.

Q. Now between the time of 1942 and 1948 did Mr. Gelbman or Mr. Andrus or the Besser Manufacturing Company attempt to exert any control on the part of Stearns Corporation?

The Court: Do you mean over Stearns?

Mr. Gelbman: Over Stearns.

The Court: You said on the part of. All right.

Mr. Speer: I object to that, your Honor; the stock was not acquired——

Mr. Gelbman: I am talking about before the stock was acquired.

Mr. Speer: All right, then, go ahead.

By Mr. Gelbman:

Q. Between 1942 and 1948——

[fol. 309] A. I don't think I know what you mean.

Q. Did Besser or Mr. Gelbman or Mr. Andrus attempt to exert any control over the Stearns corporation between the time of the license agreement and the time you parted with your stock?

A. Not that I recall, no.

The Court: Wait a minute now. Between the time of the license agreement——

Mr. Gelbman: Yes, sir.

The Court: You mean when they both had the license?

Mr. Gelbman: That's right.

The Court: Besser had part and the Stearns company had the same right as Besser?

Mr. Gelbman: That's right.

The Court: Between the time that that was entered into——

Mr. Gelbman: In 1942.

The Court: What part of 1942?

Mr. Goreff: December of 1942.

The Court: And the time that the Stearns——

Mr. Gelbman: March, I believe, 1948.

Mr. Goreff: March 26, 1948, I believe was the date the witness testified to that the Stearns stock was sold by the witness.

The Court: All right; during those six years or almost [fol. 310] six years or five years and a half, did they try to exert any control——

Mr. Gelbman: Over the Stearns Corporation, and I believe the witness answered "no".

The Court: His answer is, "I recall none".

A. That is correct.

The Court: All right.

By Mr. Gelbman:

Q. Now I believe that recently you had a conversation with Mr. Gelbman concerning a license to your new corporation, the Gocorp?

A. Yes, sir.

Q. Is that the Gene Olsen Corporation or is the name Gocorp?

A. It is the Géne Olsen Corporation.

Q. And did Mr. Gelbman express his assent to a license subject to the approval of the Stearns Corporation and the Besser Corporation?

A. Yes.

Mr. Gelbman: No further questions.

[fol. 311] Robert Lewis Graveley, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Speer:

Q. Would you state your name and address, please?

A. Robert L. Graveley, Jr., Orlando, Florida.

Q. What is your present occupation, Mr. Graveley?

A. At present I am in a partnership with a firm that manufactures metal awnings.

The Court: Metal what?

A. Metal awnings.

The Court: Metal awnings.

By Mr. Speer:

Q. Were you ever, Mr. Graveley, at any time in the concrete block machine manufacturing industry?

A. I was.

Q. For what period of time?

A. October 1945 until a short while ago, this year.

Q. Until 1950?

A. Yes.

Q. And where did you have your place of business?

A. Orlando, Florida.

Q. During the period of your machine industry, did you manufacture both kinds of concrete block machines; by that I mean vibrating machines and tamping machines?

A. No, only vibrators.

Q. Now, would you give the court a brief description of [fol. 312] the vibrating machine?

A. You mean as manufactured by myself, the description of my machine?

Q. Yes, as it was manufactured by you on your premises.

A. Well, I made more than one type of machine, more than one model and more than one type.

The Court: Will you keep your voice up, witness, so that I can hear you?

A. Yes.

The Court: I lose part of it.

By Mr. Speer:

Q. Well, now, you say you made more than one type. In what respects were they not the same?

A. I made cored pallet machines which were either manually operated or manually controlled; and I also made a fully automatic plain pallet machine.

Q. But with respect to the principle of compacting the mix in the mold, did all the machines operate in the same way?

A. They did.

Q. Now, would you explain that part of your machine to the court?

A. They all used the feed drawer which received the mud from a storage hopper. The feed drawer went over the mold box and the material was vibrated into the molds, the feed drawer went back. And I had some machines without a pressurehead, but those that had the pressure head, the pressurehead came down and it vibrated under pressure.

[fol. 313] The Court: Was the feed box separate from the mold? When the mold vibrated, did the feed box vibrate?

A. Yes.

The Court: Was that when the machine was new? Did it also vibrate after it had been used for some time?

A. Yes. It was the purpose to vibrate the feed drawer.

The Court: You mean it never wore out so that the feed box, or the mold vibrated separate from the feed box?

A. No. On most of the machines the feed box was depressed down onto the top of the mold box and held there by spring pins.

The Court: I see. That was your own machine?

A. Yes.

The Court: The mold vibrates separate from the feed box in the Gelbman patent, doesn't it?

A. He has one such patent, yes.

The Court: But you had your hopper, the concrete mix or whatever it was, went into the feed box, emptied into the feed box, the feed box traveled on a rail, or on tracks, did it, over the mold?

A. On one machine that I made, it followed on a separate rail but on the others it was at all times depressed onto the top of the mold box, or flush.

The Court: Did you have the hopper right above the feed box?

A. Yes.

The Court: How did you control the amount that went [fol. 314] in from the hopper into the feed box?

A. All of the contents of the hopper would drop down through into the feed box, and as the feed box came forward there was a cutoff plate attached to the back end of it.

The Court: It came forward?

A. It came forward.

The Court: Did the feed box move along tracks over the mold in your machines?

A. Your Honor, if it moved it would have to be on tracks. I don't know what your interpretation of the word "tracks" is.

The Court: Did the feed box after it had taken from the hopper—It is not then over the mold, is it?

A. No.

The Court: Did it have to move a distance over, two or three feet, before it got over the mold?

A. Yes.

The Court: How did it get there?

A. Well, it was drawn forward either by hand or by hydraulic cylinder, depending on the particular machine.

The Court: Just slide or was it on rollers?

A. It was not on rollers, it slid.

The Court: It slid over and then you emptied it into the feed box and then you had a pressure applied to the mold, is that it?

A. That is right.

The Court: Not tamping?

[fol. 315] A. No, sir.

Mr. Babcock: Your Honor said, "Then you emptied it into the feed box." Did you mean feed box or mold?

The Court: Into the mold, I am sorry, into the mold. All right, that is his machine.

Mr. Speer: If your Honor please, I want to ask him one or two more questions on that line.

By Mr. Speer:

Q. When the feed drawer engaged the mold box, was the mold box then vibrated?

A. Yes.

Q. Did it continue to—did the mold continue to vibrate while the feed drawer was emptying its contents into the mold?

A. Yes.

Q. Did the mold continue to vibrate when the feed drawer went back to its former position?

A. No.

Q. It came to a stop?

A. That is right.

Q. Did it at any other time after this, during the operation, begin to vibrate?

A. Yes.

Q. When was that?

A. It vibrated again as the presser head came down on it. I had two distinct vibrating cycles, and since the vibration applied was rotary in effect, I vibrated the second cycle in the opposite direction from the first cycle.

[fol. 316] The Court: What do you mean by rotary, it went clear around, or did it go half way around and back, half way around and back? Was it a jiggle?

A. The vibration was applied directly to the mold box by

eccentric weights, and in doing that your vibration must follow some sort of a rotary path. It would be elongated if you could take a stroboscopic picture of it.

The Court: It didn't go around a circle, did it?

A. Not exactly.

The Court: Did it go around, whether in a circle or not?

A. Yes.

The Court: Went completely around?

A. Oh, yes.

The Court: I see, all right.

A. It was not restricted in its amplitude.

The Court: It did not go around half way and when it stops over there jiggle it then, and back like that (indicating). It didn't do that?

A. No.

The Court: All right. And it wasn't an up and down movement?

A. Not purely.

The Court: If it didn't go around in a complete circle, then there must be some plane it went around in in making the circle, is that right?

[fol. 317] A. That is right.

By Mr. Speer:

Q. Mr. Graveley, in your opinion what is a high production concrete block machine?

A. Any machine that makes four hundred blocks per hour or over, I would call a high production machine.

The Court: Four hundred blocks or over?

A. Per hour.

The Court: Per hour. That would be a two- or three-pallet machine, or mold?

A. That could be a two-unit, or a three-unit. A two-unit can attain that production.

The Court: All right.

By Mr. Speer:

Q. Now, a concrete block machine having a capacity of four hundred blocks an hour, will it produce thirty-two hundred blocks per eight-hour day?

A. Normally.

The Court: If there are no rest periods and everything else, and if you keep working right there for eight hours, and the machine going, that is what it will produce, but actually it doesn't work out that way, does it?

A. Well, I would say that no machine is perfect. However, they quite frequently get that number.

The Court: In an eight-hour day?

A. On an eight-hour operating day. Normally in a block plant they achieve an eight-hour day by working nine hours. They always have clean-up time and so forth.

[fol. 318] The Court: All right.

By Mr. Speer:

Q. In the year 1946, Mr. Graveley, what was the total dollar value of sales received by the R. L. Graveley Company, from the sale of concrete block machines only?

Mr. Henry: What year?

Mr. Speer: For the year 1946.

A. From concrete block machines only it was approximately $300,000.

By Mr. Speer:

Q. For the year 1947, what was the same figure?

A. Approximately $69,500.

Q. And for the year 1948?

A. Approximately $29,800.

Q. Are these block machines which you manufactured covered by any patents?

A. No.

Q. Have you applied for any patent?

A. Yes.

Q. When was such application made?

A. In 1946. I couldn't get any closer than that. I made several applications on that thing.

Q. Have you ever requested a patent license from the Besser Manufacturing Company, or any of its employees, or from Gelbman and Andras, or from any employee of the Stearns Manufacturing Company?

A. Yes.

Q. When did you make such request, Mr. Graveley?

Mr. Gelbman: May we have not only when, but to whom? [fol. 319] Mr. Speer: I want to take one at a time. I will identify it.

A. Very early in 1948.

Q. And on whom did you make such request?

A. Mr. Stark.

Q. Mr. Stark. Did he identify himself to you?

A. He represented himself to be in the legal department of the Besser Manufacturing Company.

Q. Is he present in this courtroom?

A. Yes.

Q. Would you mind pointing him out, please?

A. He is the gentleman over there, having a brown suit and a bow tie.

Q. Now, would you tell us the substance of the conversation that took place between you and Mr. Stark at this time?

Mr. Gelbman: May I at this time interpose an objection on behalf of defendant Gelbman on the ground it is not binding on him?

The Court: You may have your objection. I don't know. I doubt whether it is binding but I am not saying now that it wouldn't be. You may have your objection, however.

Mr. Speer: All right, Mr. Graveley.

A. Mr. Stark came in to my plant, introduced himself as I stated, being in the legal department of Besser Manufacturing Company, and advised me that my machine might be infringing on patents held by them, by Besser, and/or licensor to Besser. And he showed me quite a few patents, [fol. 320] a number of patents, all of which he didn't say that Besser was the licensee or owner of, he merely showed me some six or eight patents.

By Mr. Speer:

Q. If I show you some patents, would you be able to identify those as the ones which you are referring to?

Mr. Gelbman: I object to that on the grounds it is leading.

The Court: What is leading about it?

Mr. Gelbman: Would you be able to identify those as the ones that you are referring to?

The Court: Yes. I don't know what he is going to say.

Mr. Gelbman: I think he ought to ask him what patents they were and let him identify them.

By Mr. Speer:

Q. Did Mr. Stark specify what particular patents he was referring to?

A. Well, he showed me the copies of them, of several patents, and he later, during the conversation, did specify that he thought that I was infringing on two patents, I believe.

Mr. Speer: If your Honor please, I offer the witness the opportunity to inspect these patents in order to refresh his past recollection.

The Court: On what question?

Mr. Speer: On the question of what patents Mr. Stark showed to him.

The Court: Is there any objection to that? He may show [fol. 321] him what he has.

Mr. Babcock: The only request that I would make is that each of the documents be marked for identification and we be given an opportunity to examine them.

The Court: Of course, I don't know what the question is.

Mr. Babcock: Even if there isn't a question, your Honor, as they are being exhibited to the witness for the purpose of refreshing his memory, I think we have a right to examine them.

Mr. Speer: They are going to be offered, your Honor.

The Court: All right, you may mark them.

[fol. 322] A. I have one here that I believe that Mr. Stark claimed there was an infringement on.

By Mr. Speer:

Q. Which patent are you referring to?

A. It is No. 2,366,780 to Gelbman.

The Court: That was a patent that he said he thought you were infringing?

A. That's right.

The Court: I see; any other patent?

Mr. Speer: Yes, I believe he will find some.

(Whereupon a copy of patent No. 2,366,780 was marked by the reporter as plaintiff's exhibit No. 116.)

Mr. Speer: I offer into evidence Government's exhibit No. 116.

A. I believe that he——

The Court: Just a minute. Any objection? Which one is that?

Mr. Babcock: The method patent.

The Court: The Gelbman method patent issued in 1942; is that right?

Mr. Babcock: Yes.

The Court: All right; there is no objection?

Mr. Babcock: No objection.

The Court: It may be received.

A. I believe he also claimed infringement of this one; it is also a Gelbman machine patent.

[fols. 323-325] The Court: Issued in 1945?

A. Issued in 1942, March 10, 1942.

The Court: I thought there was a different year. Both the same year?

Mr. Speer: If your Honor please, this patent was issued in 1945, that is No. 2,366,780.

The Court: I knew one of them was issued in 1945.

Mr. Babcock: That is Exhibit No.——

Mr. Speer: Exhibit No. 116.

The Court: That is the method patent?

Mr. Speer: That is the method patent.

The Court: The apparatus patent was issued in 1942?

Mr. Speer: Earlier.

(Whereupon a patent No. 2,275,676, was marked by the reporter as plaintiff's Exhibit No. 117.)

Mr. DeGree: Will you give us the patent number on that?

Mr. Babcock: No. 2,275,676. I am not clear in my own mind whether these documents have been produced here by the witness from his files or what the source and origin of the documents may be.

The Court: He said "some patents", and they were shown to him by somebody representing himself as the attorney for Besser & Company, claiming that they were

infringed. And he remembers that they claimed that those two were infringed.

[fol. 326] The Court: He didn't say these particular documents, but he said that the papers that were shown to [fol. 327] him showed the two Gelbman patents and he recognizes them, and the court will permit them to be admitted.

By Mr. Speer:

Q. At the time, Mr. Graveley, that the patents were shown to you by Mr. Stark, did Mr. Stark inspect your block machine?

A. Yes.

Q. Did he tell you in what respect your machine infringed these patents?

The Court: Which patents are you talking about? The Gelbman patents?

Mr. Neville: These two Gelbman patents which have been admitted.

The Court: The only patents he has identified are the two Gelbman patents.

Mr. Speer: Yes, your Honor, those are the patents.

The Court: All right.

By Mr. Speer:

Q. Did Mr. Stark specify as to what claims, what specific claims of the Gelbman patents your machine infringed?

A. Yes.

Q. Can you recall for us what those claims were?

Mr. Gelbman: I object, your Honor, on the ground that none of this is binding on the defendant Gelbman.

The Court: Well there may be a question about that in view of the contract that you have entered into, but I think [fol. 328] the question is proper.

A. On one patent that he showed me a copy of, which is in evidence here——

Mr. Babcock: May we have it identified, please.

By Mr. Speer:

Q. Would you tell the court which of these two Gelbman patents you are now going to testify to?

A. On patent No. 2,366,780.

The Court: I think you better refer to them as the method and the apparatus patent.

A. All right, on the method patent he pointed out that whereas even though I had two separate and distinct vibrating cycles my machine could readily be altered, in his estimation, by a customer to make it infringe this patent. He referred to my two separate and distinct vibrating cycles as a flimsy dodge to perhaps avoid infringement.

The Court: What do you call your two-cycle? When the feed box goes over the mold you have a rotary cycle, do you not?

A. That is correct.

The Court: All right; then the feed box moves back?

A. Right.

The Court: And then you have another vibration and pressure?

A. That's right.

[fol. 329] The Court: And what direction does that go in?

A. On the same plane but in reverse; in other words——

The Court: Goes back the other way?

A. One is clockwise and the other is counter-clockwise.

The Court: All right.

Mr. Babcock: May the record show the witness has been referring to Exhibit No. 116 in this testimony?

The Court: Yes, 116. He was just telling you, was he not, the way he thought your machine infringed upon theirs? Isn't that the way you took it?

A. In effect, yes.

The Court: All right. Did he represent that he was a patent attorney?

A. He did not; he represented himself as being in the legal department of Besser Manufacturing Company only.

The Court: All right.

By Mr. Speer:

Q. Now then, Mr. Graveley, with respect to that Exhibit No. 116 which you have in your hand, in addition to the

fact that Mr. Stark said the machine could be altered so as, to infringe, did he say anything else about that particular parent?

A. Well I think that he was referring to that particular patent, and he told me that if I built and sold any plain pallet automatic block machine that I would be sued and my customer would be sued and a restraining order would be [fol. 330] sought which would hold me for a matter of years from manufacturing any machine.

Q. With respect to plaintiff's Exhibit No. 117, the apparatus patent, did Mr. Stark say in which way that your machine infringed the Gelbman patent?

A. I believe that he claimed that it infringed claim One of the patent which relates to the feed drawer and track system.

The Court: You mean where the feed drawer moves from under the hopper to over the mold? Isn't that right?

A. That's right.

The Court: Well is that claim One?

A. Yes.

The Court: I haven't looked at Claim One in a long time. Well all right. I thought the feature of Claim One of the Gelbman patent was that it moved over and remained separate and apart from the mold. Isn't that right? Isn't that the big feature? This doesn't, does it, according to you?

A. It did touch the mold, and in the particular design of that machine he said that would infringe.

The Court: Well he was there and you had a machine like theirs and he was trying to tell you, I suppose, how he thought that your machine infringed on his; is that right?

A. Yes.

The Court: All right.

By Mr. Speer:

Q. Is that all Mr. Stark said with respect to his appa- [fol. 331] ratus patent?

A. Well in the conversation I asked Mr. Stark what would be the position of the Besser Company with respect to a license agreement and he advised me that it would be impossible to obtain a license, that their contract with Gelbman, with them, prohibited their licensing other manu-

facturers. He spoke only for Besser. Besser could not do it because Gelbman's contract prohibited their doing so.

Q. Have you had any other calls from Mr. Stark or anyone else from the Besser Company since that time?

A. Mr. Leach was in the plant, I believe, after that time.

Q. Did he identify himself as being an employee of the Besser Company?

A. He identified himself to me as assistant to the president of the Besser Manufacturing Company.

The Court: Who is that?

By Mr. Besser:

Q. What is his name?

A. Leach, I believe it is.

Q. Leach. What were the purposes of his call, did he state?

A. Oh he didn't state any purpose of his call, but quite frankly it was that he wanted to inspect my machine and he wanted to give me some friendly advice that I could not afford a long drawn out lawsuit with Besser.

Q. Did this conversation with Mr. Leach take place prior to the visit from Mr. Stark?

[fol. 332] A. He was there on three occasions. He was there prior to the visit by Mr. Stark, and again after that time.

Q. Now, Mr. Graveley, have you ever had any conversations with any of your customers, or prospective customers, with respect to the fact that they had been approached or contacted by the Besser Company, or any of its employees, with respect to the use of a Graveley machine?

A. Yes.

Q. Could you tell us the name of such customer?

A. One of those would be Harry Hirshison of the Modern Art Stone Company, of Bronx, New York.

Q. And where did this conversation take place?

A. I understand that they had a conversation at their place of business.

Q. No. I mean whereabouts did the conversation between you and Mr. Hirshison take place?

A. There were several such conversations. Generally in New York City.

Q. And approximately when did these conversations occur?

A. They went on for a long period of time in 1947.

Q. Now, would you tell us, please, what the substance of the conversation was, what Mr. Hirshison told you?

Mr. Babcock: I object, your Honor please, for the reasons stated previously.

The Court: Same ruling of the court.

[fols. 333-334] Mr. Babcock: It isn't necessary to detail those reasons?

The Court: No. I know what your objection is and it is in completely. Overruled.

Mr. Speer: All right, Mr. Graveley, answer the question.

A. Mr. Hirshison advised me that he had been contacted, he and a partner of his, one A. Vinci, a partner in the venture.

Mr. Goreff: Give the name, please.

A. Abe Vinci, V-i-n-c-i. And he had been told that if he bought that machine from me, which had a presser head and was capable of vibrating under pressure, that he and I would be sued.

The Court: You mean that is what he told you?

A. Yes, sir.

[fol. 335] By Mr. Speer:

Q. Mr. Graveley, I believe you testified concerning a conversation with Mr. Stark about patent infringement in the spring of 1948?

A. That is right.

Q. Do you recall anything else, any other statements that were made during that conversation?

A. Yes. Mr. Stark during that conversation advised me they could and would sue me and keep me tied up for a long period of time if I made an automatic block machine, whether or not infringement was involved. He reminded me that I couldn't afford to be tied up in a lawsuit for a long period of time.

Q. Did you say that Mr. Stark said you couldn't afford to be tied up in a lawsuit for a long period of time?

A. He did.

Q. And what did you say to that?

A. I told him, Mr. Stark that is, that if they should sue me, I would attack the validity of the patents which he [fol. 336] claimed I may have been infringing upon, and that I had every reason to believe that I would be successful in that attempt. Again he reminded me that I couldn't afford to be tied up for a long period of time, win, lose or draw.

Q. Now, at the close of your testimony yesterday I believe you started to tell us of a conversation between you and a customer of yours at the Bronx. What was his name?

A. Harry Hirschensen and a partner, A. Vinci.

Q. Yes. And where did this conversation take place?

A. There were several such conversations, all in New York City.

Q. Could you tell us approximately at what time was it, 1946, 1947, 1948?

A. I believe it was late in 1947.

Q. When all of the conversations took place?

A. They extended over a long period of time and may have gone beyond the new year.

Q. Now, what were the substances of the conversations?

Mr. Gelbman: I object to that on the ground it calls for hearsay evidence from this witness and not binding on the defendant Gelbman, and we have no opportunity to cross-examine on that basis.

Mr. Babcock: I think yesterday I stated my objections to this testimony of conversations with customers and I would be glad to repeat them if the court desires.

The Court: No, not if they are the same objections.

Mr. De Gree: I object also, your Honor.

[fol. 337] The Court: All right, objections overruled.

A. They told me that they had been approached by Mr. Gelbman and by representatives of the Besser Manufacturing Company, and had been told that if they purchased from me any machine having a presser head or other device to allow vibration under pressure, that they and I would be sued.

Q. Have you had any other such conversations with any other customers?

A. Yes.

Q. What was the name of the customer and when did the conversation take place, and where did it take place?

A. There have been several occasions. One that I can recall to mind was in 1947 in Orlando, Florida, with Mr. A. J. Thomas of Thomas Lumber Company.

Q. And what did Mr. Thomas have to say on this point?

Mr. Gelbman: I object to that on the same ground.

Mr. De Gree: Same objection.

Mr. Babcock. Same objection, please.

The Court: Same ruling.

A. Mr. Thomas said essentially the same thing, that he had been threatened with a lawsuit if he bought one of my machines. He wanted to know what my attorney thought of it and what, if any protection I could offer him.

Q. Now, I believe with respect——

Mr. Goreff: Did the witness say by whom, by whom he [fol. 338] had been threatened?

The Court: I thought he did.

Mr. De Gree: No.

Mr. Speer: I am going to ask him that.

The Court: That was not the person he was referring to before then?

Mr. Speer: No, I do not believe so.

The Court: All right.

By Mr. Speer:

Q. In your conversation with Mr. Thomas, did he say that he had been approached by Mr. Gelbman and a representative of the Besser Company?

A. Mr. Thomas did not, as I recall at this moment, tell me the name of the party who approached him. I do know, however, that it was a representative of the Besser Manufacturing Company.

Mr. Gelbman: I move to strike that out on the ground it calls for a conclusion of the witness.

The Court: He says he knew.

Mr. Gelbman: There are no facts here to show that he did know.

The Court: He said he knew, and you can cross-examine him on it. But when a man says he knows something it is

not a conclusion, although upon cross-examination it may be proven to be so.

By Mr. Speer:

Q. Have you had any other conversations of this type with any other customers?

A. I could not tell you a specific instance offhand, [fol. 339] although there have been such conversations with various other people.

The Court: That may be stricken.

Mr. Babcock: I will ask that——

The Court: That may be stricken and of course I think I reminded the government yesterday that there will have to be at least some proof of this. I could not hold just the hearsay evidence that I am accepting at this time entirely on this matter. You understand that?

Mr. Speer: Yes, I do, your Honor.

The Court: All right. I can under the rules and the decisions accept this hearsay evidence and it is hearsay, but the effect of it could not be very damaging unless there was some actual proof, so do not be lulled into the false position that the court is accepting this as proof of any of the facts.

By Mr. Speer:

Q. Mr. Graveley, are you still in the concrete block machine business?

A. No.

Q. Can you tell us the purpose, and tell us why you are not in the business of manufacturing concrete block machines?

Mr. Gelbman: I object to that on the ground that it calls for a conclusion of the witness.

The Court: I do not know why he is not in the business. I know why I am not in it.

Mr. Gelbman: I further object to it on the ground it is immaterial.

[fol. 340] The Court: It may be material. He may answer.

A. I was quite successful in selling concrete block machinery at a time when the trade would accept hand operated

machinery. However, the demand is now for high production machinery almost altogether and——

The Court: Automatic?

A. Automatic machinery, and, well to put it practically, I cannot afford a long drawn out lawsuit.

By Mr. Speer:

Q. Then is it your testimony that because of these patent infringement conversations——

Mr. Gelbman: I object to that on the ground it is leading and suggestive.

The Court: It could not be any more so. I sustain the objection.

Mr. Speer: That is all the questions I have.

The Court: Before you get to the cross-examination I want to find out from this witness the type of machine that he was making. Was it a hand machine, I mean the one that you were making when you were threatened, as you say?

A. No, sir, at that time I was beginning the manufacture of a high production plain pallet automatic machine.

The Court: And how many forms at one time?

A. Two.

The Court: Two. And was the hopper in that machine removed from the mold?

A. Yes, sir.

[fol. 341] The Court: And did the raw material go into a feed box?

A. It did.

The Court: And the feed box traveled along some kind of rollers, or did you say yesterday that was not rollers?

A. It was not rollers.

The Court: How was it motivated from one part of the machine so that the feed box covered the mold?

A. I had a round rod on each side and a sliding bar. It was actuated by a hydraulic cylinder.

The Court: It was not on rollers, but it went over the mold?

A. That is right.

The Court: And did it start to feed the mold until it was over the mold, until it was completely over?

A. Well, yes.

The Court: You mean as it went over it, did it feed the mold, I would like to know?

A. Yes, it did. As a matter of fact, it most certainly would.

The Court: Are you sure of that? Was the mold vibrating at that time?

A. The mold was vibrating as the feed drawer came forward.

The Court: And it was feeding the mold while the mold was vibrating. The mold must have been vibrating separately from the feed box then, or was it?

[fol. 342] A. No. The feed box vibrates with the mold, and as a result of the vibration in the mold.

The Court: What made the mold vibrate on the outside, or did you have some attachment on the outside or inside of the mold?

A. On the outside of the mold.

The Court: On the outside. And then after the feed box was over the top of the mold, it vibrated with the mold?

A. That is right.

The Court: And then was there a pressure being applied while the vibration was going on?

A. Not at that time. It vibrated under pressure, but as I brought out yesterday, the vibrations ceased when the mold was filled, or approximately when the mold was filled, the vibrations ceased, the feed drawer returned to its position under the hopper.

The Court: And then the pressure came?

A. And then the pressure came down and it was vibrated in a reverse direction from that of the previous vibrating cycle.

The Court: You said two vibrations. Did you take a look at the apparatus patent of Gelbman—I think it is the apparatus patent—did you take a look at the apparatus patent of Gelbman?

A. Yes, sir.

The Court: What distinction was there between your [fol. 343] machine and the apparatus patent of Gelbman

that would lead you to believe that you were not infringing upon him?

A. Oh, I found nothing there that would lead me to believe that I was infringing on him.

The Court: As a matter of fact, the Gelbman apparatus patent, or the Gelbman method patent feeds the mold as the feed box goes over the mold, doesn't it, the same as you were doing?

A. Yes, sir, and all other block machines too.

The Court: Now, just a minute, I will get to them. I want to find out whether this was just a scare thrown into you of litigation, or whether it was based on something.

And the Gelbman method patent was vibrated separately from the mold, vibrated separately from the feed box. That was a distinction?

A. The method patent did not have that distinction, no. The process patent, I think, did not have that distinction.

The Court: I am talking about the two of them together. The Gelbman patent vibrates separately from the feed box, doesn't it? That was one distinction that you would claim, would you not?

A. That is right, in the equipment patent, yes.

The Court: Isn't it also true in the other patent?

A. No, sir.

The Court: The method patent does not vibrate separately?

[fol. 344] Mr. Stark: If the court please, the method patent comprises method steps of operation as distinguished from structure.

The Court: I know.

Mr. Stark: And there is no mention made of the feed drawer being independent of the vibration of the mold.

The Court: But the machine that you construct, the mold always vibrates separately from the feed box, does it not?

Mr. Stark: That is correct.

The Court: And yours would be a distinction, that is at least a distinction that would be made by your attorneys if you went into court because your vibration was of both the feed box and the mold?

A. That is right.

The Court: Now, you say that every other patent on the market, or every other patent that you know of, the feed

box feeds the mold as it progresses over the mold. That is what you said, is that right?

A. That is correct.

The Court: What other patent do you know of that does that? I would be interested in learning.

A. What other block machine, did you ask?

The Court: Yes.

A. Oh, I could just name every block machine I have [fol. 345] inspected. One would be the Appley small hand operated machine. The material is fed into——

The Court: What is the name?

A. Appley, A-p-p-l-e-y.

The Court: Is that a patented machine, or do you know?

A .I don't know. Kissam has a patented machine, K-i-s-s-a-m.

The Court: That does that?

A. That the material is feeding as the hopper is drawn forward.

The Court: Kissam. Put that down. I would like to know some more because I think I have to do a lot of reading. Give me another one.

A. I found several expired patents.

The Court: Yes. I would like to know an expired patent because that would be in the prior art. I would like to know an expired patent that does that because I am frank to tell you no such patent was presented to me in the patent case at Bay City that I remember of not even faintly claimed to be feeding the mold at the same time the feed box went over the mold. The Lith-I-Bar machine, one of the claimed differences, as I remember, was that the feed box—it was different from the Gelbman patent because the feed box did not start to feed until after it go over the mold. Isn't that true? Isn't that a claimed difference at Midland?

Mr. Stark: That is correct.

The Court: And I would be interested in knowing from [fol. 346] you any other patent in the prior art that did what the method patent claimed it did.

Mr. Stark: In the machines that Mr. Graveley is speaking of, I believe they are all later than the issuance of the Gelbman patent. They were on the market later.

The Court: I mean before the Gelbman patent.

Mr. Stark: I don't think he has appreciated that distinction.

The Court: Well, if you can't think of them.

A. Your Honor, the patent examiner cited three in his original examination, I believe it was three. I am quite sure it was three in the prior art, that did that, and that is a matter of public record.

Mr. Stark: One further distinction. Both of those examples that have been cited, Kissam and Appley, they do not have pressure heads on them.

The Court: They do not?

Mr. Stark: No. Isn't that correct, Mr. Graveley?

A. As to that feature, yes, they do not have pressure heads. Pardon me, I believe Appley has at this time. I have seen an Appley machine with a pressure head on it.

Mr. Stark: He asked for a license from us and we have been negotiating with them.

The Court: All right. I just wanted to know. I thought for a while I had been entirely misled in the prior art. [fol. 347] It is all right. You may cross-examine, gentleman.

Mr. Speer: Yes, your Honor please, before the cross-examination I do want to inform the court that the government is going to call at least two or three concrete people to the stand here who have been approached by the Besser Company.

The Court: That is all right. Cross-examination, gentlemen.

Cross-examination.

By Mr. Gelbman:

Q. Mr. Graveley, I believe you testified that you had a conversation with a New York customer named Hirschensen, and Vinci.

A. Hirschensen and——

Q. Hirschensen and Vinci, and their plant was located where, do you know?

A. In the Bronx, New York.

Q. Do you know the address?

A. I do not.

Q. If I told you it was Edgewater Road in the Bronx, would that refresh your recollection?

A. It would not mean a thing, as I don't know.

Q. You sold them some machines, did you not?

A. That is correct.

Q. Did they ever get into operation?

A. I do not know.

[fol. 348] Q. As a matter of fact, isn't it true that they not only never got into operation, but they subsequently went into bankruptcy?

A. I don't know.

Q. Yet you recall very distinctly the conversation that you had with Mr. Hirschensen and Mr. Vinci?

A. That is correct, and after delivery of the machines, they were limited in capital. I had some difficulty collecting my money, in fact I never did collect my money. But I do not know as to their financial status any more than I had difficulty collecting money.

Q. Did they make a complaint to you that your machines would not work?

A. Such a complaint was made and I did send a service man up there to correct that. He made good blocks before he came home.

Q. You mean your man made good blocks before he came home?

A. Their man did with my man in attendance.

Q. How many blocks did they make?

A. I haven't his service report in front of me, so I could not state.

Q. Do you have any notation, written notation, with respect to these conversations or these reports?

A. With me, no.

Q. You knew you were being called here as a witness for the United States?

A. That is correct.

[fol. 349] Q. And yet you did not bring those written notes with you?

The Court: Did he say he had written notes?

Mr. Gelbman: He said he had.

Mr. Neville: No he did not say that.

Mr. Gelbman: He said not with him, and I inferred that he had them somewhere else.

The Court: Well, that is a very long inference. Every time you meet with somebody, do you go back and make notes about it? It would have been most unusual if at that time this man had made notes of those conversations. Did you make notes?

A. No, sir.

The Court: Have you such notes?

A. No, sir.

The Court: All right, let us not ask for something that he does not have.

By Mr. Gelbman:

Q. Did you have any service records with respect to the production of block by that company?

A. My files—let me say another company is now operating in the plant formerly operated by myself and they have taken such files as I had, and in some cases they have either been misplaced or destroyed. I find it very difficult to refer back to anything that happened and get the exact file on it.

Q. When Hirschensen and Vinci told you about a conversation they had with a Mr. Gelbman, did they indicate what Mr. Gelbman's first name was?

[fol. 350] A. Well now——

Q. Yes or no, that is all that calls for, sir.

A. I do not know. That conversation took place a long time ago.

Q. But you remember very distinctly that they told you all about being threatened to be sued; is that right?

A. That is right.

Q. But you do not remember whether or not the name of Gelbman was used other than the name "Gelbman"?

A. They told me that the gentleman that they referred to was the holder of the patent referred to.

Q. You are certain of that, sir?

A. Yes.

Q. Did this conversation that you had with your customers in New York take place during the time that you were attempting to collect your money?

A. I am not quite sure I understand you.

Q. You told us that you never collected your money for these machines that you sold them. Is that right?

A. That is right.

Q. And you said that you made attempts to collect it?

A. That is right.

Q. And I believe you testified that the conversation took place in New York?

A. That is right.

Q. Were you up there for the purposes of collecting your money?

A. On one occasion.

[fol. 351] Q. What were your purposes on the other occasions?

A. I made several trips to New York. I talked to Vinci and Hirschensen on some occasions when I was up there on other business, so I cannot tie myself down. I don't know just exactly what you want.

Q. How many machines did you sell this firm?

A. Two.

Q. And what size were they?

A. They each made two blocks at a time.

Q. And you have no idea what their production was during the period of time that they had them?

A. I do not.

Q. Do you know what period of time that they were in business?

A. I do not.

Q. Do you know if they ever went into business?

A. I do not.

Q. Mr. Gravely, were you in the concrete business in any way prior to October, 1945?

A. I was.

Q. With whom were you associated?

A. F. C. George Machine Company, at Orlando.

Q. And they were a manufacturer of concrete block machinery?

A. That is right.

Q. What was your capacity there, sir?

A. F. C. George and I started together; the two of us [fol. 352] with one assistant; but I don't know that I ever had a title in his organization.

Q. Were you a partner or stockholder of that concern?

A. It was not incorporated; as to being a partner, I believe you might say so inasmuch as I shared in the proceeds of the venture.

Q. How old are you, sir?

A. Thirty-three years old.

Q. So I believe that you first testified that you were in this business since you were sixteen years old, is that right?

A. I have not testified to anything about how long I have been in this business.

Mr. Speer: I do not think there was anything about that.

The Court: All right. There is no objection to asking him now.

By Mr. Gelbman:

Q. How long were you in business with F. C. George?

A. Oh, I don't know, a year or two, I don't know.

Q. And prior to that where were you in business?

A. I have been engaged in business with my father and myself in manufacturing at Orlando, and back when I was going to school, and at the time I was sixteen years old I recall I was running his jobs, acting as a superintendent or foreman.

Q. What type of business was that, sir?

A. We had a small plant in which we did manufacturing [fol. 353] of machinery and metal products, also dad was a structural steel contractor.

Q. What type of machinery, sir?

A. Contract machinery. Any time that if you wanted me to build you a pile driver or a block machine I would have been glad to have accommodated you.

Q. How many block machines were built during that time?

A. Oh, I cannot say.

Q. You have no idea?

A. No.

Q. Did you attend any college or university?

Mr. Neville: Your Honor please, I think we are getting a little bit beyond the scope of the direct examination.

The Court: I do not know what difference it makes. I understand a man by the name of Ford over here never attended any college or university.

Mr. Gelbman: I just want to know if this gentleman is an engineer, and I am leading up to that.

The Court: Why don't you ask him if he is an engineer? You may have the answer. I don't know as it is material.

A. The answer is yes.

By Mr. Gelbman:

Q. What university, sir?

A. I have studied with I.C.S. I have taken some of these short extension courses that were offered by the University [fols. 354-355] of Alabama, by the Case School of Applied Science, by the John Huntington Polytechnic Institute, and aside from that I have had practical experience.

Q. Have you an engineering degree from any university or college?

A. No.

Q. Have you been graduated as an engineer from any university or college?

Mr. Gelbman: That is all.

[fol. 356] Cross-examination.

By Mr. Goreff:

Q. Mr. Graveley, did you ever meet the defendant Hamlin F. Andrus?

A. No.

Q. Did you ever communicate with him by correspondence or otherwise?

A. No.

Q. You never asked him for a license? Yes or no?

A. Only as I asked Mr. Stark——

Mr. Goreff: I move the answer be stricken, your Honor, as not responsive.

The Court: It may be stricken.

By Mr. Goreff:

Q. Can you answer the question, please?

A. Please ask it again.

Q. Did you ever apply to Mr. Hamlin F. Andrus for a license under the Gelbman patents?

A. No.

Q. Was the machine you made a high production machine?

A. Yes.

Q. Was it a fully automatic machine?

A. Yes.

Q. Or was it a semi-automatic machine?

A. Fully automatic.

Q. Can you tell me what actuated the feed drawer as it moved back and forth?

A. Hydraulic cylinder.

[fol. 357] Q. Did that have to be manually controlled?

A. No.

Q. You mean it operated continuously?

A. I said it was a fully automatic machine.

Mr. Goreff: That is all.

The Court: All right, any further cross-examination?

Mr. DeGree: I have one question, your Honor.

The Court: All right.

Cross-examination.

By Mr. DeGree:

Q. At the outset of your testimony you mentioned that you had manufactured a cored pallet machine and a plain pallet machine. That is correct, is it not?

A. That is correct.

Q. Will you state whether or not the cored pallet machine is an automatic machine?

The Court: What kind of a machine?

Mr. DeGree: Cored pallet.

The Court: C-o-r-e-d?

Mr. DeGree: C-o-r-e-d.

The Court: All right.

A. No, the cored pallet was not an automatic machine.

By Mr. DeGree:

Q. Have you ever seen a cored pallet machine that was fully automatic?

A. I saw a cored pallet machine that purported to be fully [fol. 358] automatic. However, I never saw it in operation and I do not know.

Q. I see. But you do know that the plain pallet machine is an automatic machine?

A. As manufactured by myself, it is fully automatic.

Mr. DeGree: That is all.

The Court: For my information, what is a cored pallet machine?

Mr. Stark: The distinction at the Bay City trial was that on the plain pallet machine the blocks are made on a square or rectangular plain pallet, and in a cored pallet machine the block is made on a pallet that is inserted inside the mold and the pallet is ejected through the mold.

The Court: It comes out from the bottom?

Mr. Stark: Yes, sir.

The Court: Wasn't that a distinction claimed in one of the machines there?

Mr. Stark: One of the references, you mean?

The Court: Yes.

Mr. Stark: I believe so. At the moment, I do not recall that. The Lith-I-Block is a plain pallet machine.

The Court: Is it Lith-I-Bar or Lith-I-Block?

Mr. Stark: The Lith-I-Block is the machine and Lith-I-Bar is the company.

The Court: I see.

[fol. 359] Cross-examination.

By Mr. Babcock:

Q. Mr. Graveley, I would like to refer just a moment to this discussion you have just had with other counsel about the matter of automatic and manual control. During the course of your direct examination by government counsel, you were asked this question and gave this answer:

"Q. Well now, you say you made more than one type; in what respects were they not the same?

"A. I made cored pallet machines which were either manually operated or manually controlled, and I also made a fully automatic plain pallet machine."

When you said you made a fully automatic plain pallet machine, did you mean that you had made only one machine of that type?

A. If you will read my answer again, you will se- that I referred in the first instance to several models of cored pallet machines and one model of plain pallet automatic machine. I think it is quite plain.

Q. My question is, did you mean that you had made only one plain pallet machine?

A. The answer is no.

Q. Thank you. How many plain pallet machines that were fully automatic did you manufacture?

A. Three.

Q. How many of those three, if any, were sold to this New [fol. 360] York concern?

A. None.

Q. Where were they sold?

Mr. Speer: I object to that question. The witness has said that three machines were manufactured only. I do not believe there is any testimony that they were sold.

Mr. Babcock: Very well, I will withdraw the question.

The Court: All right.

By Mr. Babcock:

Q. Were those three that you did manufacture sold?

A. Yes.

Q. To whom?

A. Two of them were sold to Mr. Jose Perrone, and one to a Mr. Lipton.

Q. And where is Mr. Perrone located?

A. Mr. Perrone represents an Argentine concern.

Q. My question was, where is he located, Mr. Graveley?

A. How would I know where anybody is located unless I see him?

Q. Where is his place of business, Mr. Graveley?

A. He has several. One of them is in Argentine.

Q. Do you know the location of any of the others of the several places of business he had?

A. I know of several in Argentine and at the time of my transaction with him, he had an agent in New York City.

Q. What was the address of the office in New York City? [fol. 361] A. I do not recall offhand. I believe it was all Manhattan and I don't know the city very well.

Q. Did you visit his office?

A. I went there with a Mr. Hoffman who took me to Perrone's.

Q. And who is Mr. Hoffman?

A. Mr. Hoffman is a dealer in concrete products machinery in New York and an exporter.

Q. And where is Mr. Hoffman's place of business?

A. 110 Broad Street, I believe.

Q. Did you ship the two machines to Argentine?

A. No, I turned them over to an outfit in Orlando.

Q. And what is the name of the outfit in Orlando to which you turned over the machines?

A. Southeast Steel Sales Company.

Q. Did you turn them over to the Southeast Steel organization by instructions of Mr. Perrone?

A. Yes.

Q. As a part of your sale of the machines to Mr. Perrone, a part of that transaction was it?

A. Oh, yes.

Q. Now, is the Hoffman organization or the Hoffman office at the address you have given us under the name of Hoffman, or does he have some other trade name?

A. I believe his present style is George W. Hoffman, Incorporated, although I cannot state that to be the fact. [fol. 362] But that is my opinion, my belief.

Q. As far as you know, is he still at the same address?

A. As far as I know.

Q. Do you recall that address is rather a large building with a number of people in it?

A. Fair.

Q. When was it that you said Mr. Stark first came to see you?

A. Oh, I believe it was early in 1948.

Q. Would you say it was as early as January 1948?

A. Perhaps.

Q. Now, at that time had you completed the manufacture of any of your plain pallet machines?

A. Yes.

Q. How many?

A. Three.

Q. Where were those three machines at that time?

A. Two I believe were completed at that time. I would

like to change that, I believe only two were completed at that time.

Q. And where were they?

A. One of those was in Orlando at the time.

Mr. Babcock: I am sorry I did not get the latter part of that answer.

(Whereupon the reporter read the last answer.)

By Mr. Babcock:

Q. Where was the other?

A. The other I believe had been shipped.

Q. Shipped out of the country?

[fol. 363] A. As far as I know.

Q. And where was the one that was in Orlando then located?

A. I believe that one was in the plant of the Thomas Lumber Company.

Q. That accounts for two now. What about the third one?

A. The third one I don't believe was built at that time.

Q. Isn't it fair to conclude then that at the time of Mr. Stark's visit you didn't have one of your plain pallet machines in your plant at all?

A. I believe the one that Mr. Stark looked at was the one that was at Thomas Lumber Company. I don't believe I had one in my plant.

Q. Pardon me, Mr. Graveley, do you mind answering my question? I will have the stenographer read it to you if you have forgotten it.

(Question read.)

A. You might make such conclusion.

Q. Pardon.

A. Yes, I suppose so.

Q. All right. Now, if that is the fair conclusion, when you were asked this question yesterday and gave this answer:

"Q. At the time, Mr. Graveley, that the patents were sold to you by Mr. Stark, did Mr. Stark inspect your block machine?

"A. Yes."

Where did Mr. Stark make the inspection of your block [fol. 364] machine?

A. At the Thomas Lumber Company in Orlando.

Q. In January 1948?

A. I didn't state that it was in January 1948, I told you it may have been.

Q. Was anyone else present when Mr. Stark inspected your machine at the Thomas Lumber Company?

A. Myself.

Q. Perhaps I wasn't clear on that. Was anyone other than yourself and Mr. Stark present when he inspected them?

A. I don't remember.

Q. Now, you are very positive that on the occasion of this visit of Mr. Stark in the early part of 1948, you and he went to the Thomas Lumber Company and he inspected one of your automatic plain pallet machines?

A. I will not verify that date.

Q. Well, did he make more than one visit to you?

A. I said I believe this date to be early in 1948. it is possible that it was in later 1947.

Q. Did Mr. Stark make more than one visit to you?

A. I don't recall but one.

Q. All right. Regardless of the date, on the occasion of this one visit of Mr. Stark to you in Orlando, Florida, whenever it was, are you positive that you took him to the Thomas Lumber Company and there he inspected one of your plain pallet automatic machines?

[fol. 365] A. I am quite positive that such is the case.

Q. Now, you say you are quite positive. Is there any question in your mind about it?

A. No.

Q. You are quite positive then that it is not a fact that all that you exhibited to Mr. Stark were some pictures and some drawings of your machine? I am referring now to the fully automatic plain pallet machine.

A. Quite sure of that.

Q. What is the address of the Thomas Lumber Company?

A. The block plant is on Atlanta Avenue in Orlando.

Q. Is that where it was on this occasion of Mr. Stark's visit?

A. Yes.

Q. On the occasion of that visit, what other machines, if any, did they have in operation in the Thomas Lumber Company block plant?

A. I think they had a Stearns Jolterete in there at that time. Oh, I wouldn't be sure, they may or may not have. Mr. Thomas has traded machines and switched around considerably. I don't remember what he had, at a given moment, because the situation varied so much with Thomas, with his machines.

Q. How long did he use your machine, Mr. Thomas I mean?

A. I don't think I can give you an answer to that.

Q. Did he pay you for your machine in full?

A. No. That machine was put in there at that time more to—it was never sold to him. That machine belonged to [fol. 366] Mr. Perrone, at the time it was in Thomas' plant.

Q. Just temporarily there until you got ready to ship it?

A. Until Mr. Perrone got ready to receive it.

Q. At that time was it all crated for shipment?

A. No.

Q. Was it covered in any way?

A. No.

Q. It was not in operation?

A. Oh, it was operated there.

Q. You mean it was operated at the time of the inspection of Mr. Stark?

A. I can't say as to that, whether it was or not. I feel that it was not operated at that time, but I believe I cranked it up for him, plugged it in, let it go through its paces.

Q. Were you paid for the two machines that you sold to Mr. Perrone?

A. I was.

Q. What is the address of the Lipton or Tipton concern to whom you sold a third machine?

A. Orlando, Florida.

Q. Is that concern doing business under the name of Lipton or Tipton?

A. I believe that was sold to Mr. I. B. Lipton.

Q. I. B. Lipton. Did Mr. I. B. Lipton pay for that machine?

A. That machine, yes.

Q. Do you know whether he still operates the machine?

A. No.

[fol. 367] Q. You don't know?

A. I don't know.

Q. Did you sell any other—I am trying to be fair. I understand your testimony to be that you did not sell to the Thomas Lumber Company this one machine that was in their place of business. Did you sell any other machines to the Thomas Lumber Company?

A. No.

Q. Well, then, so far as your concrete block machinery business is co erned, the Thomas Lumber Company was not a customer of yours, was it?

A. They didn't buy a concrete block machine from me.

Q. Did you not testify on direct examination that the Thomas Lumber Company, a customer of yours, had told you of a conversation with a representative of the Besser Company?

A. I don't think I referred to him—well, if I did, he is a customer of mine and has been for a good many years.

Q. Customer for what?

A. If I used the word "customer," I mean customer. I don't think it is relevant what he purchases from me, or what services I render to Mr. Thomas. He has been a customer of mine for a good many years.

Mr. Babcock: Would you mind permitting the Court and myself to determine what is relevant, Mr. Graveley?

By Mr. Babcock:

Q. He is a customer for what?

Mr. Neville: I object to that.

[fol. 368] The Court: I think he has a right to know what he is a customer of. I am beginning to get interested now what he was a customer of.

Mr. Neville: Whether he was a customer of concrete block machinery, I think is relevant, but he might have been a customer in pills or something.

The Court: No. He might have been a customer of his in some of the other endeavors he was in, for all I know,

and he can answer if he wasn't. But to say he was a customer of mine, unless the answer is going to incriminate him——

Mr. Neville: I don't know.

A. I don't know that I called Mr. Thomas a customer yesterday.

The Court: You just did, witness.

A. But as to that, I will answer your question. I have sold to Mr. Thomas various manufactured items for his various block machines, and have done a considerable amount of maintenance and repair work on his Stearns Jolterete machine, and on his Lith-I-Bar machine, and on various other equipment which he owns or has owned.

By Mr. Babcock:

Q. All right. Will you give us some identification of some of the parts that you have sold to him?

A. I made a mold box. I believe I made a mold box for his Jolterete for him. I know for a fact that I made one or two mold boxes for his Lith-I-Bar for him. I made several presser heads for him as replacements or as accessory parts [fol. 369] for these various machines.

By Mr. Babcock:

Q. And that is the perspective from which you called Mr. Thomas your customer, is that correct?

A. Any reference to him as a customer would be in such a light, yes.

Q. Now, when was this conversation with Mr. Customer Thomas?

A. Which?

Q. Your conversation with him in which he is supposed to have related the conversation with a representative of the Besser Manufacturing Company?

A. Oh, I think there were several. I couldn't give you an exact date on that because I have seen the man quite frequently over a period of years. I can't say just what conversation that was brought up, at what time. It was at several times.

Q. Now, let me get this clear. You have had several conversations with Mr. Thomas?

A. That is right.

Q. During those several conversations, was it several times, that he repeated to you his conversation with a representative of the Besser Manufacturing Company?

A. That reference was made to it. I wouldn't say that he repeated a conversation of another party.

Q. What is the best time you can fix as being the time when he told you of the conversation with the representative of the Besser Company?

A. I think perhaps in the latter part of 1947 such a con- [fol. 370] versation took place.

Q. Was that prior or subsequent to the visit of Mr. Stark to you?

A. I believe such a conversation took place prior to the visit of Mr. Stark.

Q. What is your best judgment as to the length of time prior, month, two months, three months, six months?

A. I don't know, perhaps as much as three months.

Q. As much as three months?

A. Perhaps.

Q. By the way, were these sales to Mr. Perrone prior to or after the visit of Mr. Stark?

A. They would have to have been prior to the visit of Mr. Stark because the last of the two machines was inspected by Mr. Stark and was at that time the property of Mr. Perrone.

Q. Was the sale to Lipton prior or after the visit of Mr. Stark?

A. After.

Q. Can you tell us whether the machine that you had sold to Perrone, and which was in the place of business of the Thomas Lumber Company, was in the place of business of the Thomas Lumber Company at the time of your conversation with Mr. Thomas about the visit of the representative of the Besser Company?

A. Oh, I can't say that we did not have such a conversation during the period in which that machine was there. However, we had such conversation prior to the temporary installation of the machine there.

Q. You did have such a conversation prior to the tempo-
[fol. 371] rary installation of the machine?

A. That is right.

Q. Mr. Thomas didn't identify the representative of the Besser Lumber Company, to you?

A. You said Besser Lumber Company.

Q. Pardon me, the Besser Company.

A. He may have. That has been a good long while ago, a period of years.

Q. If you did, you don't remember it now?

A. I don't recall the name of the representative.

Q. And you don't recall definitely, so as to charge your memory with it, whether or not he did identify the representative?

A. I feel sure that he did. If you want my memory on it, I believe that he mentioned Mr. Park, but that is only—I don't want to go on record as saying I identify the man as Mr. Park.

Q. Now, was the conversation you had with Mr. Leach before or after your conversation with Mr. Stark?

A. There were three conversations with Mr. Leach, two before and one after, as I recall, the conversation with Mr. Stark.

Q. During which of them was it that he said he wanted to inspect your machine?

A. Oh, that happened at least on the last such visit, and perhaps—I won't say that it was or was not, did or did not happen on the prior visit.

Q. Did he inspect the machine?

A. He did.

[fol. 372] Q. Where did he inspect the machine? Where was that machine?

A. That machine, in my plant in Orlando.

Q. Which machine was that?

A. The one that Lipton now has.

Q. Well, with reference to the two machines that were built for Perrone, was the machine that Lipton now has built before or after those that Perrone bought?

A. After.

Q. Well, is it then fair to conclude that since the machine you say Stark saw was one of the machines that was sold

to Perrone, and since the machine that Leach inspected was the one that was sold to Lipton, and the Lipton machine was built after the two Perrone machines, that the conversation with Mr. Leach during the inspection trip of Mr. Leach was some time after Mr. Stark's visit?

A. That particular time was definitely after Mr. Stark's visit.

Q. Now, did Mr. Stark tell you that the Besser Company was an exclusive licensee under Mr. Gelbman and Mr. Andrus?

A. I don't think he brought that up. I don't think he had occasion to make any such statement.

Q. Did he in any way comment on the contract with Mr. Gelbman?

A. He did.

Q. What did he say about that?

A. He stated that their contract with Mr. Gelbman forbid their licensing anyone else to produce a machine under [fol. 373] that patent, or those patents.

Q. That Besser, acting alone could not grant a license because of the Gelbman contract, isn't that right?

A. I believe in effect that was one of his statements.

Q. Now, as a matter of fact, did he not also tell you Mr. Gelbman was very anxious to protect his patent?

A. He may have made such statement.

Q. And that because of Mr. Gelbman's anxiety to protect his pat , that if you infringed that patent you might be subject to litigation?

A. He told me several times, made it quite clear that I would be subject to litigation whether or not I infringed that patent.

Q. What kind of litigation could you be subject to except patent infringement litigation?

A. No other.

Mr. Babcock: I have no further questions.

The Court: Any redirect?

Mr. Speer: Just a second, please, your Honor.

The Court: All right.

Mr. Gelbman: Your Honor, may I ask one or two further questions?

The Court: Certainly.

[fol. 374] Cross-examination.

By Mr. Gelbman:

Q. On this conversation you had with this New York firm, who was that conversation had with?

A. Which one do you refer to now?

Q. Which member of the firm?

A. On this Hirschensen-Vinci, you mean?

Q. That is right.

A. Hirschensen most. I believe a time or two Mr. Vinci was in on the conversation. My conversation, however, largely was with Hirschensen because Vinci's English is very hard to understand, or at least to me it is.

Q. And on what occasion, or what visit was the conversation with respect to the fact that Gelbman told him he would be sued?

A. Will you please repeat that question, or repeat it?

Q. All right. I will reframe it. You said you had made several visits to this New York firm.

A. In New York.

Q. That is right. And I believe you said somewhere around the latter part of 1947 and early part of 1948, is that right?

A. Yes.

Q. On what occasion, and what visit did this conversation take place with respect to the fact that Gelbman told him he would be sued, or could be sued?

A. Oh, there were several such conversations and there were several communications between my attorney and [fol. 375] myself, and this went on for quite a long while.

Q. What occasion did Herschensen tell of that Gelbman told him? Will you please answer my questions?

A. I don't know.

Q. How many visits did you make to Hirschensen's office, or firm, or place of business?

A. Oh, I would say that I had conversation with him at least eight or ten times during our negotiations.

Q. And where were those conversations held?

A. Largely in New York City.

Q. You say largely, you mean they were held elsewhere?

A. I mean some of them were on long distance telephone

with me in Orlando and him in New York, or presumably in New York.

Q. All right. When this conversation took place, about their being sued, or being threatened to be sued, where did that conversation take place?

A. Some of those were on long distance telephone with me in Orlando and him in New York, or supposedly in New York. Some of those were in the office of George W. Hoffman, New York. Some of those conversations were in Bronx, New York at their plant.

Q. And how many times did he tell you that Gelbman had threatened to sue him?

A. I don't know that he needed to tell me more than one time, but I had to satisfy him before the sale was completed [fol. 376] that there was no infringement.

Q. And in what manner did you satisfy him, sir?

A. With a letter from a well-reputed patent attorney, and with other assurances.

Q. With personal guarantees?

A. And personal, yes.

Q. Now, you don't recall which precise conversation, whether by phone or personal call, Mr. Hirschensen told you that Gelbman told him he was going to be sued?

A. I do not.

Q. And you don't know whether that was by phone or whether personal, is that right?

A. I think that was personal. I think that was in Mr. Hoffman's office. I believe that particular conversation took place in Mr. Hoffman's office.

Q. When did you sell Mr. Hirschensen and Mr. Vinci these machines? Do you know the date?

A. The original order was placed some time in 1946, and a deposit was placed on that order at that time.

Q. When were they delivered?

A. Not as originally ordered. The order was changed and added to and added to, and as I say, the entire transaction took a very long time and involved the addition; from the original purchase of one machine, I believe, to the purchase of two, and it gravitated from a purchase of a La. l-operated machine to the purchase of a hydraulic- [fol. 377] operated machine. There were other changes.

Q. Mr. Graveley, pardon me, but I think I asked you a simple question. All I asked you was the date of delivery.

A. I do not recall the date of delivery.

Q. Was it in 1946?

A. No.

Q. Was it in 1947?

A. I believe so.

Q. Early 1947?

A. I don't know.

Q. You have no recollection at all?

A. No.

Q. This conversation that you had with Mr. Hirschensen with respect to this Gelbman conversation, did that take place before or after the delivery of the machines?

A. Before the delivery of the machines.

Q. Did you send a letter to Mr. Gelbman advising him that the machines were being delivered?

A. No.

Q. Do you know of Mr. Hirschensen or Mr. Vinci advising Mr. Gelbman that the machines were being delivered?

A. I do not know of any such correspondence.

Q. If I remember your direct testimony, you said that Gelbman told him that if he should buy these machines he would be sued? Is that right?

A. That is what they told me.

Q. So that in any event the machines had not yet been [fol. 378] bought. Is that correct?

A. I had their deposit on the machines. The sale had not been completed, or the transaction had not been completed.

Q. All right, the machines had not been delivered sir?

A. Had not been delivered.

Q. They had not been?

A. No.

Q. And yet I believe you testified a few moments ago, sir, that this conversation took place late in 1947 or early in 1948. Is that right?

A. I said that any particular conversation, I won't say when.

Q. I am talking about the conversation about Gelbman told him something.

A. I don't know.

Q. So you want to change your testimony now. You don't know when he did say——

A. No, I don't believe that I did state a definite date. I don't know just exactly when it was. It was before delivery of the machines.

Q. Am I misquoting you when I say that you testified that this conversation took place late in 1947 or early in 1948? You thought that it took place or went past the new year. Do you remember saying that?

A. I don't remember.

Q. What type of machines did you deliver to the firm of Herschensen and Vinci?

[fol. 379] A. They were cored pallet machines.

Q. Automatic?

A. Manually controlled, power operated.

Q. How many block per day were they capable of producing?

A. They should have produced each of the two machines, about 3,000 block a day.

Q. What did they sell for, sir?

A. I believe those machines sold for about $3,500. I believe each of those machines was about $3,500.

Mr. Gelbman: That is all.

The Court: Any further cross-examination?

Mr. Babcock: I have one or two more questions, on cross, please.

The Court: All right.

Recross-examination.

By Mr. Babcock:

Q. Mr. Graveley, was the model machine you called the Emerald a cored pallet or plain pallet?

A. Cored pallet.

Q. Was that fully automatic?

A. No.

Q. Or only partially so?

A. It was not fully automatic.

Q. Was the model machine you called the Diamond a cored pallet or plain pallet?

[fol. 380] A. That was a plain pallet fully automatic.

Q. Was the model machine you called the Sapphire a cored pallet or plain pallet?

A. That would be a plain pallet also.

Q. Was the model machine you called the Garnet a plain pallet or cored pallet?

A. Cored pallet.

Q. Was the model machine you called the Opal a cored pallet or plain pallet?

A. Cored pallet.

Q. And the model machine you called the Ruby, was that a cored pallet or plain pallet?

A. A cored pallet.

Q. So the only machine that was a plain pallet was the model you called the Diamond?

A. That is correct.

Q. And you have just told us, have you not, that during 1948 you manufactured three of those machines?

A. No, I do not believe I told you any such thing. I believe I manufactured two of those in 1947 and one in 1948.

Q. I see, and the two manufactured in 1947 were the ones sold to whom?

A. Perrone.

Q. And one manufactured in 1948, was the one sold to whom?

A. Lipton.

The Court: The Gelbman patent is a plain pallet, isn't [fol. 381] it? Does the Lith-I-Bar claim it is a cored pallet?

A. Plain pallet.

Mr. Stark: I did not understand; the Lith-I-Bar claim——

The Court: They claim that it is a cored pallet?

Mr. Stark: No, the Lith-I-Bar is a plain pallet.

The Court: I do not think I saw a cored pallet, machines, did I?

Mr. Stark: A cored pallet was shown you, though, on that dolly of the model machine that was in court, it was a small cored pallet.

The Court: If it was, I did not pay much attention to it. All right. I am sorry to have interrupted you.

By Mr. Babcock:

Q. How many of the Diamond model did you sell in 1946?
A. None.

Q. Do you recall appearing before a United States Commissioner or a notary and giving a deposition under oath, Mr. Graveley?

A. I do.

Q. At that time did you not state in that deposition that during 1946 you had made two of the Diamond model?

A. I do not believe that I did. They were made in 1947 and I do not believe that I have stated any different.

Mr. Babcock: May I have the court's file that contains those interrogatories?

The Court: I believe so.

[fols. 382-385] (A file is produced.)

[fol. 386] The Clerk: Is this the one you are looking for (producing a paper)?

Mr. Babcock: Yes. Well, it is only fair to the witness to say that my information was in error and that the interrogatory agrees with his present testimony.

The Court: All right. Any further questions on behalf of the government?

Mr. Speer: Yes.

The Court: Well, are you through, Mr. Babcock?

Mr. Babcock: Yes, your Honor. I am returning to the witness the sheet he gave me.

Redirect examination.

By Mr. Speer:

Q. I believe, Mr. Graveley, that you testified earlier that the total sales in dollars of the concrete block machines sold [fol. 387] by you in 1946 approximated $300,000; is that a fact; is that your testimony?

A. That is correct.

Q. Now, I have before me a copy of the deposition signed by you and given under oath; I will read the third question and your answer:

"What were the total sales in dollars of concrete machines (exclusive of repair or replacement parts,

attachments and other concrete products machinery), by the above company in each of the following years?

"A. 1946, $1,038,627.34."

I wonder if you would explain why we have these two different figures for the same year?

A. Yes, at the time of that deposition I had no breakdown of the figures as to what was sold, how much of what particular item. And I am afraid that I was a little bit at one point or another perhaps under a misunderstanding, but I reported there my total sales of block machinery and related items, including pallets, lift trucks, conveyors, and so forth, which we used in concrete products plants.

Q. Did you report that same information in the deposition for the years 1947 and 1948?

A. Yes.

Q. I will ask you again what were the total sales in dollars of concrete block machines only by Bob Graveley [fol.388] Industries, Inc., for the year 1946.

A. For the year 1946 in block machines only approximately $300,000.

Q. For the year 1947?

A. For the year 1947 in block machines only approximately $69,500.

Q. And for the year 1948?

A. Block machines only, 1948, approximately $29,800.

Mr. Speer: Thank you. That is all the questioning of the government, your Honor.

The Court: Any other examination, gentlemen? Or may we excuse this witness? Have you a question, Mr. Babcock?

By Mr. Babcock:

Q. You were just $700,000 out of the way for your figures in 1946?

A. In the one instance I reported total gross sales; in the other instance I reported machines only.

Mr. Babcock: I have no further questions.

The Court: Call the next witness.

[fol. 389] THOMAS E. WINN, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination

By Mr. Speer:

Q. Will you state your name and address, please?
A. Thomas E. Winn, Greensboro, North Carolina.

The Court: Greensboro?
A. Greensboro, that is my business address.

By Mr. Speer:

Q. Mr. Winn, what is your present occupation?
A. At the present time I am a contract engineer on construction work.
Q. I can't hear.

The Court: Please keep your voice up.

A. At the present time I am employed by a general contractor as construction engineer on a 500-bed veterans' hospital.
Q. And for what period of time have you been engaged in this work, Mr. Winn?
A. You mean in construction work?
Q. With this job that you have just described to us.
A. That is only a very short time.
Q. Well, when?
A. Approximately a month.
Q. Approximately a month. What business or occupation were you engaged in before this time?
[fol. 390] A. Before the present engagement, I was engaged in manufacturing of concrete products machinery.
Q. Concrete products machinery. And for what period of time were you engaged in such business?
A. From 1946 to 1950.
Q. Were you employed by a concrete block manufacturer, or did you have your own business establishment?
A. My own business establishment.
Q. And what was that called?
A. Operated under the trade name of Vibra-Tamp Machinery Company.

The Court: You see Mr. Babcock has had to take a place right up close to you in order to hear you. You have to keep your voice up.

A. That name is V-i-b-r-a hyphen T-a-m-p M-a-c-h-i-n-e-r-y Company, Greensboro, North Carolina.

Q. Now, Mr. Winn, what kind of block machines were manufactured by the Vibra-Tamp Company? By that I mean did they employ the vibration method or the tamping method?

A. We manufactured only the vibrating type machines.

The Court: What year is this?

Mr. Speer: From 1946 until 1950, your Honor.

The Court: All right.

By Mr. Speer:

Q. Would you give us a brief description of your block machine at this time?

A. Well, our original machine was a very small hand [fol. 391] machine, the vibration up and down, operated by two electric motors. The second model was a semi-automatic, operated the vibration by two electric motors.

The Court: Up and down?

A. Up and down. The other phases used pneumatic for the lift of the table, feed drawer, and so forth.

The third machine which we manufactured in 1947, 1948 and 1949, was a plain pallet fully automatic, pneumatically operated with electrical controls.

The Court: With what?

A. With electrical controls.

The Court: All right.

By Mr. Speer:

Q. Did this particular machine, the one you referred to in 1947, 1948 and 1949, in addition to the feed drawer and the mold box, did it have any other features in it?

A. Well, the machine itself consisted of a hopper, a frame, the feed drawer which moved forward on track with rollers, and it was moved forward by a pneumatic cylinder —all the operations were pneumatic—pneumatic cylinders, and the control over it was with electrical controls.

Q. And did the feed drawer move from the hopper to the mold?

A. That is correct.

Q. And at the time the feed drawer engaged the mold, was the mold under vibration?

A. As the feed drawer moved forward and reached its [fol. 392] most forward position, the mold box then began to vibrate.

Q. And then would you go on and describe the operation from that point?

A. Well, this particular machine, the control was by the operator who made an electric contact on the off-bar that put the machine in operation. The material went from the hopper into the feed drawer. The feed drawer went from underneath the hopper over the mold box. The length of time it remained over the mold box was controlled by an electric timer. After it had stayed out there the predetermined time, then the feed drawer returned, and the next phase the blocks were pushed out by the press head, and then they were moved out onto a receiving table.

Q. I believe I asked, I intended to ask when in the operation did the mold box first begin to vibrate?

A. Well, that could be adjusted, but as a rule the mold box started vibration after the feed drawer reached its most forward position.

Q. By its most forward position, are you referring to the fact that the feed drawer was over the mold box at that time?

A. That is right. It would go its full length before the mold box was started operating.

Q. And up until that point the mold did not begin to vibrate?

A. That is right, although the machine could be adjusted so that it could be set to vibrate at an earlier period.

[fol. 393] The Court: What would be the object of the vibrating at an earlier period if there is no material in the mold? Not just to wear out the machinery, was it?

A. There would be material in the feed drawer if you start your feed drawer vibrating.

The Court: Oh, the feed drawer vibrating.

A. I mean, not the feed drawer, I mean the mold box vibrating, you gain a little time in the cycle.

The Court: That is if there is any material going into the mold as the feed box is progressing over the mold, and that is the feature of the method patent of Gelbman, is it not?

A. Yes.

The Court: Isn't it?

A. I think it is, yes.

The Court: Could your machine be adjusted so that it did?

A. Your Honor——

The Court: Answer this. I will let you explain it. I am going to give you plenty of time. Could your machine be adjusted so that the material from the feed box would empty into the mold as the feed box progressed over the mold?

A. Yes.

The Court: It could?

A. Understand, there is no bottom to these feed drawers. [fols. 394-395] Since there is no bottom, as that feed drawer moves forward over the empty molds, the material begins to fall from the feed drawer into the molds.

The Court: You mean there was no bottom on your feed box or there is no botton on any feed box?

A. On any feed boxes.

The Court: Is there a bottom in your feed box?

Mr. Stark: No, sir. That is a correct statement. They are all of that nature, generally. If it will help the court, the Lith-I-Block machine or the Vibra-Tamp machine, whichever way you care to look at it—for this purpose the Lith-I-Block machine is a so-called Chinese copy. The court having seen the Lith-I-Block machine, it would be pretty easy to understand the Vibra-Tamp machine.

The Court: How could the Gelbman people get a patent on the filling of the mold as the feed box was going over, if that was true of every machine?

Mr. Stark: These machines we are speaking of were all after the advent of the Gelbman patent. They were all subsequent to the issuance of it. But there are other limits in the method patent. We can't just say it as broadly as that.

[fol. 396] The Court: There is no bottom on the feed [fol. 397] drawer of the Lith-I-Bar?

Mr. Stark: No. It isn't necessary because there is a plate in back of the mold which forms the bottom of the feed drawer between the hopper and the mold. So this plate on the back edge of the mold provides and forms the bottom for the feed drawer, and as the feed drawer slides over it pushes the material ahead of it inside the box.

The Court: I have seen that. But I can see now if there is no bottom to the feed drawer, this material can't help but go in. If you wanted to, you couldn't stop it unless you had a drawer you pulled out quickly, and you haven't that.

Mr. Louis Gelbman: Your Honor, some materials we are compelled to put an agitator in that feed drawer although it has no bottom. We have to have an agitator to force it out. This material is sticky.

The Court: I know that, but some has to go in.

Mr. Louis Gelbman: The law of gravity would provide some, but this whole operation takes place in a matter of six or eight seconds, the making of the entire block.

The Court: Yes, I saw that. You may proceed.

By Mr. Speer:

Q. Then is there any other further description of this machine, Mr. Winn?

A. Well, I believe the description of it is ample to place the machine in the category in which it belongs.

Q. Now, with respect to this machine manufactured, beginning in 1947, what is the real capacity of this machine? [fol. 398] A. The 1947 machine was a semi-automatic machine. Our capacity on that machine was about two to three thousand per day.

Q. And was there a change in the machine manufactured in 1948?

A. Yes. We changed the machine the latter part of 1947 to a plain pallet machine, and then continued with the plain pallet machine.

Q. And what was the real capacity of that machine?

A. The capacity of that machine is five hundred—but that is eight x eight x sixteen inch blocks—per hour.

Q. Now, Mr. Winn, do you own any patents?

A. No.

Q. Have you ever been advised by any one that the

machines manufactured by your company were infringements of any other patents?

A. Yes.

Q. And what was the occasion of that advice?

A. Well, I was advised on January 8, 1948, by Mr. Stark, John Stark, representative of Besser Manufacturing Company.

Q. And whereabouts did this conversation take place, Mr. Winn?

A. It was at my place of business in Greensboro, North Carolina.

Q. Did the conversation take place in your office or down in the plant?

A. Upstairs office.

Q. The upstairs office. Was anyone present there at that time in addition to you and Mr. Stark?

A. There were two other people present.

[fol. 399] Q. And who were they?

A. One was my secretary and wife, Mrs. Winn; the other was Mr. J. A. Finfrock, of Metropolitan Equipment Company, Washington, D. C.

Q. What kind of connection, if any, did you have with Mr. Finfrock?

A. Mr. Finfrock as president of Metropolitan Equipment Company, had a contract for sales in, I believe, it was at that time four states, or maybe six states, and he was in my office at that time to negotiate for additional states.

Q. Now, on that occasion, can you recall in particular what Mr. Stark had to say concerning patents?

A. Well, Mr. Stark—of course, when he came in I didn't know, I hadn't heard of him—identified himself satisfactorily to me, and told me he was representing the Besser Manufacturing Company in their legal department as attorney, and that he also had experience as a patent attorney. I think he mentioned, probably, at one time he was with a patent office—I am not certain. He pointed out that we, in his opinion, were violating certain patents. And I asked him if he would be kind enough to let me have copies of those patents, which he did, three patents, marking the particular claims on those patents which he said we were violating.

Q. At this time do you have any copies of those patents, or those patents?

A. I have the copies left with me by Mr. Stark.

[fol. 400] Q. I wonder if you would produce those?

(Papers produced by the witness)

Mr. Speer: May we have these three marked Exhibits 118, 119, and 120?

(Whereupon patent to Scott was marked Plaintiff's Exhibit 118 and two patents to Gelbman were marked Plaintiff's Exhibits 119 and 120, by the reporter.)

The Court: What do they purport to be?

Mr. Speer: Those are the copies of the patents that Mr. Stark gave to Mr. Winn on this occasion.

The Court: Has he identified them?

Mr. Speer: Yes he has, your Honor.

The Court: Any objection?

Mr. Babcock: I assume that he will identify them, but he has not.

Mr. DeGree. Are they all Gelbman patents?

Mr. Speer: These are the two patents of Mr. Gelbman and the Scott patent. The Scott patent is exhibit No. 118.

Mr. Babcock: It appears on these three exhibits, your Honor, that they bear some certain pencil check marks and notations, and up to the moment we have no testimony relative to them, so that I have no objection to the printed matter part of the exhibits being received without further——

The Court: Did they have those other marks on there?

[fol. 401] A. These were left with me by Mr. Stark, and at my request I asked him to mark the claims in each patent which he contended we were violating, which he did, and those marks are Mr. Stark's marks.

The Court: You claim those are the marks put on there——

A. Those are the marks put on there by Mr. Stark.

The Court: All right.

By Mr. Speer:

Q. Now Mr. Winn, I show you plaintiff's exhibit 118, which is the Scott patent, and on page 3 of that patent

there are two check marks made in pencil, are there not?

A. That's right.

Q. Are those the two check marks made by Mr. Stark?

A. They are.

Q. And also on Exhibit 118 on the front page we have written in pencil "Mr. John Stark, 2,106,329." Can you tell us who put that on?

A. That was my identification of Mr. Stark at the time he left the patents with me.

Q. I now refer to plaintiff's exhibit 119——

Mr. Babcock: Do you interpret that last answer to mean that the witness wrote that on there?

Mr. Speer: Yes.

[fol. 402] Mr. Babcock: All right.

The Court: He wrote something in addition to the marks that were made by——

Mr. Babcock: He wrote the name of Mr. Stark and some number on it.

The Court: That was his own identification number or mark, he said.

Mr. Babcock: That is what he said.

The Court: All right.

By Mr. Speer:

Q. And with respect to this Exhibit 119 did you also write "Mr. John Stark"?

A. That's right.

Q. On page 8 of this government's exhibit there are also two check marks made in pencil; are those the check marks made by Mr. John Stark?

A. That is correct.

Q. And plaintiff's Exhibit No. 120, did you write in pencil on the first page "Mr. John Stark"?

A. Right.

[fol. 403] By Mr. Speer:

Q. On page 8 of exhibit 120 there is another check mark made in pencil; was that a check mark made by Mr. Stark?

A. That's right.

Mr. Speer: Now I again offer these into evidence, 118, 119, and 120.

Mr. Babcock: I have no objection.
Mr. DeGree: I have none.
Mr. Gelbman: No objection.
The Court: They may be received.

By Mr. Speer:

Q. Now then, at the time these patents were given to you by Mr. Stark, did he inspect your block machine at that time?

A. No, not at that time, he hadn't inspected the machine. However, he had passed, on his way upstairs, where it was being assembled.

Q. Did you ask Mr. Stark if he had inspected one of your block machines?

A. My recollection is that I did not ask him.

Q. Did he state in what particulars your machine infringed these patents?

A. Well in asking that question, at my request Mr. Stark marked with a pencil check mark certain claims on each of those three patents that he said we were violating, but he also said there were additional claims but he thought [fol. 404] that those he marked would be sufficient to accomplish what he was there for.

The Court: Did your feed box vibrate with the mold?

A. No, sir.

The Court: It didn't? It was a separate vibration?

A. Our feed drawer had about one-quarter of an inch clearance over the top of the mold box but it could be so adjusted, if someone wished, so that they could beat the feed drawer on the mold box, but we didn't recommend that because we were equipped with an agitator in the feed drawer which put the material with sufficient rapidity into the mold box itself after agitating the feed drawer.

Q. Were you working on patents yourself?

A. No.

Q. Had you ever seen the Besser machine before you made your own? You knew that that was a feature of the Besser machine, didn't you?

A. That's right; my position in the matter was that I had information on the Besser patents that would prove prior usage to certain claims that they were making.

The Court: Then you depended upon the invalidity of the patents?

A. That's right.

The Court: No question but what you were making a machine just like—almost like the Besser machine?

[fol. 405] A. Well this particular machine is more like the Lith-I-Block machine than the Besser.

The Court: Well the Lith-I-Block machine, one of its claims is that it engages the feed box; the feed box and mold agitate together? Isn't that true?

A. I believe it is.

The Court: And as a matter of fact they have a couple or irons on there that after while wear down and unless they are replaced then there is a disengagement of the two; isn't that true, gentlemen? Wasn't that true at Midland, or allegedly true? That was the claim made at Midland. As a matter of fact, one of the experts took a rod or a piece of flat steel and moved it around to show there was no engagement when the bars had been worn down. But your machine, frankly, disengaged, could do either one, but you recommended the disengaging of the feed box and mold. Is that true?

A. That's right; we recommended that it be operated without vibrating the feed drawer.

The Court: How about the ejection of the product?

A. This machine which we are discussing, under discussion now, we were equipped with a presser head operated by a pneumatic cylinder; this presser head could be operated either when the mold box was vibrating or when the mold box was not vibrating, and it could be operated automatically or manually, under the tamping action.

[fol. 406] The Court: Manually under tamping; automatically under pressure?

A. When I say manually, I mean by making contact with an electric switch, a make-and-break switch, which would cause the presser head to go up and down.

The Court: How was the product ejected from the machine?

A. The presser head pressed the blocks through the mold box on a receiving table underneath the pallet.

The Court: Then a crane of some kind——

A. Then the pallet was pushed out with another automatic cylinder to the front of the machine.

The Court: The pallet that held the two molds?

A. That's right.

Mr. Stark: In a manner exactly like Lith-I-Block, the ejection of the block.

The Court: All right.

By Mr. Besser:

Q. Mr. Winn, was this the extent of the conversation with Mr. Stark.

A. Well, Mr. Stark told us that the Besser Manufacturing Company were checking and interviewing all of the manufacturers of concrete products machinery and that after he left our place of business he was going to Florida to interview persons there manufacturing machinery of this type and he also—I don't know whether this would come [fol. 407] under your question or not—but in the conversation he said that he was returning in about two weeks and he expected to find our plant closed down and shut up.

Q. When he said that upon his return in two weeks your plant was to be closed down, what was your comment?

A. Well, I don't think that I made a comment. My attitude was that we——

Mr. Babcock: Just a moment; I object to this.

The Court: I believe it is better that you do not hear what his comment was. I can imagine what it was. Do you remember whether you said anything at that time?

Mr. Babcock: He just said he did not, your Honor.

A. My recollection is that I made no comment.

The Court: That is hard to believe, but go ahead.

By Mr. Speer:

Q. Now did Mr. Stark say what other block machine manufacturers he was in contact with, or whatever words he used?

A. At that time we asked him—when I say "we" I have reference to Mr. Finfrock and myself—if they had also interviewed the Lith-I-Bar Company, manufacturers of the Lith-I-Block machine, and Mr. Stark said he had been work-

ing on the Lith-I-Bar company for about a year and that they expected to close them all.

Q. Is that the only other block machine manufacturer that Mr. Stark discussed?

A. Well I am not quite positive but he told me that he [fol. 408] was going to Florida and I think that he designated that he was to interview the Graveley Manufacturing Company.

Q. During the time that you were engaged in the concrete block machine manufacturing industry, did you ever request a patent license from anyone?

A. Well at the time of Mr. Stark's visit and the discussion of patents and the violations of patents, I called to his attention that Roy Darden of Birmingham, I believe, was at that time operating as a licensee under the Gelbman patents.

Mr. Goreff: I did not get that. I am sorry.

A. Roy Darden, I think his name is, D-a-r-d-e-n.

Mr. Goreff: Of Birmingham, Alabama?

A. Birmingham, yes.

Mr. Goreff: What did you say? I didn't hear that answer.

Mr. Speer: That Roy Darden was operating under the Gelbman patents, I believe he said.

By Mr. Speer:

Q. All right, Mr. Winn; continue?

A. And since Mr. Stark was there to notify us that we would probably be in some legal difficulties through violation of his patents, I asked Mr. Stark what he thought our opportunity was of obtaining a lease for the rights from Gelbman or Besser.

Q. And what did he say?

A. And Mr. Stark said that he did not think that it would be worth while to write either of the companies about it, [fol. 409] and he further stated that he thought that the Darden companies were only operating to finish the particular machines which they had under construction.

Q. Now Mr. Winn, have you had any conversations with any customers or prospective customers with respect to the fact that such customers or prospective customers had been

approached by any employees of the Besser Manufacturing Company, at which time the purchase of a Vibra-Tamp machine was discussed?

A. I was negotiating with——

Mr. Babcock: Just a moment, if the witness is going to proceed to recite a conversation in response to that, I would like to interpose an objection.

The Court: He hasn't answered the question yet.

The Witness: Will you state that question again, please?

(Question read.)

A. The answer is, yes.

By Mr. Speer:

Q. Now, from what particular customer or potential customers did you have such conversation?

A. Well, I have here the Miller Block Company, Lawrence E. Miller, Evansville, Indiana. That was by correspondence rather than conversation.

Q. Well, I haven't asked you for that. I am referring now to oral conversation, Mr. Winn.

A. All right. E. F. Steneman, Roberts, Wisconsin.

Q. And at what time did you have a conversation with [fol. 410] Mr. Steneman?

A. That conversation was the result of correspondence, and the conversation was a long distance call.

Q. Was that in 1947 or 1948, do you recall?

A. I believe it was 1948.

Q. And what was the substance of the conversation?

Mr. Babcock: Well, if your Honor please, I have not only the objection that we have been previously making to such conversation, but here is a conversation, or here is evidence asked for which is only part of the whole transaction, because the witness has testified that this conversation followed a series of correspondence. He has further testified that all that he did would be on one end of a telephone, without indicating whether he had any idea about the identity of the individual on the other end of the telephone, whether he had had any previous business dealings with him that enabled him to recognize the voice or anything

else that would establish he was talking with Steneman, so in addition to previous objections to this type of conversation, I think we have a better indication of complete incompetence of such testimony in this instance.

By Mr. Speer:

Q. I will ask Mr. Winn, do you have any correspondence from Mr. Steneman?

A. I have some correspondence but I doubt whether it established——

Q. Any correspondence which pertains to his being ap-
[fol. 411] proached by the Besser Company?

A. I don't believe this would establish it. It would establish the fact that he was approached.

[fol. 412] By Mr. Speer:

Q. I believe when we recessed, I had asked you, Mr. Winn, whether or not you had had any conversation with any customer or prospective customer with respect to the fact that that customer or prospective customer had been approached by the Besser Company or any one of its employees in regard to the purchase of a Vibra-Tamp block machine. Now, I don't recall whether the defendant had an objection to that or not.

Mr. De Gree: Yes. You referred to some correspondence. Mr. Babcock made an objection.

By Mr. Speer:

Q. I believe you stated that you had no correspondence from this particular man, is that true, Mr. Winn?

A. I think we were talking about Steneman, weren't we in Roberts, Wisconsin?

Q. Mr. Steneman, that is true.

A. I have a letter here which is not dated, which was received about February 19, 1948, in which he refers to the Besser machine, and also he refers to the Vibra-Tamp machine, and he states he liked our machine very much. And then on February 27th——

[fol. 413] The Court: By the way, what was the price of your machine?

A. Well, base price without attachments, $7500.

The Court: Without attachments?

A. That is right. The attachments would run the machine up around $9,000.

The Court: What is the price of the Besser machine without attachments?

A. Are you asking me?

The Court: Yes.

A. I think the Besser is about $35,000, if I remember correctly.

The Court: You are making the same machine. You can understand why he likes your machine very much, can't you?

A. Well, it is not exactly the same machine.

The Court: All right.

A. Now, about February 27, I talked with this man, Steneman, long distance telephone.

By Mr. Speer:

Q. And was that conversation with respect to this correspondence?

A. That is right. And Mr. Steneman at that time said——

Mr. Babcock: Just a minute.

Mr. Speer: Wait just a minute. Excuse me a minute.

(Plaintiff's Exhibit 121 marked.)

Mr. Speer: I offer at this time Plaintiff's Exhibit 121.

Mr. Babcock: I have no objection.

[fols. 414-415] The Court: Any other objections?

No objection. It may be received.

By Mr. Speer:

Q. Now, then, with respect to this correspondence, Mr. Winn, which is marked Plaintiff's Exhibit 121, did you have any conversations with Mr. Steneman?

A. I had an additional letter since then. And then on February 27, I think it was, 1948, I called him over long distance telephone.

By Mr. Speer:

Q. Would you tell us what was discussed at that time?
A. Well, Mr. Steneman——

Mr. Babcock: I don't think, in view of this showing, there is sufficient identification of the individual to have the evidence of a telephone conversation.

The Court: What was this, a person-to-person call, do you remember?

A. Person-to-person call.

The Court: You may testify.

Mr. De Gree: May we have the benefit of the objection previously made that it is hearsay?

The Court: Yes.

[fol. 416] By Mr. Speer:

Q. Did Mr. Steneman tell you he had any conversations with the Besser Company or any of its employees?

A. Mr. Steneman told me that a representative of the Besser Manufacturing Company had talked to him, Mr. Steneman, and that after the conversation he did not feel that he could go through with the purchase of the machine unless he could get a guarantee against suit.

Mr. Babcock: For the same reasons stated, I move that be stricken.

The Court: I don't know how he happened to answer that. Read that answer back to me, please.

(Answer read.)

[fol. 417] The Court: What is the objection to that?

Mr. Babcock: It still doesn't bring it within——

The Court: Oh, I think it does.

Mr. Babcock: —the same rule.

The Court: I think it does. That is admissible, I think. I will rule so anyway. It is not the other question at all. All right.

By Mr. Speer:

Q. Have you had any other such conversations as the one with Mr. Steneman with any other customer or prospective customer?

A. Yes.

Q. With whom and at what time and where?

A. With representatives of the J. A. Gomojack Concrete Products Company, Annapolis, Maryland.

Q. And what person of the Gomojack Company did you talk with?

A. Well, I talked with—there are two partners, Mr. Gomojack and Mr. Haymaker. I talked to each of them.

Q. You didn't talk to them both at the same time. With which one of those two gentlement did you have the conversation about which I have just asked you?

A. Mr. Haymaker.

Q. And at what time did this conversation take place?

A. Some time during 1948, the latter part of 1948.

Q. And did this take place over the phone, or was it in person?

A. No, it was in person.

Q. And whereabouts?

[fol. 418] A. In Annapolis, Maryland, at that plant.

Q. And what was the substance of the conversation at that time?

Mr. Babcock: Same objection, please.

The Court: Same ruling.

Mr. Speer: If your Honor please, this——

The Court: I ruled in your favor.

Mr. Speer: Oh, I am sorry. I misunderstood. All right, go ahead, proceed.

A. Mr. Haymaker told me he had been contacted before he purchased the machine from me, by certain Besser representatives who had warned him against purchasing the machine, that he would probably be liable for suit, along with the manufacturer of the machine, for damages.

By Mr. Speer:

Q. Have you had any other such conversations?

A. Well, yes. We had conversation with another prospective customer at Mt. Pleasant, Pennsylvania.

Q. And what was his name?

A. This gentleman's name was Mr. Kuntz, owner of the Anchor Concrete Block Products Company.

Q. And you said this conversation took place in Pennsylvania?

A. In Pennsylvania.

Q. At his place of business?

A. That is correct.

Q. And approximately at what time did this take place?

A. That was about in July, 1948.

Q. And at that time what was the substance of your [fols. 419-421] conversation with Mr. Kuntz?

A. Mr. Kuntz——

Mr. Babcock: Same objection, please.

The Court: Same ruling.

A. Mr. Kuntz said that he had also been contacted by a representative of the Besser, and that they had given him to understand that he would be in legal difficulties if he purchased a machine from me.

[fol. 422] Cross-examination.

By Mr. Babcock:

Q. Do I understand, Mr. Winn, that you went into the business of manufacturing concrete machinery, concrete products machinery, in 1946?

A. Correct.

Q. Prior to that time, what was your occupation or business?

A. Prior to that time my business was engineering and construction.

Q. You were conscious of the fact that during the war period there had developed quite a shortage of construction machinery, including the machinery for making concrete blocks?

A. That is correct.

Q. And in 1946, there was quite a demand for machinery of that type, wasn't there?

[fol. 423] A. That is right.

Q. Were you conscious of the fact that even if certain patented machinery were copied, it might take some period of time before their manufacture could be stopped, and in the meantime substantial profits could be realized?

A. Let me explain, when I say construction business and engineering, my first experience in contact with the concrete block business was in 1915, and I had followed it through on construction work on up to the present time.

Q. Yes.

A. And I was also aware of certain patents and claims, and whether in my opinion they were valid or not valid.

Q. Now, with reference to the telephone conversation with Mr. Steneman, during the course of that did he identify the Besser representative to whom he had made reference?

A. No, sir, he didn't.

Q. He mentioned no names?

A. No names, merely he represented the Besser Manufacturing Company.

Q. In your conversation with Mr. Haymaker, did he identify the representatives of the Besser Manufacturing Company to whom he had reference?

A. Mr. Haymaker did, but I do not remember the names of the parties.

Q. Did he mention more than one name?

A. If I remember correctly, he mentined two representatives, one being located in Washington, D. C., and the other elsewhere.

[fol. 424] Q. Did he indicate that they were botly together when they talked with him, or had they come separately?

A. Separately.

Q. One of them he indicated lived in Washington, D. C.?

A. That was my understanding.

Q. Would it refresh your memory any if I mentioned the name, Larson?

A. The name is familiar, but I would not swear that that was the name.

Q. That doesn't refresh your memory that that is one of the names Mr. Haymaker mentioned?

A. Not to that extent, no.

Q. During the conversation with Mr. Kuntz, did he identify the representatives of the Besser Company?

A. He did not.

Q. No names were mentioned by him at all?

A. No.

Q. With reference to your conversation with Mr. Hay-

maker, did the name he mentioned to you—I am speaking now of the representative who didn't live in Washington, D. C.—did the name he mentioned to you strike you as being someone you knew?

A. No. Of course, I never met any representatives from the Besser Manufacturing Company.

Q. So that on the basis of that mention of that name you didn't know, of your own knowledge, that he was referring to an actual representative of the Besser Company, did you?

[fol. 425] A. No, you are right.

JOSEPH J. HANNEMAN, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Speer:

Q. Will you state your name and address, please?

A. Joseph J. Hanneman, 7543 Lozier Avenue, Van Dyke, Michigan.

The Court: You will have to talk up, please.

A. Joseph J. Hanneman, 7543 Lozier Avenue, Van Dyke, Michigan.

The Court: Where is that?

Mr. Babcock: Out near Center Line.

By Mr. Speer:

Q. What is your present occupation, sir?

A. Building superintendent.

Q. Did you ever manufacture a concrete block machine?

[fol. 426] A. Yes.

Q. When was this?

A. From 1946 to 1948.

Q. And whereabouts did you manufacture these machines?

A. In Ludington and Detroit, and Manistee.

Q. Would you give the court a brief description of the machine which you manufactured?

A. Well, one that we finally settled on is a fully automatic hydraulic machine. It is capable of turning out 720 blocks per hour. It has a cycle of four cycles per minute, and each cycle turns out three blocks. It is fully automatic in that you press the button and the machine starts cycling. The only part that doesn't cycle in sequence is the off-bearing hoist.

The Court: Is the what?

A. The off-bearing hoist, which is hooked up on a separate motor and a separate control board. The feed box operates from a standing position underneath the hopper. When the button is pressed the feed box moves forward, deposits the aggregate.

The Court: How?

A. By an arm, automatic arm of hydraulic——

The Court: No rollers?

A. Well, yes, there is a roller on the box but it is forced ahead by the automatic hydraulic arm.

The Court: I see.

A. It rolls on a track which is separate from the machine itself.

The Court: The rollers are on the feed box, or on the [fol. 427] track?

A. On the feed box, and they roll on the track.

The Court: All right.

A. Then it moves forward and dumps its load in the mold box, which is on the front end of the machine. Then as it goes back to its former position, the vibration starts. After the vibration has ceased, the stripper head comes down onto the aggregate in the mold box.

The Court: Is there any vibration while the feed box is over the mold?

A. I believe it starts just about the time it leaves the mold.

The Court: Do you mean starts to leave, or leaves?

A. As it is leaving the mold it starts, it hits a switch. As the feed box leaves the mold, it hits a switch and automatically the vibration starts.

The Court: All right. Now, you got it off the mold—I mean you have the feed box off the mold, the vibration

starts. Now, how do you actually make the block, by tamping?

A. Then as the vibration diminishes, the stripper head comes down onto the mold box, and it holds it for a second or two; then it forces it down onto the pallet, and the pallet receiver, which goes down onto another track, and another arm comes out and pushes that pallet off that track out to the front end of the machine, where an off-bearing hoist operator picks it up and puts it on the rack. Then it is ready for the ovens.

[fol. 428] The Court: The press is used as a means of ejection also?

A. That is right.

The Court: How long is it there, a fraction of a second?

A. Just a second, about a second or so.

The Court: To press?

A. That is right.

The Court: No vibration?

A. Then the vibration ceases as the stripper head goes into the mold box, the vibration ceases.

The Court: All right.

By Mr. Speer:

Q. Do you own any patent on this machine?

A. I do not. I have them made up. The only patent I figured I was able to get was on my controls, which is very important on this particular machine. The rest of it is conventional set-up that has been on the market for years in one form or another.

Q. Have you ever made an application to the Patent Office for a patent on the machine?

A. No, I have not.

Q. Have you ever discussed with anyone the question of patents on your block machine?

A. Yes, I have.

Q. With whom?

A. With patent attorney Parker.

Q. With Patent Attorney Parker. Have you ever dis-

[fol. 429] discussed with anyone employed with the Besser Company the question of a patent on your machine?

A. Not exactly a patent. Maybe I don't understand your question.

Q. Have you ever had any conversations with anyone from the Besser Company about your block machine?

A. Yes.

Q. With whom?

A. With Mr. Besser, Mr. Jesse Besser.

Q. And approximately when did you have this conversation?

A. Why, I believe that was the latter part of 1947 or early part of 1948, I am not too sure. It was right in that neighborhood.

Q. And did this conversation take place at your plant in Van Dyke?

A. No. This took place in Mr. Besser's office in Alpena, Michigan.

Q. Tell us what the general topic of the conversation was.

A. Well, I think—— It is quite a story. I will have to start a little bit different, back a ways in order to get this up-to-date. Is it all right for me to do that?

Q. No. The question is, you have stated that you have had a conversation?

A. Yes.

Q. With Mr. Besser about your block machine Now, I am asking you what was the substance of that conversation in his office?

The Court: When was it, first?

A. That was in the latter part of 1947 or early part of [fol. 430] 1948, I am not too sure. I believe it was the latter part of 1947.

The Court: All right.

A. The reason for me going to Mr. Besser's office——

Mr. Babcock: Object.

Mr. Speer: If your Honor please, he is giving us the whole story on this conversation and it is part of the transaction. I believe it should be in.

The Court: He could ask him the reasons for going, but he is giving it without the question so you might as well go ahead.

A. Well, I had a machine out in Wakefield, Michigan,

which a former employee of Mr. Besser was building for me, as the backer of the machine, and it seems that the machine didn't work too well. And in the meantime Mr. Besser hired this former employee back, and I wanted to see Mr. Besser about what he could do about that machine, and he told me he would take care of it and put it in working order for me so I would be able to collect my notes. And then we further talked on block machines and he discouraged me very much of making them because he said his family had been in the business for around seventy years and it was a very specialized type of machine and business, and they didn't want too many people in there because it wasn't a paying proposition for too many people. However, Mr. Besser never did take care of the machine up in Wakefield, which he promised to do.

By Mr. Speer:

Q. Did you have any other conversations about a block [fol. 431] machine with any other person connected with the Besser Company?

A. Yes, with John Stark.

Q. With John Stark. And when did you have such conversation?

A. That also was in about the middle of 1948.

Q. And whereabouts?

A. On the Eight Mile Road, on the Oakland side of the Eight Mile Road, near Lahser Road.

Q. And what was the general topic of conversation at that time?

The Court: Who is this with again?
Mr. Speer: This is with John Stark, your Honor.
The Court: Oh, I see.

A. He called on me and tried to inform me that I probably was infringing on some of their patents, and he offered me, after the conversation—— I told him I had a lot of money in this thing and I would like to get it out, and after some conversation he offered me a franchise of three machines, asked me if I could make enough money out of that to get my money out of the set-up, and I said, "No, I couldn't." "Well," he said, "how many can you?" And I says, "I

think I can get it out on ten machines." And he said he would contact Mr. Besser and Mr. Gelbman, and the powers that be on it, and then in several weeks he come back with two contracts, one for five and one for ten. We finally settled on ten. I signed it, and up to this day I have never got the contract back.

The Court: That permitted you to make ten machines [fol. 432] as you were making them and you wouldn't be held to violate any patents, regardless of whether they had patents or not?

A. That is right.

The Court: You were recognizing for the time being that they had patents, is that right?

Mr. Babcock: They were giving him a license for those ten machines, licensing him under the patents for those ten machines.

The Court: I didn't see the contract. I just know what he claims.

Mr. Speer: It is here. I am going to introduce it.

The Court: It would be the same thing, when you accept a license you recognize the patent, you can't contest it.

Mr. Babcock: That is right.

Mr. Speer: I believe it is here.

The Court: I don't think they have objected to his statement of it, and why encumber the record unless you want the written documents.

Mr. Gelbman: Except it is royalty-free, your Honor, that is all.

The Court: All right. Letting him make ten machines and saying, "After you make those ten machines, you have to quit making any more, and you won't be prosecuted, that is, you won't be held liable for royalties, or anything else;" that is what it was, wasn't it?

Mr. Speer: Well, I won't ask it be introduced at this [fol. 433] time then. We can get it in later.

The Court: Of course, he said he never got the contract back. If that is true, how could you get it?

Mr. Speer: What was that?

The Court: He said he never got the contract back.

The Witness: The signed contract from Mr. Besser and Mr. Gelbman, I received it back.

The Court: You mean the contract for ten?
A. That is right.
The Court: You never received your copy?
A. Never received the contract, signed.

By Mr. Speer:

Q. Would you take a look at Plaintiff's proposed Exhibit 94 and see if that is the contract which was offered to you at that time?
A. I don't see the amount of machines on here.

The Court: Is this a copy, gentlemen?
The Witness: I believe there was a later one than that.
Mr. Gelbman: No. 24 on that list.
The Witness: There is a later contract than that.
Mr. Gelbman: 24 is the same thing. I have one here signed by everybody, copy signed by everybody.
Mr. Babcock: I might say, if it will expedite matters I am willing to stipulate Exhibit 24, which we have selected from this group, is a copy of the final contract signed by the [fol. 434] parties and it may be used in evidence in the examination of the witness.
The Court: All right, it may be received.

By Mr. Speer:

At the time of this transaction, in which you asked Mr. Stark for a patent license, what did he have to say?
A. He said that he didn't believe that it would be possible to get a license, a continuing license.

The Court: Just a minute.
Mr. Babcock: I object to the conversation relative to negotiating for a license. Since he did get the license, the terms of the license are all reduced to the written document. They are oral negotiations that have been reduced to a written instrument.
Mr. Speer: But the witness has testified that Stark was there two or three times and had other conversations about this.
The Court: They are not trying to vary the terms of a written instrument. He may answer.
Mr. Speer: No, we aren't trying that at all.

Mr. Babcock: Your Honor, just by way of example, he hasn't testified Stark said anything that is at variance with the fact they got one.

The Court: Well, if that is true, you should welcome it.

Mr. Babcock: What difference does it make whether Stark believed he could get it or couldn't get it?

The Court: It may have been an inducement, or co-[fol. 435] ercion of some kind. If it was the court wants to know about it. It isn't aimed to change the terms of a written instrument. You may proceed.

A. Mr. Stark said he didn't believe Mr. Besser or Mr. Gelbman would be willing to issue a license for continual manufacture of the machine. However, he said he would talk to them about it. And I asked him the reason why and I got about the same answer as Mr. Besser gave me, that he thought there were too many manufacturers of this specialized machine and they just didn't want too many making it.

The Court: You see the answer had nothing to do with this contract at all. This is another contract they are talking about.

By Mr. Speer:

Q. Under this contract that is in evidence, Exhibit 24, you were authorized to manufacture ten machines. As a matter of fact, Mr. Hanneman, how many machines have you manufactured since that time?

A. Well, since that time, one.

Q. One?

A. Since that time.

Q. What was the disposition of the machine? Is it still in your plant, or has it been sold?

A. It is in Cadillac, Michigan.

Q. And it is in Cadillac?

A. That is right.

[fol. 436] Q. What is it doing there? Has it been disposed of?

A. Well, it is at the Bolt Lumber Company in Cadillac.

The Court: What is that?

A. Bolt Lumber Company, of Cadillac, Michigan, and right at the moment we aren't doing anything further with it. We found that the stripper head and the cores had to

be changed because we had a square opening in the block and we were going to change it to an oval opening to guarantee better strength of the block, and owning to the tie-up of everything here, we just haven't done anything about it.

[fol. 437] By Mr. Speer:

Q. Before this contract, which is Exhibit 4, was entered into, how many machines did you manufacture?

A. Well with Leemon I think we manufactured,—I believe there was three.

Q. Again, before the entrance into that Contract, were you ever advised by any customer or prospective customer that they had been approached or contacted by the Besser Company or any employee thereof with respect to your block machine?

A. Yes.

Q. And with whom did you have such conversation?

A. Charles Hemkes, of Wakefield, Michigan.

Q. And approximately when was this conversation?

A. That would have been the early part of 1948.

Q. And whereabouts was it?

A. In Wakefield, Michigan, at Hemkes' plant.

Q. Can you tell us what the topic of the conversation was?

A. Well I went up to——

Mr. Babcock: I am not sure that I understand the meaning of the word "topic" as counsel uses it. If he is intending to ask for the substance I would like to state my objection.

By Mr. Speer:

Q. I will change the question: what was the general substance of this conversation?

Mr. Babcock: Then I would like to have the benefit of [fol. 438] my objection as previously stated to similar conversations.

The Court: You may have it.

A. I went up there to see whether Mr. Besser had put this machine in shape that was up there and it had not

been put in shape, so I talked to him about buying one of my hydraulic machines, and I was informed by Mr. Hemkes that Mr. Leemon told him he would only get in trouble by buying one of my machines.

By Mr. Speer:

Q. I am a little confused about this; I thought you were in business with Mr. Leemon?

A. This was after Mr. Leemon had gone back to work for Mr. Besser. There was an interval between the time I was in business with him and that he went back to work for Mr. Besser, as a salesman I believe.

[fol. 439] By Mr. Speer:

Q. What was the time you had this conversation?

A. In 1948.

Q. What part of 1948?

A. I would say near the middle of 1948.

Q. Did Charles Hemkes tell you what time he had this conversation with Leemon?

A. I was in Mr. Besser's office early in 1948 and it was between the early part of 1948 and the middle of 1948.

[fols. 440-441] Mr. Speer: The Government served interrogatories on the Besser Company, and the answer to No. 8 reads:

"The following persons were employed by Besser Manufacturing Company at all times since the date listed opposite their names, except as otherwise indicated hereafter, and in the capacities indicated and held the titles in the position indicated, to-wit:"

Then follows "Glenn Leemon, January 1, 1948."

The Court: All right.

Mr. Speer: "Salesman, separated June 1949."

[fol. 442] Cross-examination.

By Mr. Babcock:

Q. Mr. Hanneman, formerly you were in business in Alpena, were you not?

A. Yes, sir.

Q. What was the nature of your business?
A. I was in the tavern business.

The Court: I did not get that last remark.
Mr. Babcock: Tavern.

By Mr. Babcock:

Q. And you sold out your business there, did you?
A. I did.
Q. Was that by order of the liquor control commission?
A. I beat the liquor control commission in court.
Q. Did you sell your business by the order of the liquor control commission?
A. No, sir.
Q. In addition to operating the tavern did you have any [fol. 443] other business activities in Alpena?
A. Well, I don't know what you mean by that. Do I have to answer that, Judge?

The Court: What seems to be the difficulty?
A. He asked me what I had, other activities in Alpena.
The Court: You are on the witness stand for cross-examination and you will have to answer the questions.
A. All right. Well, I had some night lights there for baseball.

The Court: What is that?
A. Had night lights for baseball at the fair grounds.
The Court: Is that a business?
A. Well, we play baseball and so forth, if that is a business.
The Court: You mean you had baseball at night at the fair grounds and you were the manager or something like that?
A. I was the owner of it.
The Court: Out on Woodward or——
A. No, in Alpena.

Mr. Babcock: This was in Alpena, your Honor.
The Court: Alpena?
Mr. Babcock: Yes, your Honor.

By Mr. Babcock:

Q. As part of a business activity, you were operating the fair grounds for the playing of baseball at night?

A. That is right.

Q. When was it you left Alpena?

A. I believe it was 1947.

[fol. 444] Q. What part of 1947.

A. The latter part.

Q. Do you remember the month?

A. No, I do not.

Q. By the latter part, do you mean after summer or after Labor Day?

A. Well, I believe my business was sold some time in May but I did not leave until later in the year.

Q. How much later?

A. Several months, I assume.

Q. Well, can't you tell us whether it was summer or fall when you removed from Alpena to somewhere else?

A. It was after the midsummer.

Q. Was it cold weather?

A. No, I don't think so.

Q. Now, when you left Alpena, you left some unpaid debts, didn't you?

A. Meaning what? I don't just get you.

Q. Well, you left creditors there to whom you owed money?

A. I would have paid those except——

The Court: Just a minute. What difference does it make as to the man's credibility?

Mr. Babcock: I am frank to tell your Honor, this is the difference: There has been injected into this the intimation that Besser Manufacturing Company has never delivered to this man the license agreement that was agreed [fol. 445] upon. I want to show and I expect to show we made a constant effort over weeks to try to find the man, to locate him and deliver it to him.

The Court: What has that got to do with this?

Mr. Babcock: The reason we couldn't find him is because he had been sued by his creditors in Alpena and was hiding out from service of process and we couldn't find him.

The Court: Ask him that. I doubt whether the ability of a man to pay his debts is any criterion of his credibility.

Mr. Babcock: That is right. That is right. But this is cross-examination and is corroborative of what the defendant will offer by way of proof of their effort to find the man to give him the license agreement.

The Court: Ask him if he was not hiding out and then if that doesn't produce results, I may permit you to go further.

By Mr. Babcock:

Q. Well, as a matter of fact, were there not at least two lawsuits started against you in Alpena?

A. I wouldn't know. I was never served with anything at any time.

Q. You knew that an effort was being made to try to find you and serve you, didn't you?

A. I didn't know it.

Q. You didn't know it at all?

A. No, I didn't know it.

The Court: I will let you pursue it as far as you want to [fol. 446] now.

By Mr. Babcock:

Q. Well, as a matter of fact, you knew, did you not, that there was certain property and equipment that had to be seized by attachment?

A. I heard of it later, and the reason for that was because the board, the County Board there, agreed to give me a ten-year lease on the fair grounds and they never come through with it. That is a matter of record, too.

Q. When you left Alpena, where did you reside?

A. I resided in Detroit.

Q. All right. Where, please?

A. At the Briggs Hotel in Detroit.

Q. And did you have a place of business in Detroit?

A. I did.

Q. Immediately?

A. Very shortly after.

Q. And where was that?

A. On the Eight Mile Road near Lahser.

Q. Were you around your place of business most of the time?

A. Mostly all the time. Mr. Stark met me several times. He knew where I was. That proves I was not hiding out.

Q. At least, he knew where you were supposed to be?

A. And I was. He met me there. Not by appointment, but just walked in and I was there.

The Court: Will it be the claim of Besser that they did try to find this man?

Mr. Babcock: Yes, your Honor. Yes, your Honor, over [fol. 447] several months and without any success.

The Court: All right.

A. May I state——

The Court (Interposing): You answer the questions as they are asked of you. Your attorneys will take care of you all right.

By Mr. Babcock:

Q. Now, it appears in your direct examination that you began manufacturing the machines for the making of concrete blocks in 1946?

A. I believe that is correct.

Q. At that time you were located in Alpena, were you not?

A. Right.

Q. And was it at Alpena that you began the manufacture of such machines?

A. No, in the old Stearns Building in Ludington, the Stearns Motor Building, Ludington, Michigan.

Q. Was that the Stearns Motor Manufacturing Company?

A. I believe so.

Q. Is that the same company whose principal business was the manufacture of electric light plants?

A. That I wouldn't know.

Q. Who was associated with you in 1946 when you began manufacturing this machinery at Ludington?

A. Glen Leemon.

Q. What was your business arrangement with Mr. Glen Leemon?

A. I furnished the capital and he furnished the engineering.

Q. Were you partners?

[fol. 448] A. No, sir.

Q. Did you have a corporation?

A. No, sir.

Q. Well, what was your arrangement with Mr. Leemon?

A. I am registered in the County Hall in Ludington as the Hanneman Sales Company.

Q. Well, what was the manufacturing company, you or Leemon?

A. Leemon.

Q. No, do I interpret from that that Mr. Leemon was the manufacturer of the machine and that you were the sales organization of the machine?

A. I furnished the money for the machine and had the selling of them.

Q. Do I understand and interpret fairly from your previous testimony that Mr. Leemon was the manufacturer of the machine and that you were the sales organization for the machine?

A. Well, I felt I was part of the manufacture because I furnished the money for it.

Q. Did you do anything else in connection with the manufacture of the machine except furnish the money?

A. Selling and giving ideas wherever there was consultation, perhaps.

Q. Perhaps?

A. Or when we had consultation, yes, we exchanged ideas.

Q. How were you to be compensated for furnishing the money?

A. Well, I was to get the machine at a wholesale price or manufacturer's price and sell it at the retail price, and [fol. 449] my compensation was the difference between the cost and the selling price.

Q. Did you have anything to do with designing the machine?

A. Well, not on paper; in thought yes.

Q. Did you ever have occasion to express those thoughts?

A. Many times.

Q. So that it was not only in thought but in words; is that correct?

A. Well, I would say so.

Q. Is that correct?

A. Yes.

Q. Well, now what particularly in relation to the manufacture of the machine did you contribute by way of thought and words?

A. Oh, changing some of the mechanism on the machine.

Q. What mechanism?

A. We had trouble with vibration and we had to change and I helped to work out the change on it.

Q. You had trouble with vibration. So you did not design the original scheme of vibration, did you?

Mr. Neville: I object to that, your Honor. That does not follow.

The Court: Has he made any claim that he did?

Mr. Babcock: Yes, he said he contributed to the design of the machine in thought and in words, as far as I am able to go with him thus far.

The Court: Well, I do not know who originated vibration [fol. 450] in machines of this kind. I did not know he claimed to be——

Mr. Babcock: I am trying to find out.

The Court: All right, go ahead to save time, but let us stick to the issue here, gentlemen, as close as we can, and if the government has some objection I wish you to make it in time.

Mr. Babcock: I hope your Honor is not feeling that I am getting off on a tangent here but this witness has testified on direct examination that he produced this machine.

The Court: You may proceed.

By Mr. Babcock:

Q. Now, do I understand that somebody else designed the theory of vibration and then it did not work and you suggested some means of change?

A. Let me say this——

Q. Pardon me, did I understand that correctly or not?

The Court: He has a right to answer.

A. Let me say this: The Leemon machine is not the machine that I testified on when I had the witness stand before. I would like the court to know that.

By Mr. Babcock:

Q. All right, then we are talking about another machine. When was the manufacture of the Leemon machine completed?

A. Well, I left him in 1948. I do not know when he finished.

Q. Up to the time you left him it had never been finished then?

A. Three machines had been finished.

Q. Pardon me.

A. Three machines had been finished.

[fol. 451] Q. Then you do know when one or more machines were finished?

A. I do not know the exact time. I could not tell you. Some time between 1947—the middle of 1947 and the early part of 1948.

Q. And where were those three machines located?

A. They were located at the—do you mean the manufacture of them?

Q. No, what was done with the three machines after they were completed?

A. Well, one went to Wisconsin, one went to Wakefield, Michigan, and the other one was still in the shop when I left.

Q. In the shop where?

A. At Ludington, Michigan.

Q. Now you have just mentioned a Leemon machine that was at Wakefield, Michigan?

A. Right.

Q. Is that the same machine about which you were testifying on direct examination last Friday?

A. The only thing I mentioned about that machine was that Mr. Besser agreed to put that in shape and he did not do it.

Q. Is that the same machine about which you were testifying on——

A. No, sir, it is not.

Q. On direct examination last Friday?

The Court: Wait until he gets the question finished and then answer, please.

By Mr. Babcock:

Q. All right. Who bought the machine, the Leemon machine, that was out at Wakefield?

A. Chares Hemkes.

[fol. 452] Q. Now, did you have another machine that you manufactured that was located or sold to somebody in Wakefield?

A. No, sir.

Q. Well then, if the Leemon machine was not the machine you were talking about last Friday in connection with Wakefield, what machine was it that you were talking about last Friday at Wakefield?

A. I was talking about the hydraulic machine that I developed myself later and that is the one that Mr. Stark was coming to see me on and that is the one he gave me a license to sell ten machines of.

Q. Was that ever at Wakefield?

A. No, sir.

Q. I repeat my question: If the Leemon machine was not the machine you were talking about in your direct examination last Friday when you were talking about a machine at Wakefield, then what machine was it you were talking about when you were talking about a machine at Wakefield?

A. It was the Leemon machine that was at Wakefield.

Q. Then you did not mean what you said just three minutes ago when you said it was not the Leemon machine?

A. I said it was the Leemon machine that was at Wakefield.

Q. Did you sell the Leemon machine to the man at Wakefield?

A. I did.

Q. Up to the time you sold the machine to the man at Wakefield, the Leemon machine, had you made any contribution to the design of that machine?

[fol. 453] A. I think I told you before how far I went with that.

Q. Had you made any contribution to the design of that particular machine?

A. Well, as I say we had conferences; we had, to make some changes on it through my suggestion.

Q. That was in relation to the vibration part?

A. That is right.

Q. During your connection with Mr. Leemon, was your place of manufacture always in Ludington?

A. No.

Q. Where else was your Leemon machine manufactured?

A. Well, twelve miles this side of Luding on, some little town there, I forget the name of it.

Q. Was the Leemon machine manufactured anywhere else while you were connected with Leemon?

A. Not to my knowledge.

Q. And you discontinued your relations with Mr. Leemon in 1948?

A. I am not too positive of that; I believe it was the early part of 1948.

Q. When did you start the manufacture of machines of this type in Manistee?

A. I did not——

Q. You did not?

A. Oh, pardon me, yes we did; I had something to do with a machine there; that is true; I did; that is where we started this machine originally and then we brought it to Detroit, [fol. 454] and that was in 1948.

Q. Well now, wait a minute. You have just said that is where we started this machine originally; are you talking about a Leemon machine?

A. No, the machine that I made after the Leemon machine.

Q. That was after you discontinued your connection with Leemon then?

A. That is right.

Q. And whom do you mean when you say "we"? "We" started this machine.

A. Well, I had some men working for me.

Q. Some men working for you?

A. That is right.

Q. Simply as your employees?

A. That is right.

Q. And where, in what plant did you start manufacturing your machine in Ludington—or in Manistee, rather?

A. Well, it wasn't a plant. It was a large garage, just

below the hill as you enter Manistee from Ludington. There is no name to it. Just a garage.

Q. And how long were you located there in the manufacture of the machine?

A. Oh, I would say we were there approximately three months.

Q. And how many machines did you manufacture there?

A. We manufactured part of one.

Q. Who designed that machine?

A. Well, it was between myself and another lad from Manistee.

[fol. 455] Q. What was his name?

A. Trying to think of it for you. I don't think of it at the moment. I may and I will give it to you as soon as I think of it.

Q. Did you use any stampings in the manufacture of that machine?

A. What do you mean by that?

Q. You don't know what a stamping is?

A. Well, we used some steel in it, if that is what you mean.

Q. You don't know what I mean by the word "stamping"?

A. Yes, I know what you mean, but I don't know how you want to or expect me to apply it. We probably did use some for the base and so forth.

Q. Where did you have those made for you?

A. We made them ourselves.

Q. In this garage?

A. Yes. We had some outside parts made, however, but we made the——

Q. (Interposing) What equipment or machinery did you use to make your stampings in your garage?

A. Oh, pardon me, now. You mean stamping of the stampings. No, we bought the stampings out. We welded them together in our garage.

Q. And where did you buy them?

A. We bought them at various places. I couldn't tell you.

Q. Can you give me one or two?

A. I can't offhand, no.

Q. Did you use castings in the manufacture of that ma-
[fol. 456] chine at Manistee?

A. Yes, we did.

Q. Where did you have the castings made?

A. I believe it was at the Salt Works in Manistee. I think they made them for us.

Q. Was this first machine started at Manistee ever completed?

A. Yes. It is in running order. It was the last time I seen it, excepting they were changing the stripper head and the mold box on it.

Q. And when it was completed, what did you do with it?

A. I sold it.

Q. To whom?

A. Boldt Lumber Company.

Q. At Cadillac, Michigan?

A. Right.

Q. And after this operation in Manistee, did you move to Detroit?

A. I did.

Q. Let's go back for just a moment to the Boldt Lumber Company machine. What were the terms of that sale?

A. I just don't recall the exact terms, but there were a certain amount paid down and the balance in a given time.

Q. Was it paid?

A. Not yet.

Q. Hasn't been paid for yet?

A. No.

Q. That is because the machine hasn't been working, isn't that true?

A. Because we intended to change the stripper head and the mold box.

Q. And you haven't been paid for the machine because it hasn't been working, isn't that correct?

[fol. 457] A. That is not correct. I wouldn't say that is correct. It is because we haven't finished the mold box and the stripper head.

Q. You haven't finished the mold box and the stripper head?

A. We haven't changed that.

Q. Now, during the course of your direct examination on

Friday, you were asked this question and you gave this answer, reading from page 310 of the transcript of the testimony:

"Q. Do you own any patent on this machine?

"A. I do not. I have them made up. The only patent I figured I was able to get was on my controls, which is very important on this particular machine. The rest of it is conventional set-up that has been on the market for years in one form or another."

Now, is that the machine that you were talking about at that time, the one that you sold to the Boldt Lumber Company at Cadillac?

A. That is right.

Q. Now, when you said "the rest of it is conventional set-up that has been on the market for years in one form or another," whose machine or machines is it that have been on the market in one form or another?

A. Are you speaking of the block machines or any type of machines?

Q. About which were you speaking when you gave this answer?

A. I was speaking about my own machine.

Q. That is a block machine, isn't it?

A. Right.

[fol. 458] Q. Then you and I are talking about the same machine. Now, whose machine was it or is it that has been on the market for a great many years as a conventional type?

A. We can go further than a block machine. There is the same operation on a lot of different type machines that are not even block machines.

Q. Whose machine was it or is it that has been on the market for a great many years as a conventional type?

A. I wouldn't know who you are speaking of.

Q. Who were you speaking of when you gave that testimony on Friday?

A. There is probably a dozen machines that I have seen on the market that are operated practically the same way.

Q. Whose machine did you mean when you testified on Friday?

A. All of them.

Q. Have been on the market.

A. All of the dozen or more I have seen.

Q. All right. Let's mention them.

A. Well, Lith-I-Bar, Stearns. Several others. I just wouldn't recall.

Q. So that with the exception of what you call your controls, you were copying these machines in the manufacture of the one that was sold to the Boldt Lumber Company?

A. I was not copying. Mine is not a copy.

Q. If it was not a copy, then what do you mean when you testified that the machine, the rest of it was conven- [fol. 459] tional set-up that has been on the market for years in one form or another?

A. That is, I mean they are not particularly on block machines, but on a lot of other types of machines, you will find the same method of operation.

Q. So that with the exception of the controls, which you figure was very important to your particular machine, the rest of the machine itself that you manufactured and sold to the Boldt Lumber Company was the same thing that is on the market from Besser and Lith-I-Bar and Stearns?

A. And many other types of machines.

Q. And many other manufacturers; is that correct?

A. Right.

Q. The machanics for bringing about the vibration process is the same as the mechanics in the Besser Vibra-Tamp?

A. No it is not. I would say it isn't exactly the same.

Q. Is the Besser Vibra-Tamp a conventional machine on the market?

A. I wouldn't know whether it is conventional. It has been on the market a long time as far as I know.

Q. So that one of the machines you intended to talk about when you spoke of it being a conventional machine on the market, was the Besser machine?

A. I had no particular machine in mind.

Q. If you didn't have it in mind at that time, would you say today whether you intended to include it in the conventional——

A. (Interposing) I just did.

Q. (Continuing) —market?

[fol. 460] A. A moment ago.

Q. Well, now, a little later in your testimony of last Friday, when you were testifying about a conversation with Mr. Besser, you gave this answer, reading from page 312 of the transcript:

> "A. Well, I had a machine out in Wakefield, Michigan, which a former employee of Mr. Besser was building for me, as the backer of the machine, and it seems that the machine didn't work too well."

Now, is that the Leemon machine you were talking about there?

A. That is.

Q. And you were the one who sold it to the man in Wakefield?

A. I was.

Q. What were your terms of that sale?

A. Well, he paid a certain amount down and still owes me a note on it.

Q. He gave you a series of notes for the balance of the purchase price?

A. That is right.

Q. Pardon.

A. That is right.

Q. How were those notes payable?

A. Monthly.

Q. Payable to whom?

A. I haven't got the papers. I can't tell you how that was made out.

Q. I am assuming the notes which were paid, at least, [fol. 461] were returned to him and they are not available, so I am asking you how were they made payable?

A. Well, I just wouldn't remember.

Mr. Neville: Objection. If we are talking about notes, let's have the notes here.

The Court: I think they have gone pretty far afield. I think the government should have objected a long time ago.

Mr. Neville: We should have, your Honor.

The Court: If you don't, I certainly am not going to object for you.

Mr. Neville: I didn't object for the simple reason that

we thought that perhaps Mr. Hanneman could throw more light on this situation, and there was no harm to the government's case at all.

The Court: That isn't the idea, whether there is harm or good to the government's case. It is whether it is proper to be in there or not. I am not interested, necessarily, in whether it is of harm or good to your case. I haven't got the time of the court to take in hearing testimony that isn't material, and if it isn't material you should object.

Mr. Neville: But I prefaced my remark, your Honor, that we thought perhaps it would throw more light on the issue.

The Court: Whether it is light or dark doesn't make any difference to me. You may proceed. Let's get down to the real issue.

[fol. 462] Mr. Babcock: Well, if your Honor please——

The Court (Interposing): Let's get down to the issue, Mr. Babcock.

Mr. Babcock: I just want to say to the court for a second, that I think this does bear on the real issue. We feel that we have before this court a question of whether certain individuals were restrained in trade. We have here a question of whether certain individuals were taken out of competition. I expect that this all bears on the fact that this man never was in trade, and never was in competition.

The Court: Well, that would be a conclusion.

Mr. Babcock: He has been offered as a witness who was.

The Court: Who tried to be, I guess, rather than "was."

Mr. Neville: Who was in trade, for a while, but perhaps in a modest way, but perhaps he could have been in a more important way had it not been for this.

The Court: Let's proceed, gentlemen. We are wasting too much time now.

Mr. Babcock: When the witness testified he had a machine——

The Court (Interposing): But you are even going into the patent articles here. I will be trying the patent case again here before I get through.

Mr. Neville: The government's objection, your Honor, [fol. 463] goes to the fact that Mr. Babcock now is going into such details as to how the man went about collecting the

moneys that were owed him, how the moneys were payable, and so forth.

The Court: All right. Make your objections and I will rule upon them.

By Mr. Babcock:

Q. How were the notes payable, Mr. Hanneman?

Mr. Neville: Objection.

The Court: I sustain the objection.

By Mr. Babcock:

Q. What did you mean when you testified on Friday, "I had a machine which a former employee of Mr. Besser was building for me as the backer of the machine"? What did you mean by "as the backer of the machine"?

A. I furnished the money to build it.

Q. Well, was he building it for you or was he building it for himself and you were furnishing the money as the backer?

A. Well, I would say he was building it for me because I had the sale of them, so he was really building it for me.

Q. What did you pay Leemon for building the machine for you?

A. I paid him whatever his profit was over the cost of the machine.

Q. Who paid the cost of the machine?

A. I paid all costs.

Q. You paid all the cost of the machine?

A. That is right.

Q. And did you pay Leemon his profit?

A. That is right.

Q. Over and above that?

[fol. 464] A. That is right.

Q. That machine never did work, did it?

A. I believe they worked it for a while up there.

Q. But it broke down?

A. I don't know what happened to it really. I kind of left it in the hands of Mr. Besser. He was going to fix it up.

Q. At the time you went to Alpena to see Mr. Besser, the machine would not work, would it?

A. I do not believe it was working at that particular time.

Q. And you went to Alpena to talk to Mr. Besser to see if you could get him to help you make it work?

A. That is not true. I went there to talk to him about Mr. Leemon going back to work for him and I had a guarantee from Mr. Leemon that he would make it work.

Q. Then your testimony is at least that when you did go to Alpena you talked to Mr. Besser about helping you make the machine work at Wakefield?

A. I do not believe I did. I believe he stated that he would send a man over there to make it work without my asking for it.

Q. Why should Mr. Besser volunteer to make your machine work?

A. I don't know why, and I don't know why he wanted to get me out of business either, on the Eight Mile Road. If I was not in business, why did he give me a license to build ten machines if they were afraid of the machine?

Q. I think you can safely leave the argument to the government attorneys. You do not need to make an argument [fol. 465] for the government. Well now, let us see if I can read a part of your testimony of last Friday for you, from page 312:

> "In the meantime"—I am reading now——
>
> "In the meantime Mr. Besser hired this former employee back and I wanted to see Mr. Besser about what he could do about that machine."

Do you recall that testimony, Mr. Hanneman?

A. Yes, perhaps——

Q. Pardon me, I will ask you.

A. I remember that.

Q. Was it the truth last Friday as you gave it?

A. It is excepting perhaps it sounds a little bit different than I expected the expression to come out. I really went there to see him about Leemon because Leemon had promised to put that machine in order and he was going back to work for Besser and I was going to start suit against him, and Mr. Besser agreed not to, and he asked me not to start it, that he would take care of it.

Q. What did you mean when you said you went to see Mr. Besser about what he could do about that machine?

A. Well, it seemed like we had had a conversation of some kind before on this thing.

Q. By that do you mean you and Mr. Besser?

A. I believe we had.

Q. Where did that occur?

A. In Alpena.

[fol. 466] Q. How long previous? How long previous to this conversation?

A. I do not recall. It seems like it was a telephone call or something, or a message or something.

Q. Just a message or something.

A. I just do not recall, no.

Q. On the basis of that rather nebulous message or something, you wanted to see Mr. Besser about that machine. Is that right?

A. Well, we talked about that.

Q. And at that particular time the machine was not working, was it?

A. I do not believe it was.

Q. Now, what compensation was the Besser Manufacturing Company to get for putting your machine in working order?

A. Mr. Besser said that he would do it for the experience that he gained out of it, and it would not cost me anything.

Q. Now, at that time did Mr. Besser know that you were manufacturing machines of this type?

A. He knew I was in on that machine, yes.

Q. Do you know whether the man at Wakefield, to whom you sold the machine, has ever used the machine since?

A. I would not know.

Q. And you would not know whether the Besser Manufacturing Company ever sent a service man down there?

A. I know that they claimed they sent a man over there but they never done anything.

Q. How do you know?

[fol. 467] A. Because I asked Mr. Hemkes.

Q. And did Mr. Hemkes tell you that when the service man came he would not let him touch the machine because he said he had had so much trouble with the machine he did not want to have anything more to do with it?

A. He did not tell me that.

Q. He did not tell you that?

A. No, sir.

Q. Now, as a part of this same testimony on last Friday, again reading from the same place on page 312, you testified:

> "I wanted to see Mr. Besser about what he could do about that machine and he told me he would take care of it and put it in working order for me so I would be able to collect my notes."

Mr. Neville: Now, at this point I want to point out that Mr. Babcock did not read all of that sentence. I wish he would have read it all:

> "And in the meantime Mr. Besser hired this former employee back,"

which would show that the purpose of this visit primarily was to talk about this man Leemon.

The Court: All right, he has the question now between the two of you.

By Mr. Babcock:

Q. Do you recall that testimony, Mr. Hanneman?

A. Yes, I do.

Q. Now, wasn't the purpose of your going to Alpena to solicit Mr. Besser's help to get the machine in working order so that you could collect your money?

A. It was not. I was going to see Mr. Besser about the [fol. 468] Leemon situation, as I told you. I was going to start suit aghinst Leemon because he guaranteed to put it into working order and he did not. He went back to work for Mr. Besser, and Mr. Besser said, "Rather than start a suit, we will take care of it and won't charge you anything because the experience we will gain will amply pay us for our trouble."

Q. What did you mean when you testified, "so I would be able to collect my notes"?

A. That is what I was interested in, collecting my notes. The machine was supposed to work and that is what I was

going to sue Leemon for, to put it in working order as he had agreed to do.

Q. Now, is my memory correct that you have told us that you came to Detroit in the middle part of the year 1948?

A. No, it was the earlier part of 1948, I believe. I am not too correct on just the exact time.

Q. Well, how much earlier than the middle part?

A. I don't remember, to tell you the truth. I just don't remember when it was.

Q. Well, it was the middle part of 1948 or thereabouts, at any rate, that you had the conversation with Mr. Stark?

A. Yes, I think it was about the middle part.

Q. And that was at your place of business on the Eight Mile Road near Lahser Road; is that correct?

A. That is right.

Q. And that place of business on the Eight Mile Road near Lahser is practically on the opposite side of Wayne [fol. 469] County from Lozier in Center Line, isn't it?

A. It is not in Wayne County. It is in Oakland County.

Q. You were on the north side of Eight Mile Road then?

A. That is right.

Q. But at any rate, making reference to an easterly and westerly direction, it is about the opposite side of the full width of Wayne County from Lozier Avenue in Center Line, isn't it?

A. I don't know where the boundaries of Wayne County commence. I could not answer that question.

Q. At any rate, Lahser Road and the Eight Mile Road are in the general neighborhood of Grand River and the Eight Mile Road; is that correct?

A. Lahser Road—will you repeat that question, please?

Q. Yes sir. Lahser and the Eight Mile Road are in the general neighborhood of Grand River and the Eight Mile Road?

A. Well, I guess they are several miles apart there.

Q. And Lozier Avenue in Center Line is north of the intersection of the Eight Mile Road and Van Dyke over on the east side?

Mr. Speer: Excuse me a minute. I cannot see what this has to do with this case, your Honor.

The Court: I do not know what he is getting at right now. He may have something in mind.

By Mr. Babcock:

Q. And when Mr. Stark came to you he told you that in the manufacture of the machine you were then making you probably were infringing on some of their patents; is that correct?

A. Right.

[fol. 470] Q. Now, is that when you consulted your patent attorney?

A. Yes, shortly after that I believe, or about that time.

Q. And who was your patent attorney?

A. A man by the name of Parker.

Q. Pardon me.

A. A man by the name of Parker.

Q. Where was his office?

A. Downtown in one of the buildings here. I could not tell you which one.

Q. And after your conference with your patent counsel, Mr. Parker, you told Mr. Stark that you had a lot of money invested and you would like to get it out. Is that correct?

A. I believe that is right.

Q. And he suggested that if the Besser Manufacturing Company gave you a license or a franchise to manufacture three machines that you might be able to get your money out. Is that it?

A. We talked about that, yes.

Q. And you told him that three machines was not enough, that if you could have a license to manufacture ten machines you probably could get back the money you had invested; is that correct?

A. Yes, sir.

Q. And Mr. Stark told you that he would contact Mr. Besser and Mr. Gelbman and discuss with them the matter of giving you a license for the manufacture of the ten machines: Is that correct?

A. Yes, sir.

[fol. 471] Q. Now that was in order to assist you in

getting back the money you had invested in this venture; isn't that right?

A. Well, I don't know whether that was the prime idea back of it or not.

Q. Well then later Mr. Stark contacted you and you signed the license agreement for ten machines?

A. That is right.

Q. At that time had you completed the manufacture of any machine?

A. We were still working on the machine.

Q. My question, Mr. Hanneman, was whether you had completed the manufacture of any machine.

A. Well, if you are speaking of the Leemon machines, yes, but not of the Challenger machine.

Q. All right, the Leemon machine was not the machine that was involved in this license agreement, was it?

A. No, sir.

Q. We are talking about the machines that were involved in the license agreement; at the time of your signing the license agreement, had you completed the manufacture of any of your own machines?

A. We were still working on the machines; it was not completed.

Q. Thank you. Did you ever complete the manufacture of any of those machines?

A. Yes, we had the machine running.

Q. How many?

A. One.

Q. Where is it?

A. Bolt Lumber Company.

[fol. 472] Q. That is the one up at the Bolt Lumber Company?

A. That is right.

Q. Have you ever completed any more, any other machines?

A. No.

Q. Have you ever started the manufacture of any other machines?

A. No, not as yet.

Q. Now, in the course of your direct examination on Friday, when you were being examined about this one ma-

chine at the Bolt Lumber Company, you were asked this question and gave this answer, on page 317½:

Q. What is it doing there? Has it been disposed of?

"A. Well, it is at the Bolt Lumber Company in Cadillac. Bolt Lumber Company in Cadillac, Michigan, and right at the moment we aren't doing anything further with it. We found that the stripper head and the cores had to be changed because we had a square opening in the block and we were going to change it to an oval opening to guarantee better strength of the block, and owing to the tie-up of everything here, we just haven't done anything about it."

Now, I am not clear from that answer whether or not you sold that machine to the Bolt Lumber Company or whether you just have it up there. Which is it?

A. I sold it to them.

Q. Do you know whether they are operating it?

[fol. 473] A. They are not right at the present time.

Q. Do you mean by that answer that there is still something more to be done with the machine?

A. I answer that question on direct examination there.

Q. Now, by that do you mean this language:

"We found that the stripper head and the cores had to be changed?"

A. He had some very dry sand, very dry sand and the square did not hold together the way we wanted it to, and it showed some cracking, so we intended to change the stripper head and the cores.

Q. And those operations are necessary to complete the manufacture of that machine?

A. To make it operate the way we wanted it to operate.

Q. Now, what do you mean when you said, "And owing to the tie-up of everything here"?

A. Well, you know, I had some money back of me that would have come in, but seeing that this thing is tied up and I have got a short ten-machine franchise, I can't do anything about money. They won't come along with it.

Q. What do you mean when you say, "This thing is tied up"?

A. It is tied up as far as I have gone. I am supposed to have a ten-machine franchise, and the backing that I had to continue making machines will not go along with the ten-machine franchise. However, I have never seen it signed by Mr. Besser or Mr. Gelbman. I have never seen it. I signed it myself but I have never seen one.

Q. Now, is that all that you meant when you referred to [fol. 474] a tie-up of everything here?

A. As far as I know.

Q. Well, let's see if I state this fairly, now. You have been talking with somebody about giving you some financial help?

A. I have.

Q. But because your license was for ten machines that party would not give you the financial help?

A. That is right.

Q. And when that party would not give you the financial help, for that reason you couldn't go ahead and complete the manufacture of the machine at Cadillac?

A. I haven't been able to as yet, no.

Q. Now, you testified on page 319 of the transcript, when you were asked to state the substance of a conversation with Mr. Hemkes:

> "A. I went up there to see whether Mr. Besser had put this machine in shape that was up there, and it had not been put in shape, so I talked to him about buying one of my hydraulic machines, and I was informed by Mr. Hemkes that Mr. Leemon told him he would only get in trouble by buying one of my machines."

As a matter of fact, Mr. Hemkes had been in trouble ever since he bought the Leemon machine, hadn't he?

A. Not the type of trouble that we were talking about.

Q. How do you know what type of trouble he was talking about?

A. Because we talked about the fact they may be involved in the case of a patent suit.

[fols. 475-476] Q. Then you did not relate the whole conversation when you were testifying on Friday, is that it?

A. I related everything that they asked me.

Q. When you testified on Friday, you related everything you were asked to give. Is that your answer?

Mr. Neville: He has answered that question. He just said he answered everything he was asked.

A. I answered everything that he asked me.

By Mr. Babcock:

Q. You gave the whole conversation?

A. No, I didn't.

Mr. Neville: Objection. He did not say that.

The Court: Sustain the objection. You may cross-examine.

By Mr. Babcock:

Q. I will read the question by Mr. Speer on page 318:

"Q. I will change the question; what was the general substance of this conversation?"

Now, I will ask you, did you on Friday give the whole general substance of the conversation?

A. I only gave what I was asked to give, and I didn't give any more.

Q. Did you give the whole general substance of the conversation?

A. No. We talked about a lot of things after I was up there.

[fol. 477] By Mr. Babcock:

Q. Did you give all of the general substance of that conversation?

Mr. Neville: Well, objection for the same reason.

The Court: Let him answer. He ought to be able to tell whether he gave all the general substance of the conversation.

Mr. Babcock: There was more conversation, then?

The Court: He didn't ask him whether there was more

conversation. Do you think you gave all of the general substance the other day?

A. Well, on what I was asked, I believe I did.

The Court: Then why don't you say so, and we will get on?

By Mr. Babcock:

Q. Have you communicated with Mr. Besser directly, in person, since 1948?

A. No, I don't believe I have.

Q. Have you communicated with Mr. Besser in writing or by correspondence in any manner since 1948?

A. I am not too sure of that. I believe there was a letter sent to the Besser Manufacturing asking about the machine. I am not sure of that.

Q. Perhaps you misunderstood my question. My question was do you know of any communication to Mr. Besser personally?

A. I believe there was, although I am not sure, because [fol. 478] I think I have a copy of a letter in my files. I am not too sure of that.

Q. Have you talked with Mr. Besser by telephone since 1948?

A. I don't believe so. I don't recall of it at the moment, anyway.

Mr. Babcock: I have no further questions.

Redirect examination.

By Mr. Speer:

Q. Mr. Hanneman, were you served with a subpoena to appear in this court on behalf of the United States?

A. I was.

Q. When was that subpoena served upon you?

A. I would say about a week to ten days ago.

Q. Was that subpoena served upon you at your home or at your place of business?

A. At my home.

Q. And is your home address today the same as it was at the time that Mr. Stark called upon you?

A. Yes, sir.

Q. Was a subpoena served upon you or upon your wife?
[fol. 479] A. I accepted it myself.

Q. At the time you were engaged, Mr. Hannemann, in 1948, in the manufacture of block machines, did any other person at your plant know of your home address at that time?

A. Yes.

Q. And what particular person at your business address was acquainted with your home address?

A. My secretary, Mrs. Van Sickle.

Mr. Speer: That is all, your Honor.

The Court: Just a minute.

Recross-examination.

By Mr. Babcock:

Q. What is the place of business to which you have reference as your place of business today?

A. I just don't understand.

Q. Well, what is your place of business today?

A. My place of business today is at 20— or 1820 Joy Road.

Q. What is that business?

A. I am building homes.

Q. How long have you been located at that business address?

Mr. Neville: Objection.

The Court: He may answer.

A. Oh, probably a month, I guess.

By Mr. Babcock:

Q. What was your business address before that?

A. 13327 Linwood.

Q. By the way, is this business on Joy Road your own business?

[fol. 480] Mr. Neville: Objection.

The Court: He may answer.

A. I am in with another party.

The Court: He has a right to show the type of person who is testifying on behalf of the government.

A. I am in business with another person.

Mr. Babcock:

Q. What is the name?

A. William E. Wakes.

Q. Is that the name on the door of the office of the building?

A. That is right, that was his place of business when I went in there and his name is still on there.

Q. And what was the business at Linwood Avenue?

A. Builder.

Q. Were you in business there for yourself?

A. No, I was superintendent for the Willis Construction Company.

Q. How long were you occupied for the Willis Construction Company.

A. Almost a year, I guess.

Q. What was your place of business before that?

A. Well, I did not have any. I was at my home.

Q. And how long were you at home without a place of business?

A. Oh, I should say about three or four months. Something like that.

Q. And before this period of three or four months at home, where was your place of business?

A. Eight Mile Road.

Q. And Lahser?

A. I believe so, yes, at Lahser?

[fol. 481] Q. Well now you have told us about a one year with the Willis Construction Company, three to four months at home without a place of business, which if we take the smaller figure means fifteen months, and one month at the Joy Road place of business, making a total of sixteen months; so it is fair to say that it is sixteen months ago since you have last been at the Eight Mile and Lahser Road place of business; is that correct?

A. I am not too sure that that is correct. I am only giving you an estimate on the time. I do not remember the exact dates, sir.

Q. Well, as your business judgment serves you, that is the time, is it?

A. That is somewhere near it.

Q. That would take it back to about the first of the year 1949 or the last of 1948, wouldn't it?

A. I would think so, yes.

The Court: When was it he said that the Besser people really drove him out of business, what year?

Mr. Babcock: I do not recall any testimony to that effect, your Honor. It was in the middle of 1948 that Mr. Stark came to see him and they——

The Court: Well, Mr. Stark did not exactly encourage his continuing in the business, did he, Mr. Babcock?

Mr. Babcock: Why certainly not.

The Court: Well, all right. I did not say drove him out of business. I said he claimed they drove him out of business, and there is no variance with that, is there? That [fol. 482] he claimed they drove him out of business, is there? Whether they did or not is another thing. I am talking about the man's claim.

Mr. Babcock: I analyze the effect of his testimony somewhat differently than that.

The Court: I would be interested in knowing that analysis. But the court takes it the other way, what the man claims. When was it that you claim that they made it impossible for you to continue on in this business?

A. The latter part of 1948.

The Court: And how long had you been in that business before that?

A. Well, I originally started with Leemon in 1946.

The Court: What was your business before 1946? What was your original business?

A. I was a real estate man in Detroit from 1921 until about in the 1930's, and then I went with Ed Rose, a builder, and was a sales manager with him.

The Court: Had you ever been in any building business before that?

A. Yes.

The Court: What was that?

A. J. J. Hanneman Building Company.

The Court: I do not mean as a salesman; as a builder?

A. As a builder, yes, that was my building company.

The Court: All right. I just want to get the picture.

[fol. 483] Eugene F. Olsen, recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified further as follows:

Cross-examination.

By Mr. Babcock:

Q. Mr. Olsen, do I understand correctly that you have been conected with the machinery manufacturing business, with few interruptions, one or two interruptions since 1919?

A. That is correct.

Q. Prior to that time, you had spent some time in the service of the United States Army?

A. Yes.

[fol. 484] Q. And when you went into the business, became connected with business in 1919, was that your first business connection?

A. Yes.

Q. And that was as general manager of the Anchor Concrete Machinery Company, is that correct?

A. Technically, it was known as Anchor Concrete Stone Company at that moment, but that is correct, if I know what you mean.

Q. Had you had some college training before going into the Army?

A. Yes.

Q. What was your college training?

A. Civil Engineering and aeronautical engineering.

Q. Did you receive a degree from any college?

A. In aeronautical engineering, M.I.T.

Q. That is the Massachusetts Institute of Technology?

A. Yes, sir.

Q. When you joined the Anchor Concrete Stone Company in 1919, what was the type of products it was manufacturing?

A. Concrete block machines.

Q. Was it engaged exclusively in the manufacture of concrete block machines and parts?

A. Yes.

Q. And where was it located?

A. Rock Rapids, Iowa.

Q. What was the type of concrete block machines it was manufacturing?

A. The tamper type.

Q. Any automatic features about it?

[fol. 485] A. We called them that at the time. They would not be called that now.

Q. For the most part, they were more or less hand operated, were they not, manually operated?

A. Yes, except it was not hand tamped; there were mechanical tampers activated by manually operated levers.

Q. At or shortly after making your connection with the Anchor Concrete Stone Company, did you become familiar with the style and appearance of the early machines?

A. Yes.

Q. Does this picture on the top fairly present a picture of one of the earliest machines for making concrete blocks (exhibiting a paper to the witness.)?

A. Yes.

The Court: May I see that?

Mr. Babcock: May I ask just one more question, your Honor?

The Court: Yes, you may.

By Mr. Babcock:

Q. Does the picture at the bottom of the page fairly present a picture of one of the more modern types of machines for making concrete blocks?

A. Yes, sir.

(Whereupon the paper was handed to the court.)

By Mr. Babcock:

Q. In 1919 when you joined the Anchor Concrete Stone Company, what was the type of machine being manufactured by the Besser Manufacturing Company, if you know?

[fol. 486] A. I cannot remember that. If you mean tamping or vibration, it would be tamping.

Q. Well, do you recognize the type of machine when I mention the title "Double Automatic Face Down" machine?

A. Yes.

Q. Do you recall whether or not that was the machine that the Besser Company was manufacturing about the time you joined the Anchor Concrete Stone Company?

A. Then or within the next several years; it was an early machine.

Q. What were the special features about that machine?

A. In my opinion the outstanding feature was its high production for that time.

Q. Is it fair to say that that machine had a capacity for approximately 3000 units per day?

A. I think so. I would have to do a little arithmetic to be certain.

Q. But even that machine was a substantial improvement over the early machine which is indicated in the first or the top picture of the article or page I have just shown you?

A. Yes, indeed.

Q. Now, was the place of business of the Anchor Concrete Stone Company moved from Iowa?

A. Yes, sir.

Q. And to where, please?

A. Adrian, Michigan.

Q. When was that done?

[fol. 487] A. 1922. And about that time we started calling it the "Machinery" company.

Q. About that time you changed the name from the Anchor Concrete Stone Company to the Anchor Concrete Machinery Company?

A. That is correct.

Q. Now, in 1926, the Anchor Concrete Machinery Company merged with a number of other concerns, did it not?

A. I believe it was '27, but in that general time.

Q. And what were the other concerns with which the Anchor Concrete Machinery Company merged?

A. The Adrian Steel Castings Company, Thomas W. Noble Company, Ideal Concrete Machinery Company and Universal Tamping Company.

Q. What were the products that were being manufactured by the Adrian Castings Company?

A. Commercial gray iron castings.

Q. For anyone who might wish to buy castings from them?

A. Yes, sir, a jobbing business.

Q. At the design and specification of the customer?

A. Yes, sir.

Q. And what was the business of the Noble Company?

A. It was the sales outlet for the Universal Tamping Machine Company.

Q. Now, one of the concerns you mentioned, I think, was the Ideal something?

A. Yes, sir, Ideal Concrete Machinery Company.

Q. Where was that located?

[fol. 488] A. Cincinnati.

Q. And what was the product which it manufactured?

A. Concrete block machines.

Q. And the Universal Tamping Company, where was it located?

A. Peoria, Illinois.

Q. And what were the products of its manufacture?

A. Concrete block machinery.

(Corporate records of Consolidated Concrete Machinery Company were thereupon marked Defendants' Exhibit 123 for identification.)

By Mr. Babcock:

Q. Let me hand you a book which has been marked for identification as Exhibit 123. I will ask you if you recognize it?

A. It has been a long time, but I presume my name is in there a good many times, so I must have been familiar with it.

The Court: What is that? Some minutes or something of the corporation.

Mr. Babcock: Yes, your Honor, the corporate record book of the Consolidated Concrete Machinery Company.

The Court: All right.

By Mr. Babcock:

Q. You are able to recognize it, are you, Mr. Olsen?

A. Yes. I must have been familiar with that.

Q. You have thumbed through it and you have observed the signatures?

A. I see names and signatures I am familiar with.

[fol. 489] Q. With which you are familiar?

A. That is right.

Q. You are able to identify this Exhibit 123 as the corporate minute book of the Consolidated Concrete Machinery Corporation?

A. Yes, I think so. Yes, sir.

Mr. Babcock: I offer in evidence Exhibit 123, so that the whole of it may be available for use by all counsel. There are certain pages I intend to use on cross-examination, as I proceed, and which I will identify as I approach them.

The Court: Any objection? On this, as I notice, on the outside, is the minutes of some corporation.

Mr. Babcock: Consolidated.

The Court: Anchor Consolidated. Is the Anchor in there? Is the Anchor in there?

Mr. Babcock: Anchor was one of the five concerns merged to form the Consolidated Concrete Machinery Corporation.

The Court: And he was connected with which one?

Mr. Babcock: He was originally the general manager of Anchor, and then became president of Consolidated Concrete Machinery Corporation.

The Court: What year is that for?

Mr. Babcock: It goes back to 1926 and carries through to 1932.

The Court: All right.

Mr. Babcock: Incidentally, I invite the court's attention to the fact that the acquisition, the alleged acquisition and [fol. 490] dissolution of the Consolidated Concrete Machinery Corporation is one of the acts which the government claims the Besser Manufacturing Company performed in order to remove a competitor.

The Court: All right. Any objection?

Mr. Neville: Yes, your Honor, the government objects to the introduction of this book as such for the reason that at this point, Mr. Babcock has failed to show that

anything in the book is material or relevant to this cause, and if he has anything in fact in the book which he thinks is pertinent, I think that that will be the time for Mr. Babcock to introduce that particular page and that that will be the time for us to object to it.

The Court: Has he identified the book itself?

Mr. Babcock: Yes, your Honor.

The Court: As to just what it is.

Mr. Babcock: Yes, your Honor.

The Court: All I heard him say was something about "my name appears in here so I must be familiar with it." Did he identify it?

Mr. Babcock: The last question I asked before I offered it in evidence was if he could identify that as being the corporate record book of the Consolidated Concrete Machinery Company, and he said he could.

The Court: Well, I think it is admissible.

[fol. 491] Mr. Neville: The whole book, your Honor.

The Court: Yes. You can use any part of it or all of it or none of it. He said he is going to introduce some parts of it, and the entire record is available, at least up to the time it passed into the other organization.

Mr. Babcock: That is the end of the record, too.

The Court: That is what I supposed it would be.

By Mr. Babcock:

Q. Now, referring to Exhibit 123, I invite your attention to the minutes of a special meeting of stockholders of the Anchor Consolidated Concrete Machinery Corporation under date of April 21, 1927. Is that the meeting at which the merger was approved by the stockholders?

A. I couldn't tell without reading it. It would appear to be.

Q. Now, when the merger was accomplished, at first the name of the new merged corporation was the Anchor Consolidated Concrete Machinery Corporation, wasn't it?

A. Yes, that is right. And then the word "Anchor" was dropped.

The Court: That is what you usually do with the anchor.

A. Yes. Quite an appropriate action.

By Mr. Babcock:

Q. You were a member of the board of directors of the merged corporation?

A. Yes, sir.

Q. What was your office? What office, if any, did you hold?

A. I was president.

Q. Inviting your attention to the minutes of a special meeting of the board of directors on April 21, 1927, you recognized your own signature on a waiver of notice of [fols. 492-501] that meeting?

A. Yes.

Q. And you recognize your own signature on the certificate of ratification and approval of the minutes of that meeting?

A. That is right, yes.

Q. Then returning to the minutes of special meeting of stockholders of May 25, 1927, we find there a record of the change of name of the company to the Consolidated Concrete Machinery Corporation, do we not?

A. Yes.

[fol. 502] By Mr. Babcock:

Q. Is it not a fact, Mr. Olsen, that as of December 31, 1923, in reference to the Anchor Consolidated Machinery Company, there was an appreciation or increase in the surplus of that corporation of the year's operation of $14,908.05, or approximately $15,000?

A. Yes, sir.

Q. And for the year 1922, $16,343.24?

A. I would have to study this. This is unearned surplus, appreciation. Profit and loss surplus is $30,000.

Q. That is the carried forward figure, up to the end of the examining period, is it not, the $30,000 figure?

A. Well, may I look at the operating statement?

[fol. 503] Q. Yes.

A. You want the profit?

Q. For the year.

A. Let's get it from the operating statement.

Q. The increase, the appreciation, the amount of surplus.

A. Net profit, $21,371.

Q. But the increase and surplus for the year is what?

A. Oh, I can't remember what they might have done that affected the surplus. You can appreciate those things and sometimes depreciate them without affecting the earnings. The profit for the year is $21,000 plus.

The Court: What year is that.

A. 1922, sir.

The Court: All right.

By Mr. Babcock:

Q. Now, for the end of the fiscal year of June 30, 1925, the increase in unearned surplus over that period of accounting was $12,755.27, was it not?

A. The increase in the unearned surplus, yes, that amount.

Q. And for the end of the fiscal year of June 30, 1926, the increase of unearned surplus, $11,320.08?

A. That is right.

Q. And for the accounting period ended December 31, 1926, there is shown an appreciation of permanent assets of $10,602.49?

The Court: Is that the criterion of the success or the failure of this company? Isn't it what they made every year?

A. Are you speaking to me or to counsel?

[fol. 504] The Court: Speaking to both of you. Either one of you or both of you may answer. I don't care. What do you think, witness? Is that the criterion of success?

A. No. That is a matter of accounting. It is how much you earn. That is the measure of success.

The Court: That is what I think. I think the General Motors, a year or so ago, put a tremendous amount of money in a research plant out there. Looking at that wouldn't mean whether they had lost or made money for the year. If you are trying to show whether any money was made or not, I suppose that that report shows it.

A. On the next page, yes, sir.

The Court: All right, gentlemen, let us proceed.

By Mr. Babcock:

Q. Well, allowing you, Mr. Olsen, to use these exhibits for reference in any way that you may wish, let me ask you if it is not a fact that in 1928, as of the period ending May 31, 1928, the Consolidated Concrete Machinery Corporation suffered a loss of $33,040.50?

The Court: For that year, you mean?

Mr. Babcock: For that year, yes, your Honor.

A. Yes, sir.

By Mr. Babcock:

Q. And for the year 1929 ending May 31, 1929, a loss of $235,142.59?

A. For the year ending May 31, 1929?

Q. Yes, sir.

A. And what figure have you?

[fol. 505] Q. $235,142.59.

A. No, the audit report shows it was $37,000.

Q. And for the period ending May 31, 1930, a loss of $166,815.22?

A. Net loss from operations $60,000, and then there was a loss from sale of capital assets that brought that up to the figure you named.

Q. $166,000?

A. Including $120,000 loss from sale of capital assets.

Q. That was still a loss to the company, was it?

A. Yes, sir, but not from operations.

The Court: What did you do? Sell some land or something?

A. I believe that was the period in which we sold that foundry company away from the Consolidated.

The Court: All right.

A. That is only thing I recall that would account for that.

By Mr. Babcock:

Q. That was a foundry company that had been included as part of the merger?

A. Yes, sir.

The Court: Which merger are you talking about, Mr. Babcock?

Mr. Babcock: The merger into the Consolidated Concrete Machinery Corporation.

The Court: Not into Besser?

Mr. Babcock: Oh, no, there was not any merger with Besser.

The Court: That was a sale, wasn't it? Didn't the Besser [fol. 506] take over these people after a while?

Mr. Babcock: No, your Honor.

The Court: They did not?

Mr. Babcock: Not the Besser Manufacturing Company, no, your Honor.

Mr. Neville: The Besser acquired a majority stock interest in Consolidated.

The Court: That is what I mean. Let us not quibble over words, gentlemen.

Mr. Babcock: Well, your Honor, I am not quibbling, really I am not.

The Court: All right, let us proceed.

Mr. Babcock: This is not a situation like the Brownhoist or the Stearns Manufacturing Company at all. It is an entirely different one.

The Court: They took over the majority of the stock or a certain percentage in what year? I have forgotten.

Mr. Speer: In the year 1929 or 1930.

Mr. Neville: The period that we are talking about, your Honor.

The Court: And those are the reports showing what that company lost in 1929, 1930 and 1931?

Mr. Babcock: 1928, 1929 and '30.

Mr. Neville: Apparently so, Your Honor.

The Court: All right.

Mr. Neville: I would like your Honor to take judicial [fol. 507] notice that we are talking of the years 1930 and 1931, which is immediately following 1929.

Mr. Babcock: I am happy to have that brought to the court's attention.

By Mr. Babcock:

Q. Now, referring, Mr. Olsen,——

Mr. Babcock: I am starting a little different line of examination. Would you like to take the recess now?

The Court: No, not for five or six minutes yet.

By Mr. Babcock:

Q. Referring now to the minutes of the special meeting of the board of directors of October 3, 1927, it would appear that that early the directors were somewhat concerned about the financial position of the corporation, would it not?

A. Yes, sir.

Q. And they were then beginning various efforts to improve the financial condition of the corporation?

A. That is right.

Q. Now, I direct your attention to the minutes of the regular meeting of the board of directors of November 21, 1927, where reference is made to a report of the president. That was your report, was it not?

A. It must have been.

Q. And it would appear from your report there that for the period you were reporting there was a net loss in operations, wouldn't it?

A. I believe so, yes. I have not read it all but——

Q. It would also appear then that it was your judgment and that of the other directors that some effort had to be [fol. 508] expended to rearrange the financing of the corporation, wouldn't it?

A. Yes.

Q. Now, I invite your attention to a sheet which is entitled "President's Report to the Board of Directors" at the regular monthly meeting of the 15th of December, 1927. Do you recognize that as being a copy of one of your reports?

A. I do not question it. I, of course, cannot remember 23 years ago.

Q. Again, you are making reference in that report to a failure to show a net profit in the operations, aren't you?

A. That is right.

Q. Now, referring to the minutes of the regular monthly meeting of the directors in January, 1928, is it not true that the officers and directors of the Consolidated Concrete

Machinery Corporation at that time began giving serious consideration to manufacturing a new product, namely, a washing machine?

A. That is right.

Q. And that would be in an effort to get into a business that would show a profit, wasn't it?

A. Yes, sir.

Q. Which was not being shown in the manufacture of the concrete block machinery at that time?

A. That is right.

Q. Then on February 16, 1928, we find again the minutes of the regular monthly meeting of the board of directors, and at that time the directors are giving careful considera-
[fol. 509] tion to undertaking the manufacture of another product?

A. That is right.

Q. Some pin setter machines, that is for bowling alleys, I assume?

A. Yes.

Q. And that too was in the search for something that would be profitable?

A. Correct.

Q. Isn't that correct?

A. Yes.

Q. Now, in March of 1928, as would appear from the minutes of the special meeting, an adjourned special meeting of the directors, the directors found it necessary to give consideration to a reduction in salaries of the officers and employees, isn't that correct?

A. Yes, sir.

Q. And that is in an effort to economize and reduce the loss in operations of the company?

A. Yes, sir.

Q. Now, Mr. Olsen, from the minutes of the special meeting of the board of directors of the Consolidated Concrete Machinery Corporation in November, 1928, it would appear [fol. 510] that at that time it was the judgment of the officers and directors of the corporation that a plan of reorganization was necessary and a reduction of capital stock of the corporation was necessary, wasn't it?

A. That is right.

Q. And by reference to the minutes of a meeting, regular monthly directors meeting, December 21st, 1928, there was a report made by a committee appointed to investigate and submit a plan for the reorganization of the capital structure?

A. Yes, sir.

Q. And among other things, the committee recommended that the accumulated dividends on the preferred stock could not be paid; is that correct?

A. Yes.

Q. And that in the opinion of the committee, it was absolutely essential to the successful operation of the company that additional funds be provided?

A. That is right.

Q. Then turning to the minutes of the annual meeting of stockholders of the Consolidated Concrete Machinery Corporation, June 26 of 1929, there is recorded the president's report. That, too, was your report, was it not?

A. Yes.

Q. And in that you advised the stockholders that, like the first year of the merged corporation, this one was one of constant struggle against many and varied difficulties?

[fol. 511] A. Right.

Q. And in that report you advised the stockholders that there was a building depression in all classes of structures and that that affected the business of manufacturing concrete block machines?

A. Right.

Q. In that report also you advised the stockholders that in order to increase the volume and increase the profits, your management had secured the manufacturing and sales rights of several additional lines of equipment; is that correct?

A. That is what it says. I don't recall what those were, but no doubt they are recorded.

Q. They were lines of equipment different from concrete block machines, were they not?

A. Yes, I presume so.

Q. Now, in November of 1929, by referring to the minutes of a special meeting of the directors, we find that Mr. D. E. Winslow, Mr. L. H. Bridgman, and Mr. Frank Lay

had offered to loan money to the corporation; is that correct?

A. Yes, sir.

Q. And that at that meeting the directors, by resolution, authorized the officers of the corporation to do the acts that might be necessary to carry out that proposition of those three men?

A. Right.

Q. Now, by referring to the minutes of the board of directors of February 3, 1930, we find that it was the judgment of the directors that the foundry division of the [fol. 512] corporation be sold; is that correct?

A. Yes.

Q. And the action of selling the foundry division is approved by the board?

A. Right.

Q. That was done to improve the financial condition of the corporation; is that correct?

A. Yes.

Q. Now, by reference to the minutes of the meeting of the board of directors of May 16, 1930, I invite your attention to the paragraph which reads:

> "The General Parts Corporation of Detroit submitted a proposition to sell Consolidated Concrete Machinery Corporation all of the assets of the farm light plant division of Stearns Motor Manufacturing Company of Ludington, Michigan."

Is that the origin or advent of that concern, known as Stearns, into the Consolidated Concrete Block Machine Company?

A. That is right. That is right, the name traces back to that.

Q. Now, was the Stearns Motor Manufacturing Company of Ludington a corporation?

A. At one time, yes, sir.

Q. I see. But what the Consolidated Concrete Block Machine Corporation took over was its farm light plant division?

A. Yes, during the liquidation of the Ludington Stearns Company.

[fol. 513] Q. I see. And you acquired the right to the use of the name Stearns?

A. Yes.

Q. Now, by reference to the minutes of the annual meeting of stockholders of June, 1930, we find there incorporated another president's report. Is that correct?

A. Right here, yes.

Q. And that was your report as president?

A. Yes, sir.

Q. And at the close of that fiscal year, you had found that it had been a very trying one?

A. Right.

Q. For all concerns dependent upon the building industry?

A. Right.

Q. You advised your stockholders that since the meeting of the year before that much had been done to reduce the overhead and expenses and that the Cincinnati property and the foundry property had both been sold for cash; is that correct?

A. Yes.

Q. Efforts had been made to reduce inventory and salaries had been cut, everything possible, every possible economy practiced?

A. That is right.

The Court: What year is that last one?

Mr. Babcock: June, 1930, your Honor.

The Court: All right.

[fol. 514] By Mr. Babcock:

Q. Subsequent to receiving the authority of the board of directors to consummate the plan of borrowing money from Mr. Lay and his associates, was the money actually borrowed from Mr. Lay and his associates?

A. Yes.

Q. And thereafter did Mr. Lay continue active interest in the affairs of the corporation?

A. You mean in its management? He was interested because he had this substantial block of common stock, and he put one of his men in there as an officer, as I recall. A man named Kuehneman.

The Court: What is the name?

A. Kuehneman, K-u-e-h-n-e-m-a-n.

By Mr. Babcock:

Q. And Mr. Lay was interested financially and actively in the General Parts Corporation too, wasn't he?

A. I always understood so.

Q. And it was the General Parts Corporation that sold to the Consolidated Concrete Machinery Corporation the [fol. 515] farm light plant division of Stearns Motor Manufacturing Company; is that correct?

A. Yes.

Q. Now, by the minutes of the directors of the Consolidated Concrete Machinery Corporation of September, 1930, Mr. Lay is a member of the board of directors, isn't he?

A. I didn't remember that he was. Yes. There is your list.

Q. Well, you have just invited my attention to the paragraph of the minutes of June 25, 1930, the annual meeting of stockholders, which reads:

> "The secretary therefore cast the ballot of the stock represented, 72,290.33 shares and declared Eugene F. Olsen, W. F. Kuehneman, Julius W. Freiberg, P. J. Heiler, A. J. DuPuis, G. W. Rappen, and S. W. Judd elected directors for the ensuing years."

Now, between then and September 3, 1930, do you remember whether Mr. Lay was elected to the board of directors?

A. I can't remember, no.

The Court: Doesn't the record show?

A. It should.

Q. At any rate, in the meeting of September 30, 1930, Mr. Lay was nominated for chairman of the board by E. F. Olsen, was he not?

A. That is what the book says. It must be so. Yes. Resignation of DuPuis was accepted, as a director. Frank Lay nominated by Kuehneman. So it was at that same meeting.

[fol. 516] Q. At the same meeting.

A. Mr. Lay did become a member.

Q. And he was elected chairman of the board of directors at that meeting?

A. That is right.

Q. And you were re-elected president?

A. Yes.

Q. And at that same meeting, the directors authorized the purchase from the Stearns Motor Manufacturing Company of its consigned accounts purchased from the General Parts Corporation for $20,000?

A. I didn't remember that, but it is of record.

Q. Now, we find the annual minutes of the annual stockholders meeting of June 24, 1931. You note that that incorporates the president's report?

A. Yes, sir.

Q. And that was your report, wasn't it?

A. Yes.

Q. And in that, in 1931, you advised the stockholders that the company had gone through another very trying year, is that correct?

A. Yes, sir.

Q. And during the past year, a complete new line of mixers had been developed and put on the market?

A. Right.

Q. You also advised the stockholders that you were working on efforts to get a contract with the Russian government?

[fol. 517] A. Right.

Q. If that were successful, it would prove rather profitable?

A. Right.

Q. And at that meeting, Mr. Frank B. Lay and others, including yourself, were elected directors of the corporation?

A. That is right.

Q. Now, we find a formal notice of a meeting of directors of the Consolidated Corporation, Consolidated Concrete Machinery Corporation, as of July 3, 1931, to be held at the office of Mr. Frank Lay in Detroit; is that correct?

A. Yes, sir.

Q. And the minutes of a meeting of directors, the board of directors, at Mr. Lay's office on July 8, 1931?

A. Yes.

Q. Is that correct?

A. Yes, that is correct.

Q. And at that meeting I find that Mr. C. E. Gregory resigned as a member of the board of directors?

A. Yes.

Q. And that Mr. E. F. Olsen nominated Mr. Jesse H. Besser to succeed Mr. Gregory as a director. Is that correct?

A. That is what the minutes say.

Q. That Mr. E. F. Olsen is yourself, isn't it?

A. Yes, sir.

Q. Then Mr. Carpenter resigned as a member of the board of directors?

[fol. 518] A. Right.

Q. And Mr. Costa nominated Mr. Frank R. Oakes to succeed him as a director?

A. Yes, sir.

Q. Then Mr. Costa resigned as a member of the board of directors?

A. That is right.

Q. And Mr. Besser nominated Anna M. Besser to succeed Mr. Costa as a member of the board of directors?

A. Right.

Q. Then Mr. Lay resigned as a member of the board of directors?

A. Right.

Q. And Mr. E. F. Olsen nominated Mr. Philip M. Park to succeed Mr. Lay as a member of the board of directors. Is that correct?

A. Right.

Q. Then at the adjourned special meeting of the board of directors on the same day Mr. Besser was elected chairman of the board, Mrs. Besser was elected secretary of the corporation, and Mr. Oakes treasurer of the corporation. Is that correct?

A. I presume so. I lost this Oakes only. Where is that? That is right.

Q. And you continued as president of the corporation, did you not?

A. I thought I was vice president, but let us see.

Q. Well, you were president at the time, were you not?

A. Up to the time of this meeting, yes, and I see no change here. This recites the changes that were made. Yes, it refers to President Olsen, "The meeting was called to order by President Olson." I see no place that I resigned or was replaced as——

[fol. 519] Q. Now, in the adjourned meeting of the board of directors of July 10, 1931, it appears that it was made known at that time if it had not been known before, that the interest and stock which was formerly held by Mr. Frank Lay of Detroit had been transferred to Mr. Besser?

A. Yes.

Q. And it was at that meeting of July 10, 1931, that you were elected vice president and sales manager?

A. That is right, and Mr. Oakes became president.

Q. Mr. Oakes became president of the corporation, did he?

A. That is right.

Q. And you continued as a member of the board of directors?

A. Yes.

Q. Now, we find a special meeting of the stockholders of October 9, 1931, and at that time the stockholders had presented to them for consideration the question of removing the company's office and factory from Adrian to Alpena. Is that correct?

A. Yes.

Q. And also the stockholders had presented to them for consideration a proposed contract under which the Besser Manufacturing Company would do the manufacturing for the Consolidated Concrete Machinery Corporation. Is that correct?

A. I believe that is right. I have not read this but it comes back to me that that is correct.

Q. And that action was approved by the stockholders and by the directors, wasn't it?

A. I believe so, yes.

[fol. 520] Q. And among those who approved it was yourself?

A. I presume I voted for that.

Q. Of course these minutes are just the stockholders; they will not show the owners but they just show the number of shares voting favorably on it.

A. I was wondering if there were any dissenting votes. I have forgotten.

Q. And in the minutes of that meeting there is set out the memorandum of agreement between the Besser Manufacturing Company and the Consolidated Concrete Machinery Corporation under which they were to consolidate the operations for the mutual benefit and interest of both companies and stockholders?

A. Yes, that obviously is the agreement.

Q. Now, as part of the minutes of that same meeting, the stockholders were presented with a problem because of the failure of the Security Home Trust & Savings Bank of Tol-do, were they not?

A. Yes.

Q. And by reason of that, it was the judgment of the stockholders that the officers be authorized and directed to negotiate for the sale of the real estate and the plant facilities at Adrian? Is that correct?

Q. That was your judgment at that time too, wasn't it, Mr. Olsen?

A. It apparently was, yes.

Q. Now, on October 9, 1931, there was a meeting of the board of directors of the Consolidated Concrete Corporation; it appears from these minutes that you as a director [fol. 521] attended that meeting?

A. Yes.

Q. As far as you know, that is a correct report, is it?

A. That is right.

Q. And among other things, the board there authorized the president and secretary to offer the company's real estate in the city of Adrian together with the plant equipment as may not be removed to Alpena, to offer them for sale at a total minimum price established by concurrence between the directors and a committee of Adrian stockholders? Is that correct?

A. Yes.

Q. Do you remember whether that program was carried out?

A. You mean the sale of the Adrian properties?

Q. Yes.

A. No, it was not carried out by Consolidated.

Q. Because you could not get a satisfactory sale?

A. I suspect that was the reason because the action I believe was perfectly sincere.

Q. Then in March of 1932, there was a special meeting of the stockholders at Alpena and that meeting was called to consider and act upon a proposition to sell and convey the property and franchises, rights and privileges and real estate to the Besser Manufacturing Company. Is that correct?

A. Yes.

Q. That occurred only after an effort had been made to make a sale to someone else or to someone of the public [fol. 522] of these assets at Adrian. Is that correct?

A. I presume so.

Q. Well, that is what these minutes reflect, isn't it?

A. Yes, and there is no reason to doubt the action.

Q. And we find also, do we not, a special meeting of the board of directors of the Consolidated Concrete Machinery Company on March 9, 1932?

A. Yes.

Q. In which the directors authorized the president and secretary to execute the documents necessary to make the sale to the Besser Manufacturing Company?

A. I believe I was not at that meeting. The absent directors have been penciled in.

Q. Now, we find a special meeting of the stockholders on May 28, 1932, those minutes do not seem to reflect who was present. Do you recall whether you were present at that meeting?

A. On May 28? I think not. I was in the East most of that spring. That is why probably I was not present at the March meetings there.

Q. But you knew that——

A. Is this the meeting we are talking about?

Q. Yes, sir.

A. Oh yes, some motion was offered by me there so I must have been there.

Q. You must have been there?

A. Yes.

Q. That is a resolution that the board of directors and officers be authorized to proceed with the liquidation of [fol. 523] the company?

A. Yes.

Q. And take such steps as might be necessary to wind up the corporation?

A. That is right.

The Court: What is that date, please?

Mr. Babcock: That is May 28, 1932.

By Mr. Babcock:

Q. That was your judgment, wasn't it, Mr. Olsen, that that was the best thing to do with the Consolidated Concrete Machinery Corporation at that time?

A. It must have been.

Q. I should complete this. Immediately following the minutes of the meeting of the stockholders we find the minutes of a special meeting of the board of directors on the same day, May 28, 1932, and that reports you present as one of the directors, doesn't it?

A. Yes.

Q. And the directors in conformance with the resolution of the stockholders authorized the president and secretary to take such steps as might be necessary and appropriate to wind up, dissolve, and liquidate the company?

A. That is right.

Q. And the last document in that corporate record book appears to be a printed form of certificate of dissolution, and among those signing is yourself, is it not?

A. Right.

Q. That is your signature there?

[fol. 524] A. Yes.

The Court: Is there anything there that shows what is going to happen to the assets of the company?

Mr. Babcock: The resolution, your Honor, says that any moneys remaining after the payment of debts, expenses and

disbursements would be distributed pro rata among the stockholders entitled thereto.

The Court: I know, but doesn't it show who takes over the assets, or what they are going to do with them?

Mr. Babcock: That is the only reference to assets is the distribution of the moneys. Your Honor will recall that these minutes reflect, first, an effort to make a sale to the general public of the plant and equipment at Adrian, and then later action of the directors directing the sale to the Besser Manufacturing Company.

The Court: The sale of the assets?

Mr. Babcock: Of the plant and equipment.

The Court: That is what I thought. That is why I asked if the Besser Company took over this Consolidated Company. Didn't they? And you remember you said that your analysis was not the same as mine.

Mr. Babcock: Well, I misunderstood your honor. I thought you meant in a corporate manner. They took it over in the sense that they bought the plant and equipment. [fol. 525] The Court: First they bought a majority of the stock, and when it didn't pay as a separate unit they just closed it down and took the assets, that is all. That is plain to the court, what happened.

Mr. Babcock: Well, of course, whether it was a majority of the stock, I think it will be shown——

The Court (interposing): I don't know whether it was a majority.

Mr. Babcock: A substantial block of the stock. Yes, your Honor.

The Court: Yes. You don't always have to have a majority, that is fifty-one per cent, to control a corporation.

By Mr. Babcock:

Q. Now, did you remain at Adrian until the plant of the Consolidated was removed to Alpena, Mr. Olsen?

A. I remained there until the production at Adrian ceased. Some of the machine tools and much of the inventory was moved to Alpena.

Q. Well, now, these minutes seem to reflect that the action of the stockholders and directors for the removal to Alpena was taken on October 9, 1931?

A. Yes. I recall that.

Q. Is that about the time when the actual removal was accomplished?

A. I believe so; yes, sir.

[fol. 526] Q. And is that about the time that you moved to Alpena?

A. I moved the first week in December.

Q. Of 1931?

A. Right.

Q. Well, now, from October of 1931 until May of 1932, what was your principal activity?

A. The selling of concrete block machinery.

Q. As a matter of fact, you spent a great part, the greater part of those six or seven months travelling throughout the different parts of the United States in an effort to sell machinery, didn't you?

A. I spent it travelling, all right, in an effort to sell machines and straighten out deals that had become messes in those bad times.

Q. And the machines that you were trying to sell at that time were the machines of the Consolidated Concrete Machinery Corporation?

A. You are taking me over a period from October, 1931, to——

Q. (Interposing) To May of 1932.

A. I also did work for the Besser Company in that period.

Q. Yes. You also made efforts to sell the Besser products?

A. Yes.

Q. But you were also trying to sell the machines of the Consolidated Concrete Machine?

A. That is right. I believe I was sales manager of both [fol. 527] companies.

Q. And your efforts to sell the machines of the Consolidated Concrete Machinery Corporation were just as serious and just as intense as your efforts to try and sell the products of the Besser Manufacturing Company?

A. Well, yes. I can't remember how that was divided, but there was no reason why they wouldn't have been.

Q. And you were making a determined and a sincere effort as best you knew how to serve and to promote the

interests of the Consolidated Concrete Machinery Corporation?

A. Yes. That is where my heart really lay.

Q. And after you had made this sales effort, you had found it, despite all of your efforts, impossible to make a sale of a single machine during that particular period, hadn't you?

A. I can't remember whether that is correct or not.

Q. I mean, for the Consolidated Machinery?

A. I can't remember the answer, whether that is a correct statement or not.

Q. You wouldn't deny it, would you?

A. No, because I can't remember.

Q. And confronted with conditions as you found them to be after that trip over the territory, the conditions generally as you knew them to be, you joined in the judgment of the other directors that the best thing to do was to dissolve and wind up the Consolidated Concrete Machinery [fol. 528] Corporation?

A. Yes.

Q. Now, you remained then with the Besser Manufacturing Company how long after May of 1932?

A. Until the middle of July, 1932.

Q. Now, in addition to the Consolidated Concrete Machinery Corporation, in your efforts as sales manager of Besser Manufacturing Company you learned that the Besser Manufacturing Company was having its financial problems at that time also, didn't you?

A. Yes.

Q. And, as a matter of fact, in June and July of 1932 there was an item of accumulated unpaid salary in your favor owing by the Besser Manufacturing Company, wasn't there?

A. I can't remember as to that.

Q. Well, I wonder if perhaps Exhibit 114, which is the agreement between you and the Besser Manufacturing Company for the transfer of property pertaining to the Stearns Manufacturing Company of July 16, 1932, paragraph 6 of which appears to read:

> "First party agrees to pay second party all salary due him as appears from the books to date, such back

salary to be paid at the rate of $400 per month commencing August 1st, 1932, until payment is fully paid and thereafter to pay first party the sum of $100 per
[fol. 529] month on the first day of each month following settlement of salary account until the further sum of $600 is paid."

A. Yes. That is the agreement.

Q. Does that refresh your memory?

A. That would indicate there was some back salary due me.

Q. And you also had, at the time of your termination of your official connection with the Besser Manufacturing Company, two hundred shares of stock of the Besser Manufacturing Company?

A. Some block of stock. I presume that was the number.

Q. And upon the termination of your position as sales manager of the Besser Manufacturing Company, by way of settlement of these obligations for the purposes indicated by the agreement, this agreement of Exhibit 114 was entered into under which there was turned over to you the property pertaining to the business of the Stearns Manufacturing Company?

A. In Adrian there.

Q. Yes.

A. Yes. And subject to a mortgage, I believe.

Q. That is right. Now, that property was not only subject to a mortgage but in that you agreed that you would not permit that property to be used for the purpose of manufacturing concrete block or products machinery; is that correct?

A. Right.

[fol. 530] Q. And subsequent to that, and for a matter of approximately two years, you and Mr. Besser carried on negotiations for the removal of that restriction in that agreement? I mean by that restriction, the agreement not to engage in the business of manufacturing concrete block machinery?

A. Yes; at some point in that two year period we had negotiations.

Q. From time to time as you met him you talked to him about it and corresponded with him about it?

A. I can't remember. I wouldn't say yes or no. We finally did arrive at such an arrangement.

Q. And that arrangement at which you arrived is reflected in the agreement Exhibit 110?

A. Yes; that is right.

Q. Now, during the period between July, 1932, when the Adrian property was transferred to you, and June, 1934, when the agreement removing the restriction upon its use was made, what use did you make of that property?

A. I used one of the lesser buildings of the group for the manufacture and sale of farm lighting plants, which was the little subsidiary of Consolidated that was not removed to Alpena, but continued to function at Adrian in that period that I was in Alpena. Just two employees, so it was a small set up, but that is what I did in the period you have questioned me on, was to operate that little light plant business.

[fol. 531] Q. Now, at the time of the consummation of your negotiations with Mr. Besser about the removal of the restriction upon the use of this Adrian property, you advised him, did you not, that it was your purpose and intention to go into the business of manufacturing concrete products machinery?

A. Well, I must have, because I wanted the restriction lifted so I could.

Q. As a matter of fact, Exhibit 110 reads in one of its paragraphs:

> "Whereas second party now proposes to engage in the business of manufacturing such machinery."

A. Right. That is right.

Q. In the original agreement on July 16, 1932, which is Exhibit 114, the Besser Manufacturing Company had assumed some of the obligations for taxes on the Adrian property, had it not?

A. Yes.

Q. And in the agreement of June, 1934, which modified the earlier agreement, you agreed to assume that obligation of taxes?

A. That is right.

Q. And you also agreed to deliver to the Besser Manufacturing Company a release by the Adrian State Bank of any claim it might have growing out of its previous guarantee of the mortgage?

A. That is right.

Q. The release of liability for the taxes and the release from the guarantee on the mortgage were a matter of value [fol. 532] in the financial management of the affairs of the Besser Manufacturing Company, were they not, Mr. Olsen?

A. Yes. That was the consideration for what I received.

Q. Now, at that time, in June or July of 1934, when you acquired this Adrian property, did you have a plan or a design for a concrete block machine?

A. You said 1934, I believe. Do you mean 1932?

Q. No. I meant 1934, Mr. Olsen.

A. When I got the release?

Q. When you got the release; yes, sir?

A. Oh, I can't remember. It all started with the production of repair parts. That I remember. That was the immediate reason for wanting a release, so that we could make parts.

Q. Well, do I interpret from that that for some period of time, either long or short, after acquiring the property and having it released from the restriction, the principal occupation of your Stearns Manufacturing Company was the making of parts?

A. Yes, I would estimate that it was six to ten months from the time I got the release until we might have made and shipped even a small block machine.

Q. Well, who designed the first machine you did make?

A. In this 1934 period?

Q. Yes, sir.

A. If you are going to accredit that to one man, his name would be Bowerfind.

[fol. 533] Q. How long had you been working on the development of that machine before you actually completed it, ready for sale?

A. Oh, just several months; a very simple machine.

Q. That was a very simple machine?

A. Yes.

Q. Was that an automatic machine?

A. No, sir; power operated, but not automatic in the sense of the definition I believe I gave last week.

Q. And a tamper type machine?

A. Yes, sir.

Q. Well, when then did you begin the development work on the first more complicated machine of the Stearns Manufacturing Company?

A. Approximately 1935.

Q. And over how long a period of time did your development activities proceed?

A. Perhaps a year.

Q. These automatic machines such as on the market today, require more, before they are actually ready for the market, than just a blue print and to follow the blue print, don't they, Mr. Olsen?

A. Yes; if you have not built one before, you make a lot of mistakes.

Q. It requires considerable effort in developing and trial and error before you finally get what they call the bugs out of it?

A. Yes.

Q. So that when you finally put a machine on the market, you have contributed more to that machine than just the [fol. 534] acquisition of a patent right and its actual manufacturing cost, haven't you?

A. Oh yes, the patent in itself does not say that anyone who undertakes to use the patent can build a successful machine.

Q. Now, when was it that the Stearns Manufacturing Company was incorporated?

A. I am pretty sure that was 1936.

Q. And a great deal of its stock was offered for sale to the public?

A. No, not until 1940.

Q. Not until 1940. Between 1936 and 1940, who were the stockholders principally?

A. Myself, my son, my wife, Mr. Delamater, Mr. Mays. I believe that is all of them.

Q. In the meantime, about 1935, you had your contract

and connection with Mr. Gelbman about the use of his earlier patent?

A. 1935 or 1936.

Q. And when you did offer the stock to the public in 1940, you had already been actually manufacturing several different types of machines?

A. Yes.

Q. Among them was a machine called the Clipper Stripper?

A. Not in that period; it came a little later.

Q. Well, among the items of exhibit which the government has offered us here is Exhibit 2, which seems to list for the fiscal year ending August 31, 1939, nine clipper stripper block machines?

[fol. 535] A. Then I am wrong on the dates. Do you find a Stearns power stripper among those items? That is what I thought we called the tamp machine until about 1940.

Q. Well, these figures that they have given us here show seven model 15 for the years 1939, the Jolterete block machine, 46 machines up to August 31, 1939; the clipper stripper block machine, 9 up to August 31, 1939; and other block machines, 50.

A. Well, that's right then, we had started the clipper in the latter part of that period.

Q. Was that clipper stripper a tamper or a vibrator?

A. It was a tamper.

Q. Does the picture on page 583 of the 1949 Pit & Quarry Handbook, which I now show you, fairly present the Stearns clipper stripper?

A. That is it, yes.

Q. Now, because, perhaps I should say because, among other things, but at least included among the reasons, because of the shortage of that type of machinery following the war, the Stearns Manufacturing Company enjoyed quite successful sales of the clipper stripper in 1946 and 1947, did it not?

A. Yes.

Q. So that Exhibit 2 seems to reflect that on August 31, 1946, the sales of the clipper stripper were 247; and August 31, 1947, the sales of the clipper stripper were 265?

A. Yes.

[fol. 536] Q. Of course you left the active management of Stearns in the spring of 1948, wasn't it, Mr. Olsen?

A. Yes.

Q. But you do note, do you not, that in this same Exhibit No. 2, as late as October 31, 1948, the Stearns Manufacturing Company is still manufacturing and selling the clipper stripper to the tune of 40 machines?

A. Yes, that is right.

Q. And that is a tamper machine, isn't it, Mr. Olsen?

A. Yes.

Mr. Speer: I would like if I may, at the time that Mr. Babcock refers to, Exhibit 2 was furnished to the government by Stearns Company after Mr. Olsen was there, and I feel that he is not able to give answers that are founded on that. It was prepared by the——

The Court: If he does not, he is able to take care of himself, but he should say so. He should not answer something that he does not know. You may proceed.

A. I cannot tell that those are right but they appear to me to be logical and what I would expect.

The Court: Do not say anything that you do not know.

A. Then I cannot say hardly anything.

By Mr. Babcock:

Q. Well, it would appear from the figures shown in Exhibit 2 for the first ten months of 1948 that the clipper stripper tamper was the machine of which they sold the greatest number during that ten months period, wouldn't it?

[fols. 537-538] A. Yes, number of machines.

[fol. 539] Q. Mr. Olsen, prior to its demise, the Consolidated Concrete Machinery Company, under your direction, had built up quite a competent and successful sales organization, had it not?

A. Yes.

Q. And you know and remember, do you not, that after the dissolution of the Consolidated, most of that sales organization became connected with the Besser Manufacturing Company?

A. That is my recollection.

Q. As a matter of fact, there are several of them that are still connected with the Besser organization, are there not?

A. Yes.

Q. You are acquainted with Mr. Rhodes?

A. Yes.

Q. Mr. Paulson?

A. Yes.

Q. Mr. Neihouse?

[fol. 540] Q. Mr. Franklin?

A. Yes.

Q. Those four men were all at one time connected with the Consolidated, were they not?

A. Yes, they were with my company and I am quite certain it was in that period.

Q. And they are still connected with the Besser Manufacturing today, are they not?

A. I understand so.

Q. Do I understand correctly that it was along in the latter part of 1934, in fact November of 1934 that you made your first agreement with Mr. Gelbman relative to a license to use his vibrating principle?

A. I can't remember the date. I thought it was about 1935, but perhaps the 34 figure is correct.

Q. Well, I wonder if I can refresh your memory. You recall that in the so-called Bell suit in the United States District Court for the Southern District of New York, you testified as a witness?

A. Yes.

Q. And that was in 1942?

A. Yes.

Q. Is it fair to assume that your memory as to certain details of that nature was a little more fresh then than it would be today?

A. Yes. And perhaps I had refreshed my memory by reading or looking into records.

[fol. 541] Q. Now, please permit me to read to you one or two questions and answers:

"Q. Is this Stearns Manufacturing Company that you refer to one of the plaintiffs in this suit?

"A. Yes.

"Q. And will you explain how this comes about?

"A. The Stearns Manufacturing Company is an exclusive—has certain exclusive rights under the patent in question.

"Q. And is that by virtue of a written agreement?

"A. That is right.

"Q. What was the date of the license agreement under which you first acquired such license rights?

"A. November 13, 1934."

Mr. Neville: May I ask what you are reading from, Mr. Babcock?

Mr. Babcock: A transcript of the testimony before the Honorable Simon H. Rifkind, District Judge, in civil action No. 7-314, United States District Court for the Southern District of New York, in a lawsuit entitled Hamlin F. Andrus, Louis Gelbman, and Stearns Manufacturing Company vs. H. W. Bell Company, Inc., under date of April 9, 1942.

Mr. Neville: Thank you.

A. As I say, that establishes that date you are after.

By Mr. Babcock:

Q. Does that recall to your mind that you were asked such questions and gave such answers at that time?

[fol. 542] A. I recall being a witness in that trial.

The Court: Who was he a witness for?

Mr. Babcock: Stearns Manufacturing Company.

The Court: Did they bring the action?

Mr. Babcock: They were one of the plaintiffs in that action.

The Court: And who was the defendant?

Mr. Babcock: H. W. Bell, Inc.

The Court: Oh yes. Well then he would have been on the same side as Besser at that time?

Mr. Babcock: No, your Honor.

A. No, sir.

The Court: Or against them. Besser had given Bell——

Mr. Babcock: Besser was assuming the defense for the Bell organization.

The Court: That is right.

By Mr. Babcock:

Q. Perhaps we can make it a little more certain, Mr. Olsen, if I direct your attention to Exhibit No. 111, one of the exhibits offered by the government in this case; the first paragraph under the word "Witnesseth" you will notice makes reference to three certain licenses, dated the 13th day of November, 1934, the first of July 1936, and the 6th of August, 1937?

A. Yes.

[fol. 543] Q. That establishes, does it not, that the 13th of November, 1934 is the date of the first agreement you had with Mr. Gelbman?

A. It would certainly seem to.

Q. Now, prior to that date, prior to November 13, 1934, you knew about the so-called Flam machine, did you not?

The Court: I did not get that word.

Mr. Babcock: Flam, F-l-a-m.

A. I cannot remember that; I cannot remember whether or not I knew of it at that period.

By Mr. Babcock:

Q. Well, permit me to see if we can refresh your memory with some further questions and answers in the same trial to which I just made reference a moment ago:

"Q. Now, at this time, that is prior to your agreement with the patentees, were you familiar with the machines for making concrete blocks that were offered to the trade by your competitors?

"A. Oh, yes, by reason of my business it was necessary that I do keep informed of everything that I could and I think that reached anything that was in commercial use.

"Q. And what type of machines did you know about at that time?

"A. Well, these tamping types and pressure types that I mentioned; there were those; and then there was a machine used in relatively restricted sections of the country known as the Flam machine, primarily on the West Coast and some in the Southeast; this was a vibratory type machine but was not used generally [fol. 544] because it was restricted to the use of a mix of concrete so wet that when you made units of what was considered and are considered a standard height, that is eight inches, and with thin webs, that wet concrete would swamp and not maintain a plain face; but in units up to perhaps four inches high and with relatively thick webs it would mantain sufficient shape to use."

Does that refresh your memory on the matter?

A. Oh yes, surely.

Q. So that prior to November 13, 1934, you were acquainted somewhat at least with the Flam machine?

A. Yes.

Q. And you knew of it as a vibrator type machine?

A. Yes.

Q. And you knew and recognized that while the theory of the machine as it appeared at that time was good, in practical result it had these difficulties that are mentioned in the testimony I just read?

A. Right.

Q. Now, did you not also know at that time of a machine sometimes referred to as the Stone Tile?

A. I know of it now certainly, and have for many years. I probably knew of it then. If I testified there that I did, I will certainly say I did.

Q. All right, let me refresh your memory by some further examination.

"Q. Did you know of another machine that was being [fol. 545] offered to the trade of the vibrating type any other than Flam?

"A. Well, there was a lot of experimental work going on; I will try to confine this to what was used commercially to enough degree to be a factor at all; exploitation was made of another vibrator machine in

the West and in the Southeast again, known as Stonetile; it had the same limitations as the Flam machines as to the height and web thicknesses of units that were practical to use. I had particular occasion to know about this Thomas development——

"Q. Wait a minute; you say Thomas development. Who is Thomas?

"A. I am taking too much for granted. He was always identified with this Stonetile."

A. That is right.

The Court: Sout what?

Mr. Babcock: Stonetile—T-i-l-e—Stonetile.

The Court: Is that a trade name of some kind?

A. Yes.

By Mr. Babcock:

Q. Continuing:

"He was the man most active in the exploitation of the Stonetile proposition, and after he ceased to exploit that, he came to our factory in the late twenties and asked to use our facilities because he would like to do some research work in an effort to develop a vibration machine with which he might make so-called [fol. 546] standard height and web thickness units."

Does that refresh your memory?

A. Yes, that is correct.

Q. Now, you also know from your experience in the industry that connected with this Thomas E. Stone Tile development was a man by the name of Scott, do you not?

A. No, that I do not know.

Q. You do not recall that?

A. No.

Q. Now, do you recall that it was approximately in 1928—you refer to the late 20's—when Mr. Thomas was in your plant doing his research work?

A. I recall that he was there. I couldn't have told you what year.

Q. And that while he was there, he built various molds and vibrating devices?

A. In an experimental way.

Q. That is what I mean.

A. Yes, sir.

Q. And after several months, he gave it up?

A. He left the plant.

Q. And your company had no further connection with him?

A. That is correct.

Q. Well, you do know that subsequently concrete block machines using his patent came into quite general use in the industry?

[fol. 547] A. That I do not know.

Q. Now, after your contract with Mr. Gelbman, the first machine that your company made——

Mr. Speer (interposing): Excuse me, Mr. Babcock, Would you tell us what contract you are now going to ask Mr. Olsen about? I understand there was one in 1934 and one in 1936, one in 1933, and one in 1942.

Mr. Babcock: Certainly. I am at the present time referring to the 1934 contract.

Mr. Speer: Thank you.

By Mr. Babcock:

Q. After you- 1934 contract with Mr. Gelbman, the first machine that your company made was a machine that you put into a plant of a man by the name of Hogg at White Plains, was it not?

A. I do not remember that.

Q. Well, perhaps I can refresh your memory on that question, referring to the same previous testimony:

"Q. Now, after entering into this agreement, what did you do, if anything, toward building concrete block machines embodying the vibration principle?

"A. Well, I appreciated that the machines Mr. Gelbman had were not sufficiently sturdy to stand daily operation but felt that the principle he had employed was sufficiently valuable to attempt to make a machine

built around that principle, which would stand up and that we had finished the first one in late——

"Q. Now, what did you do with that machine?

[fol. 548] "A. Well, much against our better judgment, we let a man named Mr. Hogg at White Plains put the machine in his plant. He felt that it was practical to put it in but we later took it out because it did not stand the abusive vibration that it was getting."

A. It must be right.

Q. Now, two years later—strike that. Perhaps I shouldn't say that because the date of putting the machine in the Hogg plant isn't fixed—but in 1936, your second machine was placed in the plant of the Toledo Cement Block Company, wasn't it?

The Court: What year is that? 1936?

Mr. Babcock: 1936.

The Court: 1936.

A. I think you have the name of the plant wrong. It was the Toledo National Cement Products Company, I believe was the name.

By Mr. Babcock:

Q. Well, just to be sure that we are on right ground, let me read another question and answer:

"Q. Did you subsequently build another machine of the vibrating type?

"A. Yes. We added or made the machine stronger and in 1936 put a machine in Toledo, Ohio, in the plant of the Toledo Cement Block Company. This was not sold but put into heavy run tests. We did take people to see that machine from many places around the country."

[fol. 549] A. Well, we are talking about the same machine, but I think there is confusion, there must have been at that time, about the name of the plant.

Q. I see.

A. The owner's name, in either case, is Fellabaum.

Q. I see. But in any event, you merely had the machine there for demonstration purposes?

A. That is as I recall it, yes, and test.

Q. And that machine gave you quite a lot of trouble, didn't it?

A. I suppose so. I can't remember much of any detail.

Q. Well, will this refresh your memory:

> "Q. Subsequently to the Toledo machine, did you build another machine?
>
> "A. Yes. The Toledo machine gave quite a lot of trouble and so we finally took it out and made what we thought was still a better machine and in 1937 sold that machine to the Malstead Material Company."

A. I remember that.

Mr. Speer: Mr. Babcock, excuse me a minute. I would like to ask Mr. Babcock, your Honor, what the particular purpose is in this line. He is talking now about conduct and activities of the Stearns Company in the year 1934, 1935 and 1936. I don't know what bearing it has on this case.

The Court: Do you care to answer that, Mr. Babcock? [fol. 550] Mr. Babcock: I am assuming that to be an objection.

I say to your Honor that I think it is very important, in view of the economic questions involved, and I think it will help the court in its final determination, the conception of the problems that these men engaged in this business were faced with, to show that and to develop that the answer was not found simply in getting the patent and blueprint; that it took years to develop the machine and the obstacles he had to overcome in engineering and going through all the practical applications of the matter before they had something to offer to the trade, it was something that had *had* contributed to it so much more than just the acquisition of the patent, that it had so much more value than just the mere acquisition of the patent, that it was more involved in the watchful care of the industry than a mere protection of patent rights, there was more involved in the watchful care of the industry than what would appear

to be, perhaps, inconsequential, namely, the immediate conferences with some individual who might start a business in an alley garage somewhere. On the face of it, that would appear to be inconsequential, but if the alley garage is actually copying the machine that has taken all the years of engineering and labor and effort to develop in addition to the patents, it is not an unreasonable thing, and we are governed by the rule of reason in the antitrust matters. It is not an unreasonable—for them to protect what they [fol. 551] had spent years in developing within the realm of reasonable conduct, of course.

The Court: Well, if that is your purpose, I think you can cut your examination short, because the only question here is one of monopoly. The birth pains they had in becoming the organization that they are, I think you can go over. Every business has that kind of trouble. But even if that were true, that doesn't justify a monopoly under our laws, does it?

Mr. Babcock: No, but it may enter into a consideration of what is and what is not an attempt to create a monopoly.

The Court: Well, I do not want to shut you off entirely, but I do think you can cut it down considerably more than you have.

[fol. 552] By Mr. Babcock:

Q. Well, now, I have just made reference to another machine in 1937 which was identified as the Malstead machine. The fact is, you had a lot of trouble for a matter of weeks and months after installing that machine, didn't you, Mr. Olsen?

A. I presume so. The second one was put in, however, not to replace the first one.

Q. Well, it wasn't, in fact it wasn't until 1938 that you finally concluded that you were settled down to production and had removed most of the bugs in the machine, isn't that true?

A. I think so.

Q. Now I would like to refer to an item of your testimony given in this court the other day, on May 16, on the

direct examination by the plaintiff, on page 9 of the transcript of your testimony:

"Well, currently, or at any time as far as you know, has there been a tamping machine with a capacity of 400 blocks an hour with a daily production of at least 2500 blocks?

"A. Yes, there are. I believe no longer made or offered for sale, but there have been tamping machines of that capacity.

"Q. And can you tell us approximately when they disappeared from the market?

[fol. 553] "A. Well, they started to disappear in 1939 or 1940.

"Q. Then it is your testimony that since 1939 or 1940, there have been no tamping machines qualifying as high production machines?

"A. I think that is not quite correct, but the market for tamping machines has rapidly gone down."

Do you recall that examination?

A. Yes, sir.

Q. Now, I am a little confused, Mr. Olsen, because the government Exhibit No. 2 indicates that in 1939 for the fiscal year ended 1939, the Stearns Manufacturing Company sold nine of the clipper stripper block machines. The clipper stripper block machine was a tamping machine, was it not?

A. That is right.

[fol. 554] By Mr. Babcock:

Q. Now, you note, referring again to Exhibit No. 2, that after making nine of the tamper machines in 1939, according to the Stearns figures for 1946, they made and sold 247 of these machines, and in 1947 they made and sold 265 of these machines, is that correct? Is that what appears on this exhibit?

A. Those figures I think are right; I cannot recall that they are exactly right, but that was not the trend of the industry.

Q. Does that indicate the market going down?

A. Oh yes, because these were not high production machines.

The Court: Was the market on tamping machines going [fol. 555] down?

Mr. Babcock: Yes, your Honor.

The Court: Is that disputed? Is it disputed that the tamping machines have almost become extinct of this industry?

Mr. Babcock: Well, does your Honor intend by that question to refer to today or to the years when the government is presenting this problem; in 1946 and 1947 certain of the three years that the government is emphasizing, that was not true.

The Court: I was under the impression it was. You mean the tamping machines were increasing in number, or decreasing?

Mr. Babcock: During those two years, yes.

The Court: Well, that may be so. It was not my impression. My impression was that they were out of the business. When did the final Gelbman patent, the method patent, come out?

Mr. Stark: 1945.

The Court: That was allegedly the first pressure machine, wasn't it, Mr. Stark? Wasn't that the first time that pressure was present?

Mr. Stark: Vibration under pressure.

The Court: Yes.

Mr. Stark: I believe so.

The Court: Everything had been tamping up to that [fol. 556] time?

Mr. Stark: Oh, they had some vibration before that as shown by the Gelbman apparatus patent, which preceded that.

The Court: That was 1942.

Mr. Stark: Yes.

The Court: The Gelbman apparatus patent was vibration, wasn't it?

Mr. Stark: That is correct, vibration under pressure.

The Court: Is pressure mentioned in the Gelbman 1942 patent?

Mr. Stark: In the apparatus patent, oh yes. This method patent is a division of the apparatus patent and it was shown in the drawings and that was the type of machine, and that was pending quite a long time before 1942, also, back in the 30's.

The Court: Yes, I know that.

Mr. Stark: Since 1938, I believe.

The Court: Yes, that was 1938. The Scott patent was entirely vibration, wasn't it?

Mr. Stark: They did not show pressure.

The Court: They did not show pressure on tamping.

Mr. Stark: Yes, that went back to 1927.

The Court: Are you sure that the apparatus patent—I am not disputing you, but are you sure that the apparatus patent was a pressure patent?

[fol. 557] Mr. Stark: A copy of it will show.

The Court: Well, what is it?

Mr. Stark: No. 2,275,676.

The Court: Will you look at it for me, please, and tell me which claim it is? You may proceed, Mr. Babcock.

By Mr. Babcock:

Q. Now, were the two years of 1946 and 1947 abnormal years in the industry?

A. In some respects.

Q. In what respects?

A. A great many people, including many who had gotten out of the service, started small block plants with low cost equipment and also little capacity.

The Court: Everybody was going to get rich and there was the need for building houses?

A. Yes. The mortality rate was nearly 100% after that, but that accounted for this flash of sales for this rather clever slipper tamping machine. The major trend, however, even through that period was away from tamping. I think everyone familiar with the industry agrees with that.

By Mr. Babcock:

Q. So that that period of time was not a normal criterion?

A. No, sir, not in that respect.

Q. Now, in 1929 you, of course, were connected with the Consolidated Concrete Machinery Corporation?

A. Yes, sir.

Q. Do you recall whether Consolidated was called upon by the Department of Commerce in 1929 to supply figures [fol. 558] for its census report?

A. Oh, I cannot remember that.

Q. Now, during the course of your direct examination, do you recall being shown Exhibits 102, 104 and 106?

A. Yes.

Mr. Babcock: I think I should correct that. I am not sure whether they were shown to the witness or just offered at that time.

A. I cannot remember either.

By Mr. Babcock:

Q. But I will call your attention to them.

A. Yes, sir.

Q. Let us take first of all the Exhibit 102. You recognize it as a photostatic copy of the corporation income tax return of the Consolidated Concrete Machinery Corporation for the fiscal year of 1929?

A. Yes.

Q. Now, Mr. Speer has read into the record from this exhibit the top figure of gross sales from trading or manufacturing. I invite your attention to the figure of Item 24, net income, $39,417.54. As a matter of fact, Mr. Olsen, that is a loss, is it not?

A. Yes, the gross was 311, expense 350. Well, the photostat could not show it in red. That would appear to be loss, yes.

Q. In accounting practice, that would be a red ink figure?

A. Yes.

[fol. 559] Q. And on the face of the return you paid no tax? Is that correct?

A. I would have to study that some more.

Q. You note down here the word "none"?

A. Balance of tax, none, that is correct.

Q. That is because you operated at a loss, isn't it?

A. I presume so, I do not know any other reason we would avoid tax.

Q. All right. Let us refer to the next exhibit, 104, which is the corporation income tax return for the fiscal year 1930 for Consolidated. Mr. Speer has referred to the figure of $388,000 and some odd dollars as the gross sales from trading or manufacturing. I invite your attention to the figure which is Item 24 on the exhibit, $57,391.30 I guess it is, or 20 cents.

A. I don't know.

Q. That too is a loss figure, isn't it?

A. Yes, that appears to be a loss.

Q. That is the amount of the expense of operation over the income?

A. That is right.

Q. And again the corporation paid no tax because it had no net income?

A. Right.

Mr. Speer: Excuse me, Mr. Babcock. May it please the court, is it important to this case that this company operated at a profit or at a loss for those particular years?

[fol. 560] The Court: I do not think so.

Mr. Speer: I do not think so.

The Court: Do you object?

Mr. Speer: I object.

The Court: The objection is sustained. We have to cut this down some place, gentlemen. You say there is an objection?

Mr. Speer: Yes, your Honor.

The Court: Of course the question and answer are in now.

Mr. Speer: I believe it is in for the year 1929 and 1930.

The Court: Well, he started it and he might as well finish, but it should not take so long to get these questions and answers in, gentlemen. Have you found out what that claim is, Mr. Stark?

Mr. Stark: Yes, Claim 7, line 50. It also appears at page 8 at the top in the specifications.

The Court: Well, I do not care about the specification. I am talking about the claim.

Mr. Stark: Yes, Claim 7, line 49.

The Court: Let me read it, please.

(Short delay.)

The Court: All right. That as I remember, is the first pressure head and one of the reasons for the Gelbman patent, that is I mean one of the claims, although in neither [fol. 561] brief furnished me is that emphasized. All right.

Mr. Neville: Your Honor, I was about to say that if my memory serves me correctly, this particular witness testified to that same effect yesterday. I think he testified on the financial losses of the Consolidated.

The Court: You make your objections and I will rule on them.

Mr. Neville: Therefore, the government objects to any further testimony on that score.

The Court: If it was covered yesterday, yes. If not, it may be covered, but briefly. Just what do the reports show?

Mr. Babcock: Well, there were two things I had in mind in connection with this, your Honor. The manner and form in which the government has produced these exhibits is by photostat. The originals of them, if they had taken the trouble, to get those from the treasury department, would have shown the figures in red ink and they would have spoken for themselves. But, as photostats, they do not speak for themselves. They do not show that distinction, and I think that in order to cover the complete explanation of the exhibits offered by the government, that we have that right.

The Court: I do too, but you take so long on the question, Mr. Babcock. You have the right to show that. Of course, you and I know the difficulty of getting these originals from the government. We always use photostats. But where [fol. 562] the photostats do not give a correct impression, or give the wrong impression, certainly it should be made right on the record.

All right.

By Mr. Babcock:

Q. Referring now to Exhibit 106, which is the tax return for 1931 for Consolidated, that also shows a net loss in 1931, does it not?

Mr. Speer: Excuse me. I do offer an objection, if he is going to testify whether it was a profit or a loss.

The Court: He has gone this far. It takes less time if he goes through it. But the questions have to be cut down, gentlemen, or I will rule them all out. I want to give you the advantage of making a record, but it can be done in much less time.

He may answer.

A. Yes. That appears to be the same situation.

The Court: All right. You have answered it.

By Mr. Babcock:

Q. Now, during the course of your direct examination, the government also offered plaintiff's Exhibit 109, which was a report of the Department of Commerce census of manufacturers for the year 1931. Did Stearns Manufacturing Company make reports to the Department of Commerce regarding that census of manufacturers, do you remember?

Mr. Speer: I object, your Honor.

The Court: Did what?

Mr. Speer: I am going to object to the question because [fol. 563] Stearns Manufacturing Company, in the year 1931, as far as I know, was not engaged in the concrete block machine industry.

Mr. Babcock: I think counsel is right. I should not have used the word "Stearns".

The Court: All right.

By Mr. Babcock:

Q. Did Consolidated Concrete Machinery Company make a report for the census of manufacturers of 1931, if you remember?

A. I don't remember.

Q. Now, also with reference to the Exhibits 102, 104 and 106, in 1929 was the Consolidated Concrete Machinery Corporation making parts for block machines?

A. Yes.

Q. And what would be your best judgment as to the percentage of gross sales which would be from parts?

A. I couldn't remember that.

Q. It would be substantial, wouldn't it, Mr. Olsen?

A. I would judge so.

Q. And when the Exhibit 102 report gross sales of $860,608.99, that includes the income from the sales of parts, doesn't it?

A. It must have. Total sales.

Q. And when the tax return for 1930 shows a figure we have used for gross sales, in the tax return for 1931, shows the figure for gross sales, that includes the income from sale of parts, does it not?

A. I would think so.

[fol. 564] Q. Now yesterday we observed in going through the records of the Consolidated Concrete Machinery Corporation that the directors authorized the officers to initiate negotiations relative to the manufacture of washing machines. Did the Consolidated ever enter into the manufacture of washing machines?

A. I think that they did. But don't be misled. It was not machines for washing clothes. It was for washing industrial stampings and die castings and such.

Q. Very well. Then you think they did enter into that manufacture?

A. As I recall, that was done in a limited way, the manufacture.

Q. Well, the postings from that manufacturing activity would be included in these gross sales figures too, would they not?

A. I would judge so.

Q. Now, also we observed yesterday in going through the affairs of the Consolidated that the officers and directors at one time considered going into the manufacture of pin-setting machines. Did the company ever go into that activity?

A. My recollection is that they started and backed away almost before they started. I think there was no dollar volume of consequence whatever.

Q. So there were no sales?

A. Substantially none, if my recollection serves me.

Q. We also observed in going through the affairs of the Consolidated Concrete Machinery Corporation that from

time to time it sold some of its inventory of equipment and real estate assets—or am I wrong in that? Was it just the plants?

A. I don't know what you mean. In 1929.

[fol. 565] Q. In 1929, '30 and '31?

A. Yes. In 1931, I recall there was some scattered machine tools sold.

Q. And is it fair to assume that the returns from those were included in the figure of gross sales shown in the tax return?

A. Yes.

Q. Now, during the course of your direct examination, you were asked if prior to the sale of your stock in the Consolidated Concrete Machinery Corporation, you had been on the board of directors and after the sale of your stock if you continued on the board and for what period of time, and then what period of time transpired between the sale of your stock and your dismissal or resignation from the company. And you advised some nine or ten months. Your sale of your stock in the Consolidated had nothing to do with your ceasing your employment with the Consolidated, did it, Mr. Olsen?

A. My sale of stock in Consolidated?

Q. Yes.

A. Why, I didn't cease my employment with Consolidated until after I had sold.

Q. Some time after you had sold your stock?

A. That is right.

Q. The only reason that you have ceased employment with Consolidated was because in the judgment of yourself and the other directors, it was best for the company to go out of business?

A. There wasn't any employer.

[fol. 566] Q. Now, you were also asked on direct examination about the Industrial Brownhoist matter. You were connected with the Besser Manufacturing Company at that time, were you?

A. At the time in question. At the time I presume you refer to, the first half of 1932.

Q. You told us that certain officials of Industrial Brown-

hoist had called on you and asked to have Besser sue Industrial Brownhoist?

A. Yes.

Q. You were called upon in some official capacity with the Besser Manufacturing Company then?

A. Well, I assumed that. They came to the office and asked me to stop in, and so forth.

Q. Now, do you recall that you learned that the representatives of the Industrial Brownhoist Company approached Mr. Besser and asked him to buy the inventory on hand?

A. I wouldn't know as to that.

Q. Did you know that the Industrial Brownhoist general business was something other than the manufacturing of concrete block machinery?

A. Yes.

Q. Their general business was that of building equipment and machinery for heavy work, such as building bridges and cranes, and handling railroad cars and things of that kind, wasn't it?

A. That is what I understood it to be.

Q. And originally they were in business in Bay City, and [fol. 567] then later removed to Cleveland?

A. Yes.

By Mr. Babcock:

Q. You knew, did you not, that the manufacture of concrete block machinery was only a small division of the [fol. 568] Industrial Brownhoist Company?

A. I knew it was a minor part, yes.

Q. And you finally decided—they finally decided to discontinue that line of business?

A. Well, that had always been my understanding. I have no way of knowing it, certainly.

Q. Now, can you recall whether in 1939 or 1940 the Stearns Manufacturing—excuse me. One more question with relation to the Brownhoist. Do you know whether Industrial Brownhoist Company ever did manufacture and market a concrete block machine?

The Court: Concrete block what?

Mr. Babcock: Machine.

The Court: Machine?

A. It is my recollection that they did make and put into operation several. Not any large number.

Q. Now, do you recall whether in 1939 or 1940 the Stearns Manufacturing Company made any report to the Department of Commerce relative to the 1939 census of manufacturers?

A. No, I couldn't remember.

Q. You were also asked about the price that was paid to you for your stock in the Stearns Manufacturing Company at the time you sold it. You advised me that was $12.69 per share. And then you were asked if you had any information on what other shares of Stearns stock were sold for at or about that time and you advised us the information you had was from $8 to $10. Now, on the [fol. 569] basis of your business experience, you recognize that a purchaser would be quite willing to pay more for a large block of 30 to 35 per cent of the common stock of a corporation than would be offered on the ordinary market for a few shares, don't you?

The Court: Will you give me that question, or the last part of it again, please?

(Whereupon the reporter read the last part of the question.)

A. I think that that would be often the case. I can conceive of situations where it would not, but in general a controlling interest will command a higher price, in my opinion.

By Mr. Babcock:

Q. Whether or not it would be controlling, a large block would command a higher price in one block, wouldn't it?

A. I don't know.

The Court: Well now his opinion is not any better than mine and perhaps not as good. If you got 35 per cent of a small corporation, you haven't got control, but if you get 35 per cent of a corporation like Chrysler, or Ford or General Motors, you have got control. There is not any

question about that. So it all depends on the size of the corporation and the diversity of the stock. What does DuPont have,—around 25 per cent, is alleged, I do not say they have—in General Motors, and the government claims that is controlling. Twenty-five percent of a small corporation like several that you and I are acquainted with around town here, would not be controlling. So I can [fol. 570] understand his answer under these circumstances. All right.

By Mr. Babcock:

Q. Now, I would like to refer for a minute to your testimony regarding this meeting in Chicago with the various manufacturers in concrete blocks, which I think you fixed as occurring along in 1948, shortly after you had sold your stock in Stearns?

A. I believe that is right. I can verify that. April 14, 1948.

Q. Now, as a matter of fact, during the course of that meeting didn't the men present lead you to believe that they were going to invest money in your business and support you financially if you did go into business?

A. No, that is not quite correct. They told me they—do you want me to elaborate on that, or just answer it?

Q. Yes, I would like to have you.

A. They told me that they had met the day before and had made some tentative plans to organize a block machinery company to insure that they would have an additional source of machinery, but that if I were going back into it, they would drop those plans.

The Court: Who told you that?

A. This group in Chicago of block manufacturers.

The Court: All right.

A. And a closing remark—I cannot remember whether it was by someone of them or a statement for the group—they asked me if I would like to use the money they had [fol. 571] subscribed, and I told them no.

By Mr. Babcock:

Q. Subsequent to that time, have you ever stated to anyone that these men led you to believe that they were going

to support you financially and that you were disappointed later to discover they did not?

A. No.

Q. Have you ever made any remark of that nature in substance to anyone?

A. None that I recall because I turned down the offer and I think it was never repeated.

Q. Now, you also gave some testimony of your making a request for a patent license, discussing the problem with Mr. Gelbman and asking him to take the matter up with Besser and Stearns. As a matter of fact, throughout the years from 1934 when Stearns was incorporated, to 1948, when you retired from Stearns, you were the one who fixed the policy of the Stearns Manufacturing Company with relation to applications for license under the Gelbman patents, were you not?

A. I no doubt influenced the policy to a high degree. I was head of the company. I was its president.

Q. Well, was there anybody connected with the company with whom you discussed the matter?

A. We had a board of directors and the usual list of officers, and it was common practice to discuss it with the others, but the president, as is often the case in a small company, pretty largely determines that kind of a thing.

Q. And you were the one who carried on the correspondence, such as there was with Mr. Gelbman and with appli- [fol. 572] cants who corresponded with you relative to applications for license under the patents, weren't you?

A. At least in some cases. I recall some correspondence.

Q. So you were very well acquainted with the policy and the position of the Stearns Manufacturing Company at the time you testified that you asked Mr. Gelbman to grant you a license?

A. I was not familiar with the Stearns policy at the time I asked for the license because I was no longer with the Stearns Company. I knew what the policy of the Stearns Company had been.

Q. You left the Stearns Company in April of 1948, March or April, did you?

A. May, I believe.

Q. And it was in the summer of 1948 that you asked

Mr. Gelbman to take up with Besser and Stearns the matter of whether they would permit a license to issue to you?

A. That is right.

Q. Within those few weeks, or few months, you had become unacquainted with the policy of the Stearns Manufacturing Company?

A. I had no way of knowing what policies had been changed the day after I might have left.

Q. Now you also testified to a conversation on April 21, 1950, with Mr. Rosenthaler. And at the conclusion of your testimony relative to that conversation you said, "That is all of my notes on that trip." May I see those notes?

A. Yes, starting there and on the next page. (Produc-
[fol. 573] ing a small book.)

Q. I note that these items you have just handed me as your notes are typewritten, Mr. Olsen. When was that typing done?

A. I cannot remember but subsequent to my scribbling of the notes in longhand. I made my longhand notes promptly following those several or various incidents. The typing was all done at once from such longhand notes.

Q. And I note that by a series of typing in this small book the notes begin back in March of 1948. Did you have in mind back in March of 1948 that you contemplated using these notes at some future time?

A. No. It has been my customer for several years, in a diary-like affair, or book which I use for expenses and many other things, to make notes of conferences, and those are taken from such notes. I have notes in there that probably would never be used.

Q. You had none in your mind at that time that some day you would be testifying in behalf of the government?

A. No indeed.

Mr. Speer: Excuse me, Mr. Babcock. I object, your Honor. He has stated that it has been his ordinary——

The Court: On cross-examination he certainly has a right to inquire into that.

By Mr. Babcock:

Q. Now as a matter of fact, isn't it true that on the occasion of this visit to your office by Mr. Rosenthaler he came there to discuss primarily the matter of this sinter develop-
[fol. 574] ment project?

A. That is what he told me.

Q. And that in the course of the conversation you were the one who first initiated the matter of license under the Gelbman patent and asked him why a license could not be obtained under the patents.

A. I did not ask him that. I asked him if there was any change in Besser's previous attitude toward licensing Cocorp.

Q. And as a matter of fact, did he not state to you very plainly that he did not represent the Besser Manufacturing Company on any patent matter?

The Court: Who is this?

Mr. Babcock: Mr. Rosenthaler.

A. I recall no such statement.

The Court: Mr. Rosenthaler has been in court here?

Mr. Babcock: He has been identified as at the present time the treasurer of the company.

The Court: All right. I just wanted to make sure I had the right person in mind.

By Mr. Babcock:

Q. And as a matter of fact, didn't Mr. Rosenthaler tell you on that occasion that he could not discuss licenses?

A. I recall no such statement. On the contrary, he made some comments.

Q. And as a matter of fact, didn't Mr. Rosenthaler on that occasion say that you were the one who should know whether you were infringing on any patent?

A. I do not recall that statement.

[fol. 575] Q. Isn't it a fact that on that occasion you were the one who said that you refused to follow Mr. Besser's license program, and Mr. Rosenthaler then said that so far as he was concerned anyone who deliberately knew he was infringing and forced a lawsuit to protect a patent, could not reasonably expect in one hundred years to be licensed?

A. That is not the way I recall the conversation.

Q. But in any event that was not a matter for Mr. Rosenthaler but was a matter for Mr. Besser to decide and pass upon?

A. I would not know.

Q. I mean, isn't that what Mr. Rosenthaler told you?

A. No.

By Mr. Babcock:

Q. Now I would like to refer to your testimony relative to the so-called Goldcamp transaction; in telling us what your notes said or your memory said, I am not sure which, of the Goldcamp transaction you made reference to representatives or references of representatives of the Besser [fol. 576] Company; as a matter of fact, do you not know that prior to the time a Gocorp machine was installed at the Goldcamp plant, that a Besser contract had been signed and a deposit of money paid by the Goldcamp organization on the purchase of a Besser machine?

A. I do not believe I ever knew that.

Q. What were the terms of sale under which Gocorp installed the machine at the Goldcamp plant?

A. I cannot tell you that. Of course I could have found that out in our files. There was some money paid and some yet to be paid.

Q. Well, as a matter of fact, Mr. Goldcamp or his representatives drove the machine back to Adrian, the Gocorp machine?

A. Yes, it was delivered back, I believe in their truck.

Q. And they went from Adrian right on up to Alpena and got a Besser machine, didn't they?

A. I do not know as to that.

Q. And in your conversation with Mr. Goldcamp at or about the time he had the machine returned to you, he said that in the light of the trouble he had had with the machine, he decided to send it back?

A. In substance that was the explanation he used for bringing it back or for not keeping it. He brought it back for another purpose, but while it was back there he informed us not to return it to him.

[fol. 577] Q. Also during your direct examination you

produced a letter written to the Gocorp by the Taylor Concrete Products, Inc., which was identified as Plaintiff's Exhibit 115. In that letter there is a statement of a report that the machine you had in Benton Harbor was thrown out very recently because of broken corner posts and trouble with hydraulic cylinders. Did you have a Gocorp machine in Benton Harbor that was thrown out?

A. No, sir.

Q. Did you have a machine in Benton Harbor that had broken corner posts or trouble with hydraulic cylinders?

A. We had a machine in Benton Harbor, still have. It has no part known as corner post, so I don't know what they are talking about there. I think they have it confused with the Stearns Jolterete, which has a permanent part known as corner post. We have had mirror cylinder trouble in Benton Harbor, but there has never been any intimation that the customer intended to throw it out. He made substantial payments and is talking about buying another one.

The Court: What kind of a machine is that? How many pallets. Two?

A. Three at a time on one cylinder, the machine known as the Gocorp, the Gene Olsen Corporation.

The Court: Is that a different machine, supposedly, from the Besser machine?

A. Yes, sir.

[fol. 578] The Court: You haven't any right to use the Gelbman patents, have you?

A. We have no license under the Gelbman patent.

The Court: Nor Scott?

A. No, sir.

The Court: What patents are you acting under, if any?

A. One man named O'Conner, at Ann Arbor, with respect to the vibration.

The Court: You have vibration?

A. Vibration machine.

The Court: Suspended vibration? Well, that is all right. I won't ask you that. You don't have to answer that unless you want to.

A. I was trying to be sure I understood what you meant.

Q. I meant vibration that is free from——

A. (Interposing) Resiliently mounted.

The Court: Yes.

A. I don't — of any vibration machine that isn't.

The Court: That is not?

A. That is right.

The Court: That doesn't vibrate. I mean, when the feed box is over. What vibration, the mold, or the mold and the feed box?

A. We use no feed box.

[fol. 579] The Court: Oh, I see. You would say you don't know of any machine of that at least the claim is made that it doesn't vibrate a feed box when the mold does?

A. No, I wouldn't say that.

The Court: That is one of the claims of the Lith-I-Bar, isn't it, or the Lith-I-Block?

A. I don't know.

The Court: All right. You don't have any feed box?

A. No, sir.

The Court: Does the material go right from the hopper into the mold?

A. We pull the mold back under the main supply hopper.

The Court: You pull the mold back?

A. Yes, sir. That has certain advantages.

The Court: Yes.

A. It has certain definite advantages.

The Court: I see.

A. In our opinion.

The Court: That is the Gocorp machine, is it?

A. Yes.

The Court: The feed box is filled up, then it moves over to another operation where it is vibrated?

A. It vibrates while it is getting its feed, and it vibrates——

The Court (Interposing): That is also true of the Gelbman patent?

[fol. 580] A. That is right.

The Court: But there is no feed box?

A. No, sir.

The Court: And then does it move away and vibrate some more?

A. Moves out from under this hopper, this supply hopper.

The Court: Then it vibrates?

A. Pressure is applied while it is still vibrating, and the units are ejected.

The Court: Ejected by pressure?

A. Yes, sir.

The Court: Did you ever see the Gelbman, either one of the Gelbman patents? You must be acquainted with them.

A. My name is on one of them, at least.

The Court: I see.

A. As an applicant.

The Court: All right. The further I go in this thing the more I get into the mold or the feed box, or under pressure of some kind. All right. Sorry to interrupt you, Mr. Babcock.

Mr. Babcock: At least, you are getting your information right from the feed box.

The Court: Yes. Right from the feed box.

By Mr. Babcock:

Q. Well, that part of the rumor reported in the letter of Exhibit 115, is certainly false then, isn't it?

[fol. 581] A. In my opinion, and to my knowledge, it certainly is.

Q. And did you know the individual to whom reference was made in the same letter of when the name Crandall was mentioned?

A. Do I know Crandall, are you asking?

Q. Do you know the individual referred to when the name Crandall is mentioned in the letter?

A. I know it would be one of two, the father or the son named Crandall, who owned and operated this plant. That is a Gocorp machine.

Q. And the letter reads also that Crandall had purchased two Stearns 15 to replace the Gocorp?

A. I know the Crandall he would refer to, yes.

Q. Is that a fact, that Crandall purchased two Stearns to replace the Gocorp?

A. Not to my knowledge. In fact, my information is quite contrary.

Q. So that letter is also a false rumor, reporting a false rumor in that part of the letter?

The Court: Has there been any letter introduced?

Mr. Babcock: Oh, yes. The government introduced it. This is Exhibit 115.

The Court: To that effect. That is the one.

Mr. Babcock: That is the series of reports coming from customers and potential customers.

The Court; Showing the dire effect of the propaganda of the Besser Company, allegedly.

[fol. 582] Mr. Babcock: At least, that is what the purpose of it is.

The Court: I see. Has this man testified that he has been, or Gocorp has been threatened with infringement suit?

Mr. Speer: Yes, your Honor, he has.

The Court: All right.

Mr. Babcock: Well, I think probably that is a question for the court to conclude from a review of the testimony, as to whether he has been threatened or not.

The Court: I didn't say whether he had been threatened. You have a bad faculty, Mr. Babcock. I say, has he testified?

Mr. Babcock: He has testified to some conversation with individuals relative to patent infringement suits.

The Court: Yes.

Mr. Babcock: But whether they are threats or not——

The Court (Interposing): He claims it was a threat to him.

Mr. Babcock: I don't think he has claimed they were threats.

The Court: I will ask him, then, so that there will be no question about it.

Mr. Babcock: I object to his drawing the conclusion.

The Court: Did you look upon those claims or those [fols. 583-586] statements made to you as a threat to you of future infringement, or of infringement of the patent?

Mr. Babcock: May I object, if the court please?

The Court: Yes.

A. Certainly. I don't know how it could have been put any more plainly.

By Mr. Babcock:

Q. Mr. Olsen, in the course of the years that you were acting as president of the Stearns Manufacturing Company, in joining in the agreement for the exclusive license under the Gelbman patents, in exercising your judgment with reference to applications for licenses, did you intend to become a party to a combination in restraint of trade?

Mr. Neville: Objection.

Mr. Speer: I object, your Honor.

The Court: On what theory?

Mr. Speer: On the theory that a combination in restraint of trade is a legal theory, and that that is best proved by the facts in the case.

[fol. 587] The Court: I sustain the objection.

Mr. Babcock: I am not trying to prolong the argument but I want to be sure the record is clear that your Honor understands that I am contending that intent is an essential element under the allegations of the compalint.

[fol. 588] The Court: All right, but I disagree with you on that.

Mr. Babcock: In order to save time, I will advise the court that I have three other questions of a similar nature that I had planned to propound and I will read them.

The Court: You may ask them and I will rule on them as there may be a different point involved, but if you care to lump them in that manner, it is all right with the court.

Mr. Babcock: The questions are: Did you intend to conspire with the other defendants in this case to restrain and to monopolize trade and commerce?

Mr. Speer: I object, your Honor.

The Court: I sustain the objection.

Mr. Babcock: Did you intend to enter into a combination with the other defendants in this case to monopolize trade and commerce?

Mr. Speer: I object, your Honor.

The Court: I sustain the objection.

Mr. Babcock: Did you intend to conspire with the other defendants in this case to monopolize trade and commerce?

Mr. Speer: I object, your Honor.

The Court: I sustain the objection.

[fol. 589] By Mr. Babcock:

Q. Mr. Olsen, beginning with the time when the Stearns Company and the Besser Company joined with Messrs. Gelbman and Andrus in the agreement of 1942, and until the time you sold your stock in the Stearns Manufacturing Company, did Mr. Besser ever attempt to exert or to exercise any control over the Stearns Manufacturing Company?

A. No, I recall none.

Q. Or did any other officer or representative of the Besser Manufacturing Company attempt to exercise or exert any control over the Stearns Manufacturing Company during that period of time?

The Court: During what period is this?

Mr. Babcock: This is from 1942 when the exclusive license agreement was made with Gelbman and Andrus, until 1948, when Mr. Olsen sold his stock in the Stearns Manufacturing Company.

The Court: Was that during the period that the gov-
[fol. 590] ernment alleges the board of directors itself had control of the Stearns Manufacturing Company?

Mr. Speer: No, we have alleged that the stock was purchased by the Besser Company in the spring of 1948.

The Court: Oh, that is in 1948. I have to keep these companies separate. All right.

A. I recall none.

The Court: Up to that time, Besser owned no stock in Stearns?

Mr. Babcock: That is right.

The Court: They were two separate companies that were in the business?

Mr. Babcock: That is right.

The Court: All right.

By Mr. Babcock:

Q. And whatever judgment you exercised from time to time relative to applications for license to use the so-called Gelbman patents, was your own independent judgment, wasn't it?

A. For the company.

Q. Yes, sir.

A. For the Stearns Company.

Q. Yes, sir.

A. Yes.

Q. Now, as a matter of fact, Mr. Olsen, is it not true that throughout the United States there are a large number of manufacturers of concrete block machinery of various types, who have their own theory of machine manufacture, and who are not infringing upon the so-called Gelbman [fol. 591] patents or the Scott patent in any manner.

The Court: Wait a minute.

Mr. Speer: I object, your Honor.

The Court: On what grounds do you object?

Mr. Speer: On the ground that this man is not able to tell whether or not those other machines are infringing on any of these particular patents.

The Court: Well, isn't the government's case laid on the assumption that the Gelbman patent practically controls the trade? How can you blow hot and cold on this thing?

Mr. Speer: Well, your Honor, I do not think we are blowing hot and cold. The point I was making is that I do not think that this man is in a position to state whether or not these other concrete block machines in the country as a matter of fact do infringe these particular patents. I think that is what he was asked.

The Court: May I have the question over again? Perhaps the question even in cross-examination might call for a legal conclusion on his part. May I have the question again, please?

(Whereupon the last question was read by the reporter.)

The Court: I sustain the objection because of the last part of the question. If you desire to reframe it and add

[fol. 592] there, "And who claim that they are not infringing", then I will permit the witness to answer, because I take it for granted that everybody that is in the business that is not using the Gelbman patents or the Scott patents or even if some of them are using them under other names, they claim that they are not infringing. And for him to say that they are not is a legal question. If you desire to reframe the question, you may do so.

By Mr. Babcock:

Q. As a matter of fact, Mr. Olsen, isn't it true that throughout the United States there are a large number of small manufacturers of concrete block machines who produce machines that are dissimilar to the machines using the Gelbman patents and the Scott patent process?

A. Actually I can only give you my opinion in reply to that.

Q. Your Opinion on the basis of your years of experience in the industry?

A. I have no way of knowing. It is my opinion that there is not a large number who are making such machines and who are not infringing the Gelbman and/or the Scott patents.

Q. Well, are there some, in your opinion, if there are not a large number in your opinion?

A. In my opinion it would be very few, if any.

The Court: But you claim your own is not, don't you?

A. No, I have not claimed that.

The Court: Do you admit that your machine is infring-

[fol. 593] ing on the Gelbman patent?

A. No, sir.

The Court: Well, he asked you if you knew of some that were infringed, and you said——

A. (Interposing) No, I said Gelbman and Scott. I am not a patent lawyer, but the machines we are building are with the advice of counsel, naturally.

The Court: You don't think, according to your statement, that you infringe, as far as your machine is concerned, either the Gelbman or Scott patents, if those claims are good? Even if they are valid claims?

A. If they are valid, it is my personal opinion that we may be infringing on some part of it.

The Court: I see. All right. All right. There you are. You may have it.

A. They are pretty broad, those claims.

The Court: What you mean is that the interpretation desired to be placed upon them by Besser is pretty broad, isn't that what you mean?

A. Well, my reading of them tells me that they would read—or that I believe most any vibrating machine I know of would, or might be interpreted to read under one or more of the claims.

The Court: All right.

By Mr. Babcock:

Q. Mr. Olsen, do you recall that prior to the sale of your stock in the spring of 1948, your stock in the Stearns Manufacturing Company, Mr. Besser did own some stock [fol. 594] in the Stearns Manufacturing Company?

A. It was so rumored. None was in his name on the company records.

Mr. Babcock: I have nothing further, your Honor.

Cross-examination.

By Mr. DeGree:

Q. Mr. Olsen, would you refer to your memorandum book again with reference to testimony given on direct examination concerning conversation of January 31, 1950, with a Mr. Bailey at the Detroit Club? As I recall it, you stated that Mr. Bailey was referring to some previous subject which had been discussed between you with reference to buying you out; is that right?

A. Yes.

Q. Now, how many previous discussions to January 31, 1950, did you have with Mr. Bailey on that subject?

A. I believe two or three, at rather widely scattered intervals.

Q. Do you remember when the subject first came up?

A. Not very accurately, but it would have been in the late summer of 1948.

Q. That would be shortly after you had disposed of your stock in the Stearns Manufacturing Company?

A. Well, I would judge three to five months.

Q. Was any price discussed?

A. No.

Q. None whatsoever?

[fol. 595] A. No. Reference was made that I would recapture such investment as I had made, be held harmless or without want, but it was as vague as that.

Q. I see. Now, when you were connected with the Stearns Manufacturing Company, did that company manufacture a plain pallet, three at a time machine?

A. Yes.

Q. Are you familiar with whether or not there were any patents on such a machine?

A. Yes. The Stearns Company felt that that machine fell under at least the Gelbman patents.

Q. I see. Did Mr. Besser ever have any patent on that?

A. On the machine?

Q. On the plain pallet machine?

A. I wouldn't know.

Q. Did you have any conversation with Mr. Besser some time in 1936 or thereafter, concerning the Stearns Manufacturing Company making a plain pallet machine, three at a time?

A. I do not recall whether there was such or not.

Q. As a matter of fact, did you not tell us that his patents had expired under the plain pallet machine?

The Court: Tell whom?

Mr. DeGree: Mr. Besser.

By Mr. DeGree (continuing):

Q. And that you at the Stearns Manufacturing Company were going to start to manufacture a plain pallet, three at a time machine?

[fol. 596] A. I recall no such conversation, but it could have been. It is simply too far back for me to remember.

Q. Well, when you say there could have been, is it fair to imply that Mr. Besser did have a patent on the plain pallet machine which had expired?

A. Yes. That is a fair implication. There was a so-called plain pallet machine patent.

Q. That is right.

A. That did expire a few years ago.

Q. Then you know what I am talking about?

A. Yes, surely.

Q. And it is possible that you may have made that statement to Mr. Besser?

A. Quite. We visited on occasions.

Q. All right. Isn't it true that after this time, whenever it may have been, when it is possible that you made a statement to Mr. Besser that you at the Stearns Manufacturing Company were going to commence the manufacture of the plain pallet machine, my question is, it is after that time that you received your first offer, if you may term it as such, to sell out Gocorp to Besser, isn't that right?

Mr. Babcock: I object, if your Honor please.

[fol. 597] By Mr. DeGree:

Q. Do you have any independent recollection of such a conversation having been had between you and Mr. Besser concerning the Stearns making a three at a time machine?

A. No. I cannot recall definitely such conversation.

The Court: Either you remember that it took place or it did not take place, or you have no memory of it at all, and if you haven't why then it is too vague.

A. I have no memory of it, then.

[fol. 598] The Court: Well, all right.

By Mr. DeGree:

Q. Yes. Will you state what the capacity of a three at a time plain pallet would be?

A. Whose?

Q. Take the Stearns, for instance.

A. Approximately twelve eight-inch blocks per minute.

Q. Twelve per minute?

A. Yes.

Q. I see. What is the capacity of the Besser three at a time plain pallet machine?

A. It is known to have approximately the same capacity.

Q. I see. And both are what you would call high production machines?

A. Yes.

Q. Both are what you call automatic machines, are they not?

A. Yes.

Q. Is the cored pallet machine an automatic machine?

A. Being a cored pallet doesn't make it an automatic machine.

Q. Regardless of that fact, the machines known as cored pallet machines are not automatic?

A. No, there are—there is at least one that I would regard as automatic.

Q. And which one would that be?

A. The Stearns Jolterete.

Q. Would you call that fully automatic?

A. Through one cycle.

[fol. 599] Q. Well, fully automatic.

A. Fully automatic through one cycle.

Q. Through one cycle?

A. Yes.

Q. Is that what you mean?

A. Yes.

Q. You say one cyc?

A. Cycle.

Q. Yes, cycle.

A. And that is starting to get it technical. If it is very significant I would want to be pretty careful how I qualified them.

Q. Well, you say it is fully automatic through one cycle.

A. In this way. The operator manually puts the pallets in the mold box compartments. He then touches a button and it is completely automatic until the finished blocks are in front of the machine ready to be taken away.

Q. But with your plain pallet machine, it is fully automatic without any question, isn't that right?

A. It is automatic, cycle after cycle, without touching this button to start up each cycle.

Q. No manual operation whatever. That is right, isn't it?

A. Except the taking away of the finished units. But that is not regarded as a part of the making of them.

Q. Now, how many cored pallet machines are there on the market which are not automatic through one cycle?

[fol. 600] A. I would be guessing. There are a number.

Q. There are a number?

A. Yes. Maybe a dozen.

Q. Yes. But there is only one which is automatic through one cycle, and that is the Stearns machine?

A. Well, I wouldn't——

Q. (Interposing) Wait until I finish my question.

A. Pardon.

Q. There is only one on the market, as you have pointed out, as you said you knew of only one, as the Stearns Joltcrete machine.—Right?

A. I still don't get the question. I am not ready to testify that is the only automatic, if it is automatic.

Q. That is the question I asked you previously. Is there any cored pallet machine which is automatic, and you said you knew of one.

A. That is what I wanted to qualify, what made it automatic.

Q. Yes.

A. And I think there are one or two more. In fact, my company makes a small one that would qualify to that extent.

Q. I see. But unqualifiedly, is there any cored pallet machine which is fully automatic that you know of?

A. I want to know your definition of "automatic" then.

Q. Automatic in the sense that the plain pallet three at a time machine is fully automatic?

The Court: Well, you mean that you touch a button [fol. 601] and everything else from then on, except the feeding of the hopper, is that what you mean?

Mr. DeGree: Well, reference has been made here by witnesses to what is and what is not an automatic machine, and I want to find out.

The Court: What do you mean by an automatic machine? I know what I mean, but I don't know whether you and I agree on that. What is an automatic machine?

A. That is what is bothering me. My definition is that it is a machine, after it is started, that goes on and on, cycle after cycle, without manual aid in the manufacture of blocks.

The Court: Well, that doesn't include the hopper, does it?

A. No, the material must be—that is assuming that material is furnished and the finished product is taken away from the machine.

The Court: All right. You feed it. The first thing that happens is that the plate that is between the feed box and the hopper is moved and the concrete drops into the feed box, and then the feed box moves over toward the mold, and, in the meantime, in the back end of the feed box there is a place that covers up the hole in the hopper; is that right?

A. Yes.

The Court: Then it moves over to the mold, and then the feed box, because it has no bottom, feeds into the mold, and then the vibration either starts either then or right [fol. 602] after the feed box fills up the mold, the tamping or pressure takes place, and the block is removed automatically by a crane and placed over here, being controlled by one or two men, one man, isn't that right, continuously?

A. That happens over and over.

The Court: The feed box moves back to the hopper, gets filled up again, and that goes on over and over again. That is an automatic machine as far as I know. Although all of these, as I understand it, the Besser machine or any machine I saw, you can control any one of these automatic machines by limiting the amounts of the steps. I think you can control every step, can't you, gentlemen, on that? Or can't you?

Mr. Besser, you can control that, can't you?

Mr. Besser: The feed time and the finish time are ordinarily control-able or variable, but the other movements go on definitely.

The Court: I see, after it once starts on automatic it finishes up but you can control the feed time.

Mr. Besser: In order to take care of different types of material or aggregate.

The Court: I can see that, and still you call it an automatic machine, wouldn't you? All right.

Mr. Besser: May I add one word?

The Court: Yes, sir.

Mr. Besser: Because that starting and stopping that [fol. 603] I refer to goes on automatically without any person doing it.

The Court: Yes, I see that.

By Mr. DeGree:

Q. Well, is this true that a plain pallet machine has a greater production than a cored pallet machine, everything else being equal?

A. I know of no cored pallet machine that has as high a production as several of the plain pallet machines.

The Court: Of course that does not answer your question but it does give you his knowledge of it, that's all.

By Mr. DeGree:

Q. Now, with reference to this meeting with Mr. Rosenthaler which has been alluded to here twice, what sintering proposition was there that Mr. Rosenthaler sought to interest you in.

The Court: What was that?

Mr. DeGree: Sintering, s-i-n-t-e-r-i-n-g.

The Court: That is a heating process, isn't it, sintering?

Mr. DeGree: There has been testimony here, if the court please——

The Court: Maybe I missed it entirely. All right. You may answer the question.

By Mr. DeGree:

Q. Do you understand the question, Mr. Olsen?

A. I think so. You want to know what kind of sinter equipment was proposed to be made by this new setup. [fol. 604] Q. No, where was the location? Which sintering deal was it, where was it?

A. It was to be a new sinter equipment set-up that was proposed.

Q. Where?

A. The place had not been picked.

Q. No place had been picked at all?

A. For this new company?

Q. Whatever this proposal was that Mr. Rosenthaler made to you; he suggested that you put in some money?

A. That's right.

Q. On a sintering process. Right?

A. Right.

Q. And as I get your testimony before, the Besser Manufacturing Company and Ben Stone and yourself were to be in this proposed set-up?

A. That is right.

Q. But no location had been picked out for that?

A. No.

Q. All right, and you further stated that Mr. Rosenthaler described Mr. Stone to you as the gentleman who had acquired the control of the Besser block of Stearns stock? Is that correct?

A. Yes.

Q. Had you met Mr. Stone up to that time?

A. Yes, because you have been talking about the April [fol. 605] 21st conference.

Q. Well, all right. I think you have answered my question now. When did you first meet Mr. Stone?

A. February 21, 1950.

Q. Where did you meet him?

A. In Adrian.

Q. Who, if anyone, introduced you to him?

A. Mr. Rosenthaler.

Q. And what was the purpose of the meeting?

A. They had come to Adrian to discuss, so they said, the possible purchase of my company by Mr. Stone.

Q. Did you understand that time whom, if anyone, Mr. Stone represented?

A. Yes, I was told at that time that he represented only Ben Stone, that he did not represent——

Q. Who made that statement to you, if you recall, Mr. Stone or Mr. Rosenthaler?

A. I do not recall.

Q. What did Mr. Rosenthaler of the Besser Manufac-

turing Company say to you with reference to Stone when he introduced Stone to you?

A. Conversation to the effect that Mr. Stone was interested in buying the Besser block of Stearns stock if he could also buy Gocorp.

Q. I see. And did the conversation develop then as to any offer or proposal by which Stone was to purchase Gocorp?

A. There was no offer made at that time.

[fol. 606] Q. I see. Was there any other subject of discussion at that meeting, or was that the only thing that was discussed?

A. That is all I recall.

Q. And how long did that meeting take place?

A. You mean the duration of it?

Q. Yes.

A. Perhaps an hour.

Q. I see. And you talked about many other things in addition to the mere statement that Stone, after acquiring the Besser stock of Stearns Manufacturing Company, would be interested in purchasing Gocorp?

A. He did not put it just that way, that he would be interested after the purchase of the Stearns stock, but that——

Q. Well, let us get it accurately then. If I have unfairly stated it.

A. I think it was better put in my words of a few minutes ago, that Mr. Stone indicated he would be interested in buying Besser's Stearns stock if he could also buy the Gocorp Company.

The Court: We will take a recess, gentlemen.

(Short recess.)

Q. Subsequent to your talking with Mr. Rosenthaler and Stone on the 21st of February, 1950, did you accompany those gentlemen to inspect any plants where there was a sintering process in operation?

A. Yes.

Q. Where?

[fol. 607] A. Marietta, Ohio.

Q. I see. And both of those gentlemen were present with you, were they?

A. Well, Mr. Stone only.

Q. Mr. Stone only.

A. Went with me to Marietta, or I went with him.

Q. And you went there by reason of the fact that this subject was opened up with you by Mr. Rosenthaler previously?

A. Mr. Rosenthaler and Mr. Stone.

Q. As a consequence of that?

A. Yes.

Q. You visited the Marietta plant?

A. That is right.

Q. All right. You were then considering investing some money in a sintering process, were you?

A. Yes. That is what prompted the trip. I wanted to see more.

Q. Did you visit any other sintering plant?

A. Not subsequent to that Rosenthaler-Stone conference.

Q. I see. Now, after February 21st, 1950, did you have any further conversation with Stone or Mr. Rosenthaler with reference to the sale of Gocorp?

A. With Mr. Stone.

Q. When was the next conference?

A. February 23rd.

Q. Where was it held?

[fols. 608-610] A. In Detroit.

Q. And was anyone else present besides yourself and Mr. Stone?

A. At times during that day, Mr. Besser and Mr. Bailey were there, but the most of that time was spent with Mr. Stone alone.

Q. I see.

A. Mr. Bailey was with us. We saw little of Mr. Besser. We had breakfast together, but, as I recall, Mr. Besser was there no longer in any conference I was in.

Q. Well, what if anything did Mr. Besser have to say about the purchase by Stone of Gocorp?

A. I recall nothing, although we sat there and visited at breakfast. I recall no definite remark by Mr. Besser.

Q. Were the details of a proposed sale gone into?

A. Yes. We wrangled several hours about what the details might be of the purchase.

[fol. 611] The Court: Well, reframe your question.

By Mr. DeGree:

Q. Now, you have already stated that the details of the proposed sale were gone into.

The Court: By whom and where?

By Mr. DeGree:

Q. Now, that is right. Now, who were the people who participated in this conversation concerning the sale?

The Court: The sale of Stearns stock to Stone.

Mr. DeGree: No, the sale of Gocorp, which is Mr. Olsen's corporation.

The Court: Oh.

Mr. DeGree: To whoever it is that Stone represented, whether it is Stone himself or whether he is representing somebody else.

The Court: The sale by Stone to Gocorp.

Mr. Babcock: To Stone.

Mr. DeGree: The other way around.

The Court: Yes.

[fol. 612] Mr. DeGree: Gocorp to Stone.

The Court: Yes.

Mr. Babcock: And the witness has testified that as far as he knew, Stone represented nobody but Stone.

The Court: Well?

Mr. DeGree: With the further exception, as has been testified to, that he was introduced to Mr. Stone by Mr. Rosenthaler of Besser Manufacturing Company, and also that, as I understand the witness, the purchase of the Besser block of Stearns stock and the purchase of Gocorp were in some manner bound together.

The Court: You may ask him the question. I will rule on it as it goes along.

By Mr. DeGree:

Q. Who were the people who discussed the details of the proposed sale by Gocorp to Stone?

A. Mr. Stone, myself and at intervals through the day, Mr. Bailey was in and out.

The Court: Who is Mr. Bailey then? A director?

A. Mr. Bailey, I understand, is an employee of the Besser Company.

The Court: Oh. Was he on the board of directors?

Mr. Babcock: No, your Honor. In no official capacity whatsoever.

The Court: All right.

By Mr. DeGree:

Q. And Mr. Bailey is the man that you previously testified to as having talked to you earlier about the sale of your company, is that right?

[fol. 613] A. That is right, on several dates.

Q. And whom did he say was interested in purchasing your company on those earlier occasions?

A. Whom did Mr. Bailey say?

Q. Yes.

A. The Besser Company.

Q. So on the earlier occasions, Mr. Bailey had contacted you with reference to selling Gocorp to Besser Manufacturing Company. That is right, isn't it?

A. Yes.

Q. And that same Mr. Bailey is here present with Mr. Stone and you talking about the details of the sale of Gocorp to Stone. Is that right?

A. He sat in on it, yes.

Q. And did you go to this meeting with any of those gentlemen? Did you meet them or see them there?

A. The meeting of February 28, 1950?

Q. Yes.

A. I joined them at breakfast in Detroit.

Q. I see. You came to Detroit alone?

A. Yes.

Q. And when you came there you found these other gentlemen there?

A. I met them for breakfast.

Q. Yes.

A. But we met by appointment.

[fol. 614] Q. But you did not accompany them to their place of meeting, did you?

A. I think not. We met.

Q. All right.

A. In Detroit.

Q. And at whose invitation was it that you attended this meeting?

A. I can't remember. It would have been Mr. Rosenthaler or Mr. Bailey or Mr. Stone.

Q. I see. All right. Did you know who was financially interested in the sintering process at Marietta, Ohio?

A. Why, I thought I knew.

Q. Well, I am asking you whether you did or did not know?

A. If that has got to be a positive answer, I will have to say I don't know.

Q. Was there any conversation between you and Mr. Rosenthaler with respect to that?

A. Yes.

Q. All right. What was it? What did Mr. Rosenthaler say as to who was financially interested in this Marietta sintering process?

A. I don't believe he touched on that point. I know who built the equipment on it.

Q. Who built it?

A. It is known. It is generally known that the equipment was Besser Manufacturing.

[fol. 615] Q. I see. Very well. Have you made any definite, binding agreement by which the Gocorp, your interest in Gocorp, is to be sold to Mr. Stone?

A. No, sir.

Q. No agreement along that line has been made?

A. No, sir.

Q. Will you state whether or not the negotiations with respect to that have been abandoned?

A. Apparently they have. I never took the initiative and I have not been approached for some weeks.

Q. And how many subsequent meetings to February 23,

1950, did you have with either Stone, Rosenthaler or Bailey with respect to that proposition?

A. Well, Mr. Stone phoned me on February 28 for a further conference, and which I couldn't manage in the immediate future. He phoned again on March 3 with the same result. The next time I knew was on April 27, when I went with Mr. Stone to Marietta, and at that time he told me he had acquired——

Mr. Babcock (interposing): Just a moment.

The Court: Just a minute, gentlemen.

Mr. Babcock: I object to conversation between Stone alone, and the witness.

By Mr. DeGree:

Q. That is right. I did not ask you that. I just wanted to find out how many conferences you had with reference to this proposed sale deal.

A. The April 27 one is the last on that matter.

[fol. 616] Q. All right. Now I would like to be clear on this, and I wish you would refer to your notes. In your previous testimony you had stated that you had a conference with Mr. Rosenthaler at your office in Adrian. That is correct, is it not, the date being April 21, 1950?

A. That is correct.

Q. Now, am I correct in understanding that that is the time that Mr. Rosenthaler stated to you that Mr. Stone was the gentleman who had acquired the control of the Besser block of Sterans stock?

A. I have no notes and no memory that Mr. Rosenthaler told me that Mr. Stone had acquired that.

Q. I think if you will refresh your recollection about your direct examination, you will find that on the 21st of April your notes indicated that you asked Mr. Rosenthaler whether or not there was a change of attitude about the patent situation.

A. I find that, yes.

Q. And you stated that Mr. Rosenthaler told you not in one hundred years?

A. Right.

Q. Would a license be issued to you, but Gocorp was the first on the list of infringers?

A. Right.

Q. And that Mr. Rosenthaler was there to interest you in putting some money in a sintering company.

[fol. 617] Mr. DeGree: What I am trying to place, your Honor, is the time when Mr. Rosenthaler told this gentleman that Mr. Stone was the man who had acquired the Besser block of the Stearns stock.

The Court: All right, fix that.

A. Yes, that would have to be it.

Mr. DeGree: All right.

The Court: What would have to be it?

A. That that was the time.

The Court: What is the date you have in mind?

A. April 21, 1950.

The Court: All right, that is just a month ago.

A. About that.

By Mr. DeGree:

Q. Although you knew when you first met Stone in February, from what you have already related that he was interested in buying both Gocorp and acquiring the Besser [fols. 618-619] block of Stearns stock?

A. Yes, he told me that.

Q. I see, and then the first you learned that he had acquired it was when Mr. Rosenthaler told you?

A. April 21, yes.

Mr. DeGree: That is all.

The Court: Did this witness previously testify that Rosenthaler told him that not in one hundred years would they ever give him a license, and that he was No. 1 to be sued?

Mr. DeGree: That is what my notes indicate.

Mr. Neville: Yes, he has so testified, your Honor.

[fol. 620] Cross-examination.

By Mr. Goreff:

Q. Mr. Olsen, did you ever ask on behalf of Gocorp for a license from Mr. Andrus, one of the defendants here?

A. No, not from Mr. Andrus. I talked to Mr. Gelbman.

Q. So of course he never was in a position to say yes or no, I mean since you never asked him.

A. I assumed Mr. Gelbman would communicate with whomever he felt he should. I talked only to Gelbman.

Q. In any event, Mr. Gelbman did say he was agreeable to giving you a license, didn't he?

A. Yes.

Q. But you knew that neither Mr. Gelbman nor Mr. Andrus were authorized to grant licenses?

A. Yes, I knew that.

Q. Now, getting back to 1938, referring to Plaintiff's Exhibit 111, which is an agreement between Jolterete, Inc., and the Stearns Manufacturing Company, Inc., and Eugene F. Olsen, do you recall that agreement?

A. In general.

Q. Now, this agreement, Plaintiff's Exhibit 111, followed three other agreements which have been referred to, one dated November 13, 1934; another one dated July 1, 1936, and the third dated August 6, 1937. In and by the terms of this Exhibit 111, you were granted, that is Stearns was [fol. 621] granted an exclusive license. Is that correct?

A. Yes.

Q. And Stearns and yourself personally undertook to assign to Jolterete, the licensor, certain patents that you had or patent applications that you had pending?

A. The contract required us to join in any applications that Gelbman wished to make.

Q. Well, I am not referring to that. You did undertake in and by the terms of this agreement to assign to Jolterete certain patents that were either obtained or others for which applications were pending?

A. We assigned any right we had because the contract called for that.

Q. And in and by the terms of this agreement, Plain-

tiff's Exhibit 111, you acknowledged the validity of the patents referred to in that agreement. Is that correct?

A. To my recollection the contract calls for that.

Q. Well, the agreement so states?

A. Yes.

Q. Now, referring again to this same Exhibit 111, the Stearns Manufacturing Company was under previous commitment because of its other licenses and the Stearns Manufacturing Company was in default under these previous license agreements granted? Is that correct?

A. I cannot remember.

Q. Well, this will refresh your recollection, reading from [fol. 622] Plaintiff's Exhibit 111:

> "Whereas default has been made in the payment of said license fees and royalties, and the parties hereto are desirous of terminating the said license agreements and entering into a new and different agreement"——

would you say that is correct?

A. Yes.

Q. Now, on March 1 of 1940, Plaintiff's 111 was canceled and you entered into an agreement with the defendants Andrus and Gelbman, that is you—when I say you, I mean Stearns Manufacturing and yourself personally, and that is referred to as Exhibit 112. Is that correct?

A. Yes.

Q. And in that you likewise acknowledged the validity of the patents referred to?

A. I cannot remember the terms of that agreement.

Mr. Neville: May I point out to your Honor that the agreements speak for themselves at this point? They have been introduced and if they so state, I think all counsel has to do is to read that portion of the contract.

Mr. Goreff: That is what I was going to do. Reading from paragraph 11 on page 9 of Plaintiff's Exhibit 112:

> "Licensee"—that is Stearns Manufacturing—"and Eugene F. Olsen, and each of them, jointly and severally, hereby admit the validity of said letters patent and each of the same issued and to be issued upon

such application for letters patent relative to any [fol. 623] such improvement now pending or hereafter to be filed and agree not to dispute the validity thereof or title of the licensors thereto, and further agree that they and each of them will not at any time contest the same directly or indirectly in any way whatsoever, or aid others in so doing."

By Mr. Goreff:

Q. Now, following the termination, or dismissal of the Bell suit in the Southern District of New York in 1942, and following the taking of an appeal therefrom by the plaintiffs, being the inventors, now the defendants Gelbman and Andrus, and the licensee, the Stearns Manufacturing Company, you entered into an agreement; when I say "you" I mean the Stearns Manufacturing Company, and the defendant Besser Manufacturing Company, which is plaintiff's Exhibit No. 10, is that correct?

The Court: I did not quite get that. You said that this was appealed?

Mr. Goreff: It was, yes, sir.

The Court: I thought this was a consent judgment down in New York?

Mr. Goreff: Oh no, your Honor.

Mr. Babcock: No, your Honor.

Mr. Goreff: No, what occurred was that the two claims involved——

The Court: They challenged all the claims but the court held 12 and 13, or 13 and 14, or whatever they were, invalid, and what did the court do as to the others? Or were they [fol. 624] the only ones challenged?

Mr. Goreff: That is right, your Honor.

The Court: And that was a vibration up and down?

Mr. Goreff: I think so.

The Court: Did they appeal that?

Mr. Goreff: Yes, sir.

The Court: And what happened to that case?

Mr. Babcock: While the case was on appeal, by way of compromise of the issue on appeal and by reason of subsequent developments by the inventors of matters that were

not involved in the appeal, who sought to incorporate facts in the negotiations of the parties, the agreement was worked out.

The Court: And when was that suit? Was that in 1940?

Mr. Babcock: 1942.

Mr. Goreff: 1942, your Honor.

The Court: And the only Gelbman patent in question at that time, of course, was the one that was issued in 1932, wasn't it?

Mr. Babcock: I do not know, your Honor, when that was obtained.

[fol. 625] Mr. Goreff: I believe 1932, your Honor.

The Court: No. 1937. The original L. Gelbman, originally filed——

Mr. Stark: It was patented in 1932, your Honor. Patented July 12th.

Mr. Goreff: It is 1,867,144, I believe.

The Court: I have got it somewhere. I guess I have it over at the hotel. All right.

By Mr. Goreff:

Q. Now, this agreement, Plaintiff's Exhibit 10, likewise contains an acknowledgment by the Stearns Manufacturing Company, of which you were President, the President, as to the validity of these license agreements and patents? Withdraw that. I am sorry. I would like to reframe that. Likewise contains an acknowledgment of the validity of these patents; is that correct?

A. Well, again I can't remember. I assume it does. If it is in there, I agree that it does.

Q. I don't want to occupy the court's time now. I will refer to it, your Honor.

Now, you operated under the terms of these—that is, when I say "you", Mr. Olsen, Stearns Manufacturing Company operated under the terms of these various license agreements from 1934, and still continue, and also operate under the license agreement of December, 1942? That is Plaintiff's Exhibit 10. That is correct, is it not?

[fol. 626] A. I know that was correct up to the time I left Stearns.

Q. Now, did you, in 1942, in December, or any time in 1942, make any agreement with the defendant Andrus or Gelbman other than the one that is set forth in Plaintiff's Exhibit 10?

A. That is the new license agreement?

Q. Yes.

A. No.

Q. That is the only agreement you had with them in December, 1942, and thereafter?

A. I recall no other.

Q. Well, was there any other?

A. No.

Q. There was no agreement, oral, no understanding of any kind, other than the agreement that is embodied in Plaintiff's Exhibit 10?

A. No other agreement.

Q. Now, was there any plan of operation in which the defendant Andrus or the defendant Gelbman participated with the Stearns Manufacturing Company from 1942 to date?

A. Nothing except that set forth in the agreement.

Q. Well, your answer, I take it, is that there was not?

A. Up to the time I left Stearns. You said "to date".

Q. Was there any scheme——

Mr. Speer: (Interposing) I object to that, your Honor.

[fol. 627] The Court: You object to what?

Mr. Speer: He is asking the witness was there any scheme between Stearns and Gelbman and Andrus.

The Court: He hasn't asked it yet, but it may be a good question. You might have given him an idea. Go ahead.

By Mr. Goreff:

Q. Was there any scheme or arrangement between the defendant Stearns and Andrus or Gelbman?

The Court: Stearns and Andrus and Gelbman, that he knew about?

Mr. Goreff: Yes.

The Court: You may answer. It is cross-examination. He may answer.

By Mr. Goreff:

Q. Other than the one set forth—or other than the agreement set forth—I said "arrangement"—other than the agreement set forth in Plaintiff's Exhibit 10?

A. No.

Q. Did the Stearns Manufacturing Company, between 1942 and 1948, ever intend to enter into any arrangement to restrict competition?

Mr. Speer: I object, your Honor.

The Court: Sustain the objection. Proceed, gentlemen.

By Mr. Goreff:

Q. Mr. Olsen, do you own any stock of the defendant Stearns Manufacturing Company?

[fol. 628] A. Now?

Q. Yes?

A. Yes.

Q. Will you tell us how much?

A. I don't know accurately. It is between two and three thousand shares.

Q. Have they been acquired since March of 1948?

A. Part of it.

Q. And do you have any open orders for the purchase of any stock of the Stearns Manufacturing Company?

A. I think I still have an order, a standing order, at a stock price.

The Court: Is that on the market? Is it on the market?

Mr. Neville: I understand it is not on the market.

Mr. Goreff: Yes, your Honor.

The Court: Where would he have an order, or a standing offer to purchase?

Mr. Neville: With a broker.

The Court: With a broker? Over the counter?

A. Yes.

The Court: He has given him a price?

Mr. Goreff: Yes.

A. Any stock, and a price for it, a maximum.

[fol. 629] The Court: All right.

Mr. Gorey: That is all, your Honor.

Redirect examination.

By Mr. Speer:

Q. Could you tell the court, Mr. Olsen, what the profit of the Consolidated Concrete Corporation was for the fiscal year ending May 31st, 1928?

[fol. 630] The Court: Hasn't that been gone over?

Mr. Speer: I don't believe that that particular answer was.

The Court: Well, all right. If it hasn't been, I said you could cover it. But if it has been, please don't go over it again.

Mr. Speer: No, your Honor.

The Court: All right.

A. Net loss, $33,040.50.

By Mr. Speer:

Q. And for the fiscal year ending May 31st, 1929, what was the profit, if any, of the Consolidated Company?

A. Net loss, $37,263.28.

Q. And for the fiscal year ending May 31st, 1930?

A. We changed auditors and changed the form. Net loss from operations $60,528.13. Net loss, total net loss, including loss from sale of capital assets, $166,000——

The Court: (Interposing) That was gone over yesterday, to my knowledge. There isn't any question about that. I remember when he added them together yesterday. Now, please don't go over what you went over yesterday. Although I am not going to shut you out of redirect examination on these matters if they are important.

By Mr. Speer:

Q. Now, on your cross-examination yesterday, Mr. Olsen, I believe you testified that on one or two occasions the Board at Consolidated gave some thought to the manufac-

ture of items other than concrete block machines. Is [fol. 631] that true?

A. Yes.

Q. Was it the intention of the Consolidated Company to abandon the manufacture of concrete block machines?

A. Oh, no.

Q. Then, in other words, were these items to be added to the concrete block machine business?

A. That is right.

The Court: As a matter of fact, that is probably one of the most common things that happens to every manufacturing corporation. They have always been afraid something may happen to their business, so they look out for other avenues all the time. And that is what you were doing; isn't that true?

A. Yes, sir.

Mr. Babcock: Of course, the witness testified yesterday that the thing that inspired the Board of Directors and officers of Consolidated to do it was because they were losing so much money.

The Court: That is what I am saying. They do not like to have all their eggs in one basket, and the first sign that something may happen to their business they look out for other things. That is true of every organization, the smallest and the biggest.

I think if you will talk with your associate counsel, Mr. [fol. 632] Besser, they will all agree with me. They watch for these things. That is what a good businessman ought to do.

Mr. Speer: If the court please, I am now referring to Exhibit 123.

The Court: Minutes of the Consolidated.

Mr. Speer: Yes, your Honor.

The Court: All right.

Mr. Speer: The book introduced by Mr. Babcock.

The Court: What page?

Mr. Babcock: Pages are not numbered, unfortunately.

Mr. Speer: This particular information had reference to the adjourned meeting of the board of directors of July 10, 1931.

The Court: Is that the date of the meeting or is that the date from which it was adjourned?

Mr. Speer: It was adjourned from July 8.

The Court: All right, this is the meeting of July 10.

Mr. Speer: 1931.

The Court: All right.

Mr. Speer: And in it there is a paragraph that reads:

> "After discussion of the offers of the corporation and reference to the recent acquisition by Besser Manufacturing Company and others connected with it of the [fol. 633] interest and stock of the Consolidated Concrete Machinery Corporation which was formerly held by Mr. Frank Lay of Detroit, the following actions were taken."

By Mr. Speer:

Q. Now, the book shows that you were there, Mr. Olsen, July 10, 1931?

A. Yes, sir.

Q. Is that the first information that you had that a block of stock had been purchased by the Besser Company?

A. I did not know it was contemplated until it had been accomplished. I may have known it a day or two or even more before this meeting.

Q. Then can you tell us approximately when was the first time you had heard——

The Court: He has already answered that. You can see how a lot of these questions prolong the time without adding anything to the record.

By Mr. Speer:

Q. At or about that time, July 8, 9 or 10, 1931, did you know that any other officer of the Consolidated Company had information that a block of the stock had been purchased by the Besser Company?

A. I did not know.

Q. Did you know at or about that time that any officer or any stockholder of the Consolidated Company approached Besser for the purchase of Consolidated stock?

A. I knew of no such approach.

Q. Also referring to Exhibit 123, and referring to the board of directors meeting held July 8, 1931, I [fol. 634] quote:

> "Mr. Jesse H. Besser nominated by E. F. Olsen to succeed Mr. Gregory as director."

Now then, Mr. Olsen, had you been acquainted with Mr. Besser prior to July 8, 1931?

A. Yes.

Q. What was the extent of that acquaintance?

A. An occasional meeting; at conventions or when we would meet one another at prospects' or customers' plants.

Q. Again referring to the board of directors meeting of July 8 referred to in Exhibit 123, I am quoting:

> "It was then moved by Mr. E. F. Olsen, supported by Mr. Oakes, that Philip M. Park be elected to succeed Mr. Lay as a member of the board of directors."

Were you acquainted with Mr. Park prior to this time?

A. Slightly.

[fol. 635] By Mr. Speer:

Q. To what extent were you acquainted with Mr. Park?

A. Only slightly.

Q. I wonder if you could give us a little more explanation of that, please?

A. Oh, I had met him and had been told that he was Mr. Besser's nephew and probably that is about as much as I knew about him.

Q. Now, I again refer to Exhibit 123, the board of directors meeting of July 8, 1931, and I quote:

> "Mr. Frank R. Oakes was nominated by Mr. Costa to succeed Mr. Carpenter as a member of the board of directors, supported by Mr. Besser."

At this time, were you acquainted with Mr. Oakes?

A. Slightly.

Q. Again, Mr. Olsen, to what extent did that acquaintance go?

A. I had met him on a few occasions.
Q. Did you know Mr. Oakes' occupation at this time?
A. Yes.
Q. And what was it?
A. He was vice president of the Besser Company.
Q. I again refer to Exhibit 123, board of directors meet-
[fol. 636] ing of July 8, 1931, and I quote:

> "Anna M. Besser was then nominated by Mr. Besser to succeed Mr. Costa as a member of the board of directors, supported by Mr. Oakes; there being no objections, Anna M. Besser was declared elected a member of the board of directors."

The Court: What is the question?
Mr. Speer: None at this particular point, your Honor.
The Court: I see. Is the object of the government to show at this point that the board of control was taken over by Besser?
Mr. Speer: Yes.
The Court: Why don't you ask one question that could take care of the whole thing?

> "Isn't it true that at the meetings of July 8 and July 10 the following people were made directors and that they supplanted so-and-so?"

And that would have been all there was to it. If they dispute it, then you can put it in. Have you finished with those directors?
Mr. Speer: Yes, your Honor, I have finished on the directors. I now want to show who the officers were at this time.
The Court: Well, just ask him, "Isn't it true from the records", and if it is not true, you are going to hear some-
[fol. 637] thing from these people over here.
Mr. Speer: All right.
The Court: Is there any objection to that?
Mr. Babcock: We concede what the record shows the officers to be.
The Court: Let us get it in. Let us not take so much time to get in so little.

By Mr. Speer:

Q. Is it true, Mr. Olsen, that on October 9, 1931, that Mr. Oakes was the president of the Consolidated Concrete Machinery Corporation?

The Court: And who was the vice president and secretary, and so forth? Is that all in there?

Mr. Speer: Yes, your Honor.

The Court: Well, put them all in at once.

By Mr. Speer:

Q. That Mr. Oakes was the president, and that Anna Besser was the secretary of the company?

The Court: Were there any other officers?

Mr. Speer: That is all I am interested in, your Honor.

The Court: All right.

Mr. Babcock: I concede that.

The Court: Wait a minute, now.

A. Yes.

Mr. Speer: Then if I may refer to this Exhibit 123, your Honor.

The Court: All right.

[fol. 638] Mr. Speer: Referring to the special stockholders meeting of October 9, 1931, and I quote a paragraph from Exhibit 123. This refers to the special stockholders meeting of October 9, 1931, and I quote——

The Court: What do you want to prove by that?

Mr. Speer: I believe, if your Honor recalls, at about this time the officers, namely the president and secretary of the corporation were authorized to attempt to convey the plant and other assets at Adrian.

The Court: Do you want to show that they were authorized at this meeting?

Mr. Speer: Yes, your Honor.

The Court: One paragraph:

> "Is it not admitted then by all the defendants that according to the minutes of the stockholders meeting held on the 9th day of October, 1931, the president and secretary were duly authorized"—to do what?

Mr. Speer: To attempt to convey this plant of Consolidated in Adrian, and other assets that were not to be taken to Alpena.

The Court: All right. If it is disputed, we will have to prove it according to the minutes. But do you see how you can shorten this up and get everything in that you need?

Mr. Babcock: I cannot concede it as counsel states it. The record reads: "negotiate for a sale", which is not——

[fol. 639] The Court: Read the exact language of that part and see if they will concede that.

Mr. Babcock: That is not an attempt to convey.

Mr. Speer: I will quote then from the special stockholders meeting of October 9, 1931:

> "Be and resolved that the officers be and they are hereby authorized and directed, subject to ratification of this action by the board of directors, to negotiate for the sale and sell the real estate and said plant facilities at the highest prices obtainable in whole or in part, provided that the minimum price to be accepted shall be the same established by concurrence between the directors and a committee of Adrian stockholders to consist of Messrs. Burnham Robb, and Perry."

The Court: Is it admitted that that action was taken?

Mr. Babcock: Yes, your Honor.

The Court: Will it be questioned by anybody?

Mr. DeGree: Not questioned.

The Court: All right, we have it in.

Mr. Babcock: However, I do not want the implication to be conveyed to the court that there was a sale under that action.

The Court: Well, they were authorized to do certain things and that is what it says they were authorized to do.

Mr. Babcock: That is right, your Honor.

[fol. 640] The Court: Whether the government puts one interpretation on that and you put another, that is beside the point.

Mr. Speer: Then in order to conserve time, again I will ask if there is any issue about this——

The Court: Ask them if it is not admitted that at a special stockholders meeting this action was taken.

Mr. Speer: That at a special stockholders meeting of March 19, 1932, the Consolidated Concrete Machinery Company conveyed these assets to the Besser Company for the Besser Company's promise to assume its indebtedness of $104,000, plus $2,000 cash, with the Besser Company stating that the assets of Consolidated at that time were worth around $90,000.

The Court: Well, I do not see how the stockholders could convey—all they could do was either authorize the conveyance or approve of said conveyance after it was made. What do you mean by that? Is this a meeting of the stockholders?

Mr. Speer: Yes.

The Court: And did they authorize it?

Mr. Speer: Yes, your Honor, and it was after that that the board authorized the officers to enter into the actual contract.

The Court: All right.

Mr. Speer: And that said contract was entered into.

The Court: That is, at a board of directors meeting, you mean?

[fol. 641] Mr. Speer: Yes, your Honor.

The Court: All right. You do not have to agree that he has interpreted it correctly. The best way to do it to read it out of the book and ask if it is conceded that such an action was taken.

Mr. Babcock: I will concede that the action recorded in the book was taken. Whether counsel has interpreted it correctly, I cannot concede at this time, because I was trying to read as he was reciting it.

The Court: What does it say there?

Mr. Speer: Your Honor, that is what I am about to do here.

The Court: Did they pass it by resolution or what?

Mr. Speer: All right, your Honor. This is Exhibit 123, and I refer to the special stockholders meeting dated March 19, 1932, and I quote:

The Court: Did you speak correctly there? You said a special stockholders meeting?

Mr. Speer: Yes, your Honor, that is the way it is in the book here.

The Court: Did the stockholders authorize the officers and all the board of directors? All right.

Mr. Speer: I quote:

> "Be it resolved that the directors and officers be and they are hereby authorized and directed to forthwith accept the offer of the Besser Manufacturing Com- [fol. 642] pany, and to execute such documents, instruments and papers as may be necessary to transfer and convey title of the company's assets to said Besser Manufacturing Company and do every other act and thing that may be necessary or appropriate in the premises."

The Court: Is that the end of it?

Mr. Speer: That is the extent of what happened at that meeting of the board of directors.

The Court: Well, that part has been admitted. Isn't that right?

Mr. Babcock: Yes, your Honor.

The Court: All right. That took the action of the stockholders. What is the next meeting?

Mr. Speer: The next meeting was held on the same day and it is of the board.

The Court: That is what I thought. This other part has all been in there. I do not know why you reread it. Go ahead. Now this is the meeting of the board.

[fol. 643] Mr. Speer: Meeting of the Board of Directors held on the same day. And I quote one of the paragraphs:

> "That the President and Secretary be and they are hereby authorized and directed to accept the offer of the Besser Manufacturing Company for the purchase of the assets of this company at the price and upon the terms stated in the proposal which is spread at length upon the minutes of the meeting, and further"——etc.

The Court: Well, but you better get the proposal. They have never conceded the proposal.

Mr. Speer: Well, in order, your Honor, to go to the proposal itself, I have got to go——

The Court: (Interposing) Go ahead in any way you want. I can't control you gentlemen. Any way you think is best to get it in there. I don't want to make it more difficult for you.

Mr. Babcock: While Mr. Speer is reviewing that record, I am glad herewith to comply with the request of Government counsel to furnish them with the transcript of testimony in the New York case requested. (Handing document to Mr. Neville.)

Mr. Neville: Thank you.

By Mr. Speer:

Q. Now, Mr. Olsen, between the time that you were en-
[fol. 644] gaged in the sale of block machines of Consolidated Company, that is, after the time that the Board had changed control at Consolidated, and the time that the plant was completely closed down, how many Consolidated machines did you actually sell?

A. I can't remember.

Q. Can you tell us approximately what time the Consolidated completely abandoned the production of concrete block machines?

A. No.

Q. After the time the officers of the Consolidated Company were authorized to convey this plan and other assets at Adrian, do you know, as a matter of fact, what attempts they actually did make to dispose of this property?

The Court: Who is "they"?

Mr. Speer: The officers of the corporation.

The Court: Which corporation?

Mr. Speer: Consolidated Concrete Machinery Corporation.

The Court: All right.

A. I know of no attempts to dispose of that property.

[fol. 645] By Mr. Speer:

Q. At or about the time that the assets of the Consolidated Company were offered for sale, did you personally partake in any of those transactions?

Mr. Babcock: I am not sure I understand what transactions he means by "those transactions".

[fol. 646] By Mr. Speer:

Q. I will change the question. After the officers of the Consolidated were authorized to convey the assets, did you, as an officer, take part in any attempts to convey this plant and other assets?

The Court: They were conveyed, weren't they? Is there any question about that?

A. Yes, your Honor; they were conveyed.

The Court: Did he sign the deed, or did he count the machines, or what?

Mr. Speer: If your Honor please, the officers were authorized in October of 1931 to offer this plant to anyone, and it was finally sold in March of 1932 to the Besser Company.

The Court: All right. Now you want to know if he participated?

Mr. Speer: If he participated in any offering or any sale to anyone other than the sale to the Besser Company.

The Court: Well?

A. I recall no such participation.

The Court: All right. All right.

Mr. Neville: I may say, your Honor, what the Government is trying to do now is to show that all of the transactions leading to the offer of sale to the public and the actual purchase by the Besser Company was the idea of the Besser [fol. 647] people and not of Mr. Olsen.

The Court: Well, that is a matter of argument. Mr. Babcock, you have been trying to show the contrary, have you not?

Mr. Babcock: I have not approached that at all.

The Court: All right.

Mr. Neville: I think the evidence yesterday certainly slanted that way.

Mr. Babcock: I showed that it was offered to the public. We didn't undertake to decide whose idea it was.

The Court: All right. Any other questions you desire? Go ahead and ask any questions you want.

By Mr. Speer:

Q. As an officer of the Consolidated Company, was it your idea to dispose of these assets?

Mr. Babcock: Well, I submit, your Honor please, I don't know what he means by "was it his idea". Certainly the record shows he voted for it and exercised his judgment as a director.

The Court: Ask him who first suggested selling the assets, and then probably you will get an answer.

By Mr. Speer:

Q. Mr. Olsen, who first brought up the idea that the assets of Consolidated should be conveyed?

A. I can't remember that.

Q. But the idea was not suggested to the other directors by you?

[fol. 648] A. It was not I.

The Court: All right. Anything else?

Mr. Speer: That is all. That is all.

The Court: All right, now. Your one or two questions.

Cross-examination (Continued).

By Mr. Goreff:

Q. Mr. Olsen, referring to Plaintiff's Exhibit 10, which is the license agreement of December 7th, 1942, at that time you were the patentee under at least three patents which were referred to in that agreement; is that correct?

A. I can't remember that.

Q. Well, I will show you Plaintiff's Exhibit 10, and ask you if you weren't named as the patentee, sole patentee with respect to one of them issued on January 13, 1942, and a joint patentee with respect to two others, the first issued August 5, 1941 and the second issued March 10, 1942, and the application for a patent jointly with Louis Gelbman and Arthur Mays which was filed—which application was filed August 21st, 1941?

A. It appears there; yes, sir.

Q. And that is correct?

A. Yes.

Q. And you did assign those patents and all rights under those patent applications to the defendants Gelbman and [fol. 649] Andrus, is that correct?

A. Yes.

Q. Well, the agreement so states?

A. Well, it is whatever the agreement says. Anything we have assigned was because we had an agreement that we would assign.

By Mr. Goreff:

Q. And those patents either standing in your sole name or in your joint name with others, were among those licensed by the terms of this agreement; is that correct?

A. I understand so.

Mr. Goreff: That is all.

The Court: All right. Any other questions?

Recross-examination.

By Mr. Babcock:

Q. Mr. Olsen, during the cross-examination by Mr. DeGree, I understand you to say, in substance at least, that there were a dozen machines, approximately a dozen machines other than Jolterete which are on the market and are not fully automatic as you defined "automatic".

The Court: Other than which machine?

Mr. Babcock: Other than the Jolterete. That was a Stearns model.

The Court: Oh. Vibration by jolt? Is that what it is? [fols. 650-652] Mr. Babcock: I assume that is the origin of the name.

The Court: I suppose it is. All right, what is your answer?

A. Yes, I made that statement.

By Mr. Babcock:

Q. Approximately a dozen?
A. Yes.
Q. And they are made in different parts of the country, are they?
A. Yes.
Q. And these same machines that you have in mind are still being made, aren't they?
A. I don't know whether that many are; there are some still being made.
Q. By the way, when you spoke of this Mr. Oakes, when you discontinued your affiliation with the Besser Company and went to Adrian and formed your own company, Mr. Oakes left the Besser Company and joined your company, didn't he?
A. At a time subsequent to my leaving. Not at the same time.
Q. And he is still connected with you in your company?
A. As an independent distributor.
Q. That is the same Mr. Oakes?
A. Yes, sir.
Q. That back in 1931 you knew slightly?
A. Yes, sir.

Mr. Babcock: That is all.

[fol. 653] Cornelius F. Goldcamp, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Speer:

Q. Will you state your name and address, please?
A. Cornelius F. Goldcamp.
The Court: How do you spell that?
A. G-o-l-d-c-a-m-p.
The Court: Goldcamp?
A. That is right, your Honor.
The Court: All right.

By Mr. Speer:

Q. And what is your address, Mr. Goldcamp?
A. 1548 South Sixth Street, Ironton, Ohio.
Q. Are you in the business of making concrete blocks?
A. That is right.
Q. At the present time, what kind of a block machine do you have in your plant?
A. Besser Super Vibra-Tamp.
The Court: What is that again?
A. Besser.
[fol. 654] The Court: That is the name of the machine in your plant?
A. B-e-s-s-e-r,

By Mr. Speer:

Q. Could you tell us at what time this machine was installed in your plant?
A. On or about July 8, 1949.
Q. Do you own this machine?
A. It is on a lease arrangement.
Q. On a lease arrangement. Do you have a copy this morning of that lease?
A. I do. (Handing document to counsel.)

Mr. Speer: Would you identify this as Exhibit 134.

(Whereupon the document was marked by the reporter Plaintiff's Exhibit 134.)

Mr. Speer: I offer at this time Exhibit 134.

Mr. Babcock: We have no objection.
The Court: It may be received.

By Mr. Speer:

Q. Mr. Goldcamp, have you made any attempt to buy this machine from the Besser Manufacturing Company?
A. No, I haven't.
Q. When did you first begin to deal for this machine with the Besser Company?
A. My first contact was in late 1948, in December of 1948. That was with Mr. Ray Neihouse in Cincinnati, Ohio. And then again in January of 1949.

Q. All right. In your dealings back in December of 1948 with Mr. Neihouse, did he discuss at that time with you the [fol. 655] terms under which the machine would be installed?

A. Yes, he did. I do not recall the exact figures, but at that time we talked about a complete change-over installation from a one-at-a-time Besser to a three-at-a-time.

Q. Now, do you recall that as part of the terms you would be required to give the Besser Company a down payment on the machine?

A. The first deal, as I recall it, on a complete installation, was somewhere in the neighborhood of $20,000, prepayment.

Q. In addition to the prepayment of $20,000, what other kind of payments would you be expected to make on the machine?

A. A minimum monthly rental per block with a credit towards your prepayment, as set out in their contract.

Q. Now, then, did your dealings with Mr. Neihouse result in your installing the Besser machine?

A. No, it did not.

Q. Could you tell us what occurred to change the story?

A. Well, previous to the Concrete Products Show in Cleveland, in January of 1949, Mr. Neihouse was in our office and I tentatively set up a deal with him to enter into a lease agreement. This was on or about January 26. And I gave him a check and told him I would confirm the deal at the Cleveland Show, at Cleveland, Ohio, at the show. And I came up to the show and saw the Olsen machine, known as the Gocorp, and I talked with Mr. Olsen and Mr. Schulte and Mr. Frank Oakes and then I entered into a deal with Olsen on February 2, 1949.

[fol. 656] Q. Now, you say you entered into a deal with Gocorp. What kind of a deal was that, Mr. Goldcamp?

A. That was whereby he was to install a machine on a down payment of $2500 on a 45 day trial basis, on which it was to do certain things, so many blocks per hour, and he told me that he had a machine working at Adrian, or in the process of working at that time.

Q. Now can you tell us again what was the date on which the agreement with Olsen was finally confirmed?

A. The final confirmation was on February 8.

Q. 1949?

A. 1949; in other words it was typed up and resigned at that time.

Q. Now, what has become of the particular check which you stated you gave the Besser Company?

A. We did not have it back at our office. I checked on that.

The Court: I did not get that.

A. I say we do not have the check at our office, but it was canceled out,—the check number was 1014, January 26.

The Court: Which check? I do not understand that.

A. This was a check that was given to Mr. Ray Neihouse of Cincinnati, Ohio, on January 22, in our office.

The Court: Yes, for $20,000.

A. For $2,000.

The Court: Was that the down payment?

A. No, that was the preliminary check and [illegible]e was to [fol. 657] confirm the deal at Cleveland at th[illegible]ow.

The Court: I see, all right.

By Mr. Speer:

Q. Now then can you tell us what date you canceled this check?

A. No, I could not.

The Court: Does he mean that he stopped payment on it? Is that what he means?

Mr. Speer: Yes, your Honor.

The Court: All right.

By Mr. Speer:

Q. You cannot recall?

A. No, I do not.

Mr. Babcock: I am not too sure whether that is what the witness means or not. I think I would like to have the witness say what he means, rather than counsel.

The Court: The court asked the question. It was not counsel's fault.

Mr. Babcock: But counsel answered the question.

The Court: Do you mean you stopped payment, or what do you mean?

A. I do not recall exactly what happened. I think it was by mutual agreement it was stopped.

The Court: Either he returned the check to you or you stopped the payment and notified him?

A. Yes, that is right, one way or the other.

Mr. Babcock: The thing I want to get clear is this, I fear your Honor may have in mind, when you use the term [fol.-658] "stop payment," a formal notification to the bank to stop payment on the check.

The Court: That is what I mean.

A. I can say that was not done. It was not stopped that way. I either notified the Besser Corporation or Ray Neihouse.

Mr. Babcock: Not to use it.

A. Not to use it.

The Court: All right.

By Mr. Speer:

Q. Did you tell the Besser Company that this check was canceled before February 8, 1949?

A. I do not recall whether I did or not.

Q. Now, on what date did you install the Gocorp machine?

A. On or about April 1.

The Court: Did he say that he installed it? What he said was that——

Mr. Speer: No——

The Court: Did he finally buy one?

A. Gocorp, yes.

Mr. Speer: Yes, your Honor, I believe he testified to that. It was installed on or about——

Mr. Babcock: Now, pardon me just a minute. Before we go on that assumption, I think, your Honor, as you hear the rest of the testimony you may reach a different conclu-

sion as to whether or not he finally did get one. One was installed in his place of business on trial, he has said.

The Court: Well, the way I remembered his testimony, [fol. 659] he was talking about the arrangement that he could make; I do not know whether he went through with it or not.

Mr. Speer: All right, your Honor, I will ask him more about that.

The Court: All right. I asked the question because I wanted to know whether he had gone through with it. I thought he jumped from one stage of the proceeding to the other.

By Mr. Speer:

Q. At the time you entered into the agreement you just referred to with Gocorp on February 8, 1949, what were the terms of that agreement?

The Court: Was it in writing?

A. Yes, at the time.

The Court: Have you got the writing?

By Mr. Speer:

Q. Have you got that here?

A. No, I do not have it. You asked——

The Court: Can you remember the terms of it?

A. Yes, I can.

The Court: All right.

A. The terms of it was that he was to install within thirty days a machine capable of making three blocks on a plain pallet and four cycles per minute.

By Mr. Speer:

Q. All right.

A. And that it was to remain in my plant on a 45 day trial basis.

The Court: What is that? Four cycles per minute? Does that mean 12 blocks per minute?

[fol. 660] A. That is right.

The Court: All right.

By Mr. Speer:

Q. Now, did he actually install the machine pursuant to that agreement within 30 days?

A. No, it was 60 days, on or about 60 days.

Q. At or about April 1, I believe you said.

A. That is right, April 1st the machine was installed.

Q. All right. At or about that time, April 1, 1949, did you have any conversations with anyone from the Besser Manufacturing Company?

A. Not until the machine was installed.

Q. All right then, after the Gocorp machine was installed, did you have any conversations with anyone from the Besser Company?

A. I will have to rescind that statement there, not until April 1. I had a letter on March 25.

Q. I did not ask you for that.

A. Oh.

The Court: He said he wanted to change a prior statement that he had made. Didn't you say that?

A. Well, I had one letter on May 25, that is all I wanted. He asked for conversation—I misinterpreted.

By Mr. Speer:

Q. I asked for the oral——

A. I had a conversation with Mr. Park and Mr. Wehrum on April 15.

Q. Did these gentlemen tell you who they were or give themselves any identification?

A. It was the first time that I met either party and they both identified themselves; one was Mr. Park representing [fol. 661] the *Barretts* from Alpena, and Mr. Wehrum was the son of the representative of Barretts in Pittsburgh or Philadelphia.

A Voice: Not Barretts.

A. Besser. I have Barretts on my mind.

By Mr. Speer:

Q. Can you tell us whereabouts the conversation of April 15 took place?

A. In the *Marting* Hotel in Ironton, Ohio.

Q. What was the general substance of the conversation?

A. They were disappointed that we did not have a Besser machine, and that they felt that Ironton needed a Besser machine and I had been a Besser customer and they would like to see me install a Besser machine.

Q. Have you had any other conversations with any other people from the Besser Company?

A. Between April 15 and July 8, we had several visits by Mr. Park and Mr. Hahn.

Q. Mr. Park you have spoken of earlier; Did Mr. Hahn state who he was?

A. He identified hisself with the Besser Company at Alpena.

Q. And whereabouts did these conversations take place?

A. In Ironton, Ohio and Ashland.

Q. Where is that?

A. Ashland, Kentucky, and Olive Hill, Kentucky.

Q. Can you recall the general substance of the conversation in Ironton, Ohio?

[fol. 662] A. All the conversations were very similar. They just pointed out reasons, production reasons and that the machine that I had in was not working to satisfaction, and that I should make a change.

The Court: You mean they told you that, or the machine was not working satisfactorily?

A. They knew that because I was not running. Out of the first 45 days I ran possibly half of them.

The Court: With the Gocorp?

A. That is right.

The Court: That was the three pallet machine?

A. No, that was a single pallet, three blocks.

The Court: I mean three blocks.

By Mr. Speer:

Q. Now, in these conversations in Ironton and Ashland and Olive Hill, did Mr. Park or Mr. Hahn mention anything to you about patents on this Gocorp machine?

A. In the first conversation, Mr. Park mentioned that the machine they were using was patented and that they were undoubtedly infringing possibly, and that he would

like to see the machine. It was our agreement not to let anyone see the machine while it was in this 45 day period.

Q. Did Mr. Park say anything else about patents?

A. Not that I recall.

Q. Did he say that the Gocorp machine was operating under patent owned or controlled by the Besser Company?

Mr. Babcock: I think, your Honor please, we are now [fol. 663] getting into somewhat leading questions.

The Court: I think so. Sustain the objection.

By Mr. Speer:

Q. I refer to Exhibit 134, which is a copy of the lease that you presented this morning, and it states in there, does it not, Mr. Goldcamp, that the total value of the Besser machine and equipment installed pursuant to the lease was $53,488. Is that correct?

A. That is it.

The Court: What lease is that?

Mr. Speer: This is the one that was finally entered into between the Besser Company and Mr. Goldcamp.

The Court: I see.

By Mr. Speer:

Q. Also on this exhibit does it not appear that you were required to pay $1,000 down at the signing of this agreement?

A. That is right.

Q. And, in addition to that, $1,000 total cash deposit?

A. That is right.

Q. And then, in addition to that, you gave the Besser Company a note for $2500 due November 1, 1949?

A. That is right.

Q. And one note for $2500 due May 1, 1950?

A. That is right.

Q. Now, at the time these calls were made by Mr. Park and Mr. Hahn, did they attempt to interest you in the in- [fol. 664] stallation of a Besser machine?

A. They did.

Q. Could you tell us what were the first terms that they at that time proposed?

A. On the first few visits, there wasn't too much said about terms. It was the installation of the Besser equipment which they would like to see, and which they felt we should do.

Q. Well, did they ever at any time during these calls ever talk about the terms?

A. The latter part of May and early July, after the 45 day period had elapsed for the trial basis of the Gocorp machine, we talked of terms.

Q. All right. What were the terms that they offered at that time?

A. Well, they first talked of advance payment of possibly—the figures I do not exactly recall what we started out at, but it was somewhere between $10,000, possibly $12,000, and maybe $15,000. But then I told them I was in no position, after this loss I had taken over this 45 day period, to do that. We finally arrived upon the figure of, I think it was $2,000, and then the two notes.

Q. And, as far as you recall, the first terms offered to you called for a down payment of $15,000?

Mr. Babcock: Just a minute.

The Court: Just a minute.

Mr. Babcock: I think the witness has said that they talked [fol. 665] about certain figures. He hasn't said anything about an offer being made to him at any time. It is obvious the witness has testified to negotiations passing back and forth between the parties.

The Court: What is the question as it is now?

(Question read by the reporter.)

The Court: Didn't testify to that before.

Mr. Babcock: No, your Honor. He said, "We talked about it."

The Court: I thought he did.

Mr. Babcock: They talked at one time or another about the payment of $10,000 or $12,000 or $15,000.

The Court: Ask him what the first figure was, then.

By Mr. Speer:

Q. What was the first term that they offered you?

Mr. Babcock: Just a minute, your Honor please.

Mr. Speer: All right.

Mr. Babcock: The point I am objecting to is the assumption that these questions the witness has testified to an offer. The witness hasn't testified to an offer. What he has said is that these parties met and they discussed various figures and terms.

The Court: What were they doing? Just throwing numbers at each other?

Mr. Babcock: But I think there is a difference, when you [fol. 666] get down to making a formal offer, and a preliminary negotiation.

The Court: Were they trying to sell you a machine?

A. That is right.

The Court: You may answer.

A. There was no writing or no formal offer but our conversations were back and forth, the first I would say would be approximately $12,000.

The Court: Approximately what? $12,000.

A. The first figure offered.

The Court: Was that the full price of the machine?

A. That is for the advance payment.

The Court: All right. Say that, now.

A. That is what he asked.

The Court: When men talk about buying and selling something, they do not go through all the technical terms of a contract, a promise for a promise, a consideration and all that. They just talk to each other. And they were trying to sell you a machine, were they not?

A. That is right.

The Court: And how much did they say you would have to pay down? Did they set any figure at all?

A. They did not—they made several offers, as I said.

The Court: Well, what were they?

[fol. 667] A. At approximately $12,000.

The Court: All right.

A. The best of my memory.

The Court: All around $12,000?

A. Yes. That is right.

The Court: All right, was this the first time, before the Goeorp?

A. No.

The Court: This was after the 45 days were up?

A. That is right.

The Court: All right.

By Mr. Speer:

Q. Now, did you have any of these discussions, that is, any of these offers made to you before this 45 day period expired?

The Court: During these 45 days?

Mr. Speer: Yes.

The Court: Or before?

Mr. Speer: Before the 45 day period had expired. Yes, your Honor.

The Court: That is during the 45 day period?

Mr. Speer: During, yes, sir.

The Court: There is a lot of difference, you know. Or there may be.

A. During the 45 days—or at the first visit—I will put it that way—on the first visit to our plant on April 15, approximately 15 days after the installation, I told them I [fol. 668] had entered into a bargain and I was going to stick by it for the 45 days, and that I myself more or less evaded, and we never had an opportunity to come to any formal offer during those 45 days.

Q. All right. I am not talking about any formal offers. Did they offer you any terms at all during those 45 days?

A. Not to my knowledge. Not during the first 45 days.

By Mr. Speer:

Q. Mr. Goldcamp, at the present time you have a Besser block machine in your plant. Is that true?

A. That is right.

Q. Were you interviewed by the F. B. I. some time in the year 1949?

A. That is right. In May, I believe, the 20th.

Q. May 20th. And what was the general substance of that interview?

A. That was immediately after my first offer by Bes[illegible]r, and I had a discussion with Mr. Davis——

Q. (Interposing.) Who is that. Who is Mr. Davis?

A. That is Mr. Davis sitting right back there, with the Federal Bureau. (Continuing.) —outside of my office, and he was sitting in a car. I drove up and he stepped out and he asked me—he told me what he was there for, and he asked me a few questions.

Q. All right, I will ask you again: At the time of Mr. Park and Mr. Hahn's visits to Ironton, was anything said [fol. 669] by either of them about patents on the Gocorp machine?

A. As I previously stated, they said that the machine undoubtedly infringed on some patents, and that I would possibly be liable myself for operating it.

Q. After this conversation, did you contact anyone with the Gene Olsen Corporation?

A. I do not recall whether it was Mr. Olsen or Mr. Davis, but I contacted one or the other. Mr. Davis is a representative of the Olsen Company. And I asked them what would be their position if I was involved in any trouble, and they said, "Don't worry. You won't. If you do, why, we will stand behind you."

Q. In this 45 day period we recently referred to, that is the time that the Olsen machine was on trial, did Mr. Park or Mr. Hahn say that—no, strike that, please. Within this 45 day period and during some of these conversations, was anything said by Mr. Park or Mr. Hahn about your continuing to operate the Gocorp machine?

Mr. Babcock: Your Honor please, I think we are getting into leading cross-examination again. I object to it.

The Court: I did not think that the question was leading, but I will have it read.—

(Question read by the reporter.)

The Court: You may answer.

A. In what regard? I mean, in regard to continuing to operate it.

The Court: Was anything said about it at all, in any regard?

[fol. 670] A. Well, the text of all the conversation was that they wanted to sell me the Besser machine.

By Mr. Speer:

Q. I am asking you, during these conversations, did they say anything about your continuing to operate the Gene Olsen machine?

A. They wanted me to install theirs and for me to take the Olsen machine out.

Q. All right. Now, when this conversation, that is, the conversation with respect to the fact that they wanted you to take the Olsen machine out, was that conversation held at the same time that they were attempting to interest you in a Besser machine?

A. Why, yes.

Q. Did you at any time have any conversations with anyone from the Besser Company concerning the performance of the Gene Olsen machine?

A. Well, not myself, but other members of our organization, the boys in the office, and they were around the machine and could see that at different times it was operating.

The Court: Who could see that, the people in your office?

A. Well, anyone in our office could see whether we were producing blocks or not producing. And it was general talk that it was not working to satisfaction.

The Court: You know that the people in the neighborhood knew that?

A. The whole community knew.

[fol. 671] By Mr. Speer:

Q. Mr. Goldcamp, before the Olsen machine was installed at your plant, did you have any conversations in person or over the phone with anyone from the Besser Company about the performance of the Gene Olsen machine?

A. Before it was installed?

Q. Yes.

A. No, I did not. Not before it was installed.

Q. Did you say you had some correspondence from the Besser Manufacturing Company?

A. To the best of my knowledge, here is the first, on May 25. That was the correspondence.

Q. This is correspondence to you from the Besser Company, under date of March 25, 1949?

A. It is not addressed to me. It is addressed to Mr. Donald Goldcamp, who is my brother working for me.

Q. Well, it is addressed to the Goldcamp Sand & Gravel Company, is it not?

A. That is right.

Mr. Speer: All right.

(The letter was thereupon marked by the reporter Plaintiff's Exhibit 135.)

Mr. Speer: I offer Exhibit 135.

Mr. Babcock: I have no objection.

The Court: It may be received.

Mr. Goreff: What is the exhibit?

Mr. Speer: Exhibit 135.

[fols. 672-673] By Mr. Speer:

Q. Now, Mr. Goldcamp, this correspondence is dated March 25, on Exhibit 135, March 25, 1949. Now, can you recall having any telephone conversation with anyone connected with the Besser Company prior to March 25, 1949?

A. March the 25th?

Q. Yes.

A. No, I don't.

Q. Going back to your interview with the F. B. I. in May of 1949, do you recall what the conversations were, what particular questions you were asked and what answers you gave?

A. I do not. I do not recall.

A. I do not recall the exact questions that were asked or the exact answers that were given at that time. It was on or about May 20. I just confirmed that date with Mr. Davis.

By Mr. Speer:

Q. Do you recall in this conversation with the F. B. I. agent, do you recall explaining to him that on your first conversation in the early part of May with Park and Hahn, you were told that you would have to pay $25,000 down to the Besser Company?

[fol. 674] A. I think that my statement to Mr. Davis was that our first offer with the Besser Company to buy that, I meant, was the offer that Mr. Ray Niehaus had made [fol. 675] in January. That is the best of my knowledge. Now, the statements I made to Mr. Davis, like I said before, were just—he asked me questions and I answered them; it was outside my office, there was no reference made to notes or anything else.

The Court: Well, answer the question that was put to you. You did not answer that.

A. The answer is that in the early part of May there was no—it was nothing——

The Court: You better reread that question.

A. May the 12th.

The Court: He is not on the way to answering it now. Reread it to him, please.

(Whereupon the reporter again read the last question.)

The Court: Now answer that.

A. I do not recall that.

By Mr. Speer:

Q. Do you recall telling the agent that anyone from the Besser Company told you you would be required to pay $25,000 down?

Mr. Babcock: I make the same objection.

The Court: The same ruling.

A. I recall telling him a figure, but I do not know whether it was twenty or twenty-five.

Q. I am asking you, was it $25,000?

[fol. 676] A. No, it was not.

The Court: He says he stated some figure, "twenty or twenty-five".

A. Twenty or twenty-five.

The Court: You have got that. Do you want to lose it?

A. And that was in January.

Mr. Speer: No, your Honor.

The Court: All right, you better keep it as long as you have got it.

A. And that was in January.

By Mr. Speer:

Q. All right. In addition to being required to pay $20,000 or $25,000 as a down payment, do you recall telling the F. B. I. agent that you would also be required to guarantee to the Besser Company $500 a month royalty?

Mr. Babcock: In addition to the objection formerly made, I have the further objection to this that counsel has assumed in stating the question, by the use of the word "required" that there was a positive obligation imposed or suggested as being imposed upon the witness, and that all the witness has said is that the figure was mentioned. There is too much legal implication in the use of the word "required."

The Court: I think you better reframe that question. As a matter of fact, aren't you now seeking to impeach this witness on matters that he has not denied up to this point? You are taking him entirely as a hostile witness [fol. 677] and I have not said that he is a hostile witness at all. You are proceeding under the theory that the court has held him to be a hostile witness. I have not done that yet and I don't know as I will. He has not testified to these matters before, has he?

Mr. Speer: I think, if your Honor please, he testified earlier today that the first down payment proposal required $12,000.

Mr. Babcock: Oh, no.

Mr. Speer: Isn't that right?

Mr. Babcock: Oh, no.

The Court: What was your testimony on that?

Mr. Babcock: He gave no testimony——

The Court: Let him tell what he gave.

A. My first offer I put it was on January 26 and that figure as I recall was either twenty or twenty-five.

The Court: Your first offer.

A. I mean Besser's first offer to me.

The Court: Yes. All right.

A. And that was considered a prepayment, not a down payment. I think there is a difference. In other words, there was a credit back towards the payment on the contract.

The Court: Well, how much is the price of the machine?

A. The machine is set out according to the equipment that you get.

[fol. 678] The Court: Yes, but how much?

A. Well, the contract that I am under now was $33,000.

The Court: And you were paying twenty or twenty-five thousand dollars down, is that right?

A. The prepayment was to be $20,000.

The Court: Well, that is a down payment?

A. That is right.

The Court: Is there any difference between a prepayment and a down payment?

Mr. Babcock: I think the witness is correct. This is a lease arrangement and not a sales contract.

The Court: Isn't he entitled to the property?

Mr. Speer: No.

Mr. Babcock: No, your Honor. This is a lease arrangement and he is making an advance payment on the rentals.

A. It is an advance rental payment.

The Court: I do not care what you call it. You could call it a down payment then. The fact that it is a lease arrangement does not say that it is not a down payment. A down payment, of course, is usually on what you are going to get title to, but on a lease you can make a down payment too.

Mr. Babcock: Since we understand and there is no confusion about it, I have no objection to the use of the term "down payment."

[fol. 679] The Court: Now, what is the question?

Mr. Speer: It is this: I thought he did say that his first offer involved an advance rental of $12,000.

The Court: I thought he mentioned $12,000 this morning.

Mr. Babcock: I think, your Honor, I can straighten that out very simply,—at the time he mentioned the $12,000 counsel was asking him about his first conversation with Mr. Park and Mr. Wehrum; they did not enter into this agreement until along after the January 26 contract.

A. That is right.

The Court: That was after the 45 days?

A. That is right.

Mr. Speer: Yes, that was after.

The Court: Yes. The twenty or twenty-five thousand dollar offer was before you ever had anything to do with Gocorp?

A. Gocorp——

The Court: Then Gocorp came in and the 45 days went by and then the twelve or fifteen thousand dollar offer came along.

Mr. Speer: It finally ended up in the contract whereby he made an advance rental payment of $2,000.

A. That is right.

The Court: Advance rental or advance payment. They [fols. 680-681] do not get title to these machines at all, then?

Mr. Babcock: No, your Honor.

The Court: All right. How long can they use them after they pay that? Is it so much a year, or so much a block?

Mr. Babcock: It is so much a block. The contract on its face, your Honor, shows that in addition to prepayment they give notes.

The Court: I see.

[fol. 682] Q. At the time, Mr. Goldcamp, of your conversations with Mr. Park and Mr. Hahn, was anything said about the Besser Company building a concrete block plant in Ironton?

A. I wonder if you would care to repeat that question.

(Question read by the reporter.)

A. No, there was nothing said about the Besser Company building a concrete block plant in Ironton.

Q. Do you recall telling the F. B. I. agent——

The Court (Interposing): Now, may I suggest to the government that you might put him another question right now. He laid stress, for some reason, on the words "Besser Company."

Mr. Speer: Yes.

The Court: Perhaps if you would pursue the question in a different manner——

A. (Interposing.) I want to answer.

The Court (Continuing): ——in a different manner, you will get an answer, so that there will be no question here whether it is admissible. You want to keep error out of this, don't you?

Mr. Speer: Yes, your Honor, I do.

The Court: All right. Now, right now I am not positive that I should permit these questions. Now, why put the court in the position, or put your case in the position where it might possibly be error when you certainly can get around it by asking proper questions.

[fol. 683] The court isn't supposed to do this for the government, but I anticipate that sooner or later the questions are going to get in, so I am trying to get them in as fast as I can.

By Mr. Speer:

Q. In your conversations with Mr. Park and Mr. Hahn, did they say that they intended to have a concrete block plant in Ironton?

A. They said that Ironton deserved the advantages of a Besser plant, and during my dealings with them it came back to me that they had inquired about a possible site, but they made no direct mention to me. They had inquired of the city manager. A day or two later I ran into him and he asked me, "Who are the two people——"

Mr. Babcock (Interposing): Just a minute, your Honor please.

The Court: Sustain the objection.

Mr. Babcock: I think we are going for afield.

Mr. Speer: All right.

By Mr. Speer:

Q. Did you have any conversations with any people in Ironton about the fact that certain persons were contemplating building a plant in Ironton?

Mr. Babcock: I object to it, your Honor please.
The Court: Sustain the objection.

By Mr. Speer:

Q. What is the basis of your information that Park and Hahn contacted certain officials in Ironton?
[fol. 684] Mr. Babcock: Well, he has said that he talked to the city manager. That testimony is in. I object to anything further.
The Court: If you had objected to that, I would have sustained your objection to it.

Mr. Babcock: I know that, your Honor.

A. Might I——
The Court (Interposing): No. Not the way the question is put. If he can reframe the question, all right.

By Mr. Speer:

Q. Mr. Goldcamp, what information do you have that Mr. Park and Mr. Hahn asked anyone in Ironton about the construction of a concrete block plant?

Mr. Babcock: I object to it, if your Honor please.
The Court: Oh, I think he can answer that. The rules of evidence wouldn't require them to put on all of the people that he might have talked to, and yet he might have learned, and perhaps that should have been the question. He might have learned. He did go to different people and was told by different people that they had approached them concerning a block plant in Ironton.
Mr. Babcock: Wait a minute. Pardon me. Up to the moment, the only word used has been "plant." Now, it may very well be a plant for the manufacture of machinery to manufacture blocks.
The Court: Well, let's get into the word "plant." I will [fol. 685] determine later whether or not they were talking

about machinery, or were talking about a concrete block plant. But I am going to permit the question. It is not asked properly, but in spite of that I am going to permit it.

A. I run into the city manager, and he asked me who the——

Mr. Babcock: Pardon me. Well, is your Honor ruling that you are going to permit him to testify to the conversation with the city manager?

The Court: I am going to permit them to ask the question whether or not he learned they had gone to different people in Ironton about putting in a block plant. I can't see anything so wrong in that, even if they did do it. But he may show it. You may show it.

Mr. Babcock: That is with the understanding that the court has overruled my objection to it.

The Court: Yes. I am overruling it.

A. Now, what I am to——

The Court (Interposing): Go ahead and tell your story.

A. I run into the city manager and he asked me who the two men from out of town were that were inquiring for a site to put up a plant.

Mr. Speer: All right. Thank you.

Mr. Babcock: Now, in order to make sure that the record is clear, since that has reference to nothing more than a [fol. 686] plant, I move that the whole testimony be stricken.

The Court: Overruled.

By Mr. Speer:

Q. Mr. Goldcamp, during your conversation with Mr. Park and Mr. Hahn, did either of those gentlemen at any time ask you to name your own terms pursuant to the installation of a Besser machine?

The Court: Is this a conversation before the 45 days, during the 45 days or after the 45?

Mr. Speer: The question was, your Honor, at any time.

The Court: At any time.

Mr. Speer: All right.

The Court: At any time.

A. Should I distinguish what time?
The Court: He isn't asking you yet. At any time.

By Mr. Speer:

Q. At any time?
A. At any time.
The Court: Then if he is interested in the time, he will probably ask you the question.
A. At one time Mr. Park says, "What is it that you are going to have to have to"—or, I will—"What terms are you going to have to have to install this machine?" I think that is as near as I recall about what he said.
Q. All right.
The Court: Well, are you going to ask him when it took [fol. 687] place? It may become very important as to when it took place.

By Mr. Speer:

Q. Did that conversation take place during the 45 day period in which the Gene Olsen——
The Court (Interposing): Why not ask him when did that conversation take place, because you will have to ask three questions there to get an answer. This way, you can get it in one, if you will ask him when did that take place.
A. That took place in late May or early July.
The Court: That would be after the 45 days?
A. After the 45 days.
The Court: All right. All right.

By Mr. Speer:

Q. Was the Gene Olsen machine in your plant at that time?
A. Yes, it was.
The Court: But it was after the 45 days?
A. But it was after the 45 days.
The Court: All right.

By Mr. Speer:

Q. Did you keep the Gene Olsen machine in your plant after the 45 day period had expired?

A. The Gene Olsen machine was in my plant for 63 days. It left—it was installed April the 1st. It was there during April, May and left on June 8th. That would be 68 days about.

Q. I believe you stated earlier, Mr. Goldcamp, that you had conversations with Park and Hahn in Ironton and Ash-
[fol. 688] land, Kentucky, and in Olive Hill, Kentucky, is that correct?

A. That is right.

Q. Now, may I ask you what your business was, if any, at Ashland, Kentucky?

A. We do work in the Tri-State area and I was either a—might have been either a grading job or an erection job.

Q. Do you have a concrete block plant in Ashland?

A. No, I do not.

Q. Do you have a concrete block plant in Olive Hill?

A. I do not.

Q. And what was your business in Olive Hill at that time?

A. We were erecting a steel building for the General Refractories Company.

Q. Did you ask Mr. Park and Mr. Hahn to contact you in Ashland, Kentucky, and in Olive Hill, Kentucky?

A. I did not.

Q. Did you expect them there at Ashland, Kentucky, and at Olive Hill, Kentucky?

A. No, I did not.

Q. Were these two conferences in Ashland, Kentucky and Olive Hill, Kentucky held at Mr. Park or Mr. Hahn's suggestion?

A. Well, as I previously stated, I was on jobs and they would drive up.

Q. Answer that. Answer the particular question, please. Were those meetings at Ashland, Kentucky and Olive Hill, Kentucky held at the suggestion of Mr. Park and Mr. Hahn?

[fols. 689-690] A. At the suggestion, you say? I would say yes.

Q. Did Mr. Park or Mr. Hahn ask you to confer with them in Ashland, Kentucky?

A. No.

Q. All right. Did Mr. Park or Mr. Hahn ask you to confer with them at Olive Hill, Kentucky?

A. No.

[fol. 691] Cross-examination.

By Mr. Babcock:

Q. As a matter of fact, Mr. Park and Mr. Hahn were pretty good salesmen in following prospects, weren't they, Mr. Goldcamp?

The Court: Was that a question you have given him?

Mr. Babcock: Yes, your Honor.

The Court: Did he answer it?

A. I did not consider it as a question. But I will say that they were pretty good salesmen.

By Mr. Babcock:

Q. Now, you have given some testimony about a suggestion that there might be patent infringement, and that you subsequently talked with either Mr. Olsen or Mr. Davis of the Gocorp and were assured that they would protect you. Did any of that conference influence your judgment to take the Gocorp machine out and put in the Besser machine?

A. No, it did not.

Q. You have also testified to a conversation with the city manager of the city of Ironton, about the construction of a plant or looking for a site for a plant. Did that have any bearing on your decision to take out the Gocorp machine and put in the Besser machine?

A. No. It was made in the early stages. And my decision was after the 45 day trial period.

[fol. 692] Q. As a matter of fact, Mr. Goldcamp, the whole summary of your experience is that you put in the Gocorp machine on a 45 day trial, you tried it, it did not work, you were shut down a good deal of the time, you kept it there

for about 68 days, you found you were not satisfied with the machine at all, and you took it out. Isn't that right?

Mr. Speer: I object, your Honor. Whether or not the Gene Olsen machine performed in a satisfactory manner should not be involved in this case, I believe.

The Court: He may answer.

A. I was losing money during this time.

The Court: Why don't you answer the question that was put to you?

A. All right.

Mr. Babcock: Would you like to have it reread to you?

A. Yes, read it please.

(Last question read by the reporter.)

A. That is right.

By Mr. Babcock:

Q. Now you have also mentioned in the course of your testimony that during that trial period with the Gocorp machine, you were losing money. You have also testified that subsequent to the expiration of that 68 day period, you installed a Besser machine. Since the installation of the Besser machine, have you lost money by reason of the failure of the machine to operate?

[fol. 693] The Court: Just a minute.

Mr. Speer: I object, your Honor.

The Court: I sustain the objection.

By Mr. Babcock:

Q. You also testified at the time you made your contract with the Gocorp, if I recall it, and correct me if I am wrong, they promised to give you an installation within 30 days. Is that correct?

A. That is correct.

Q. Did you get the installation within 30 days?

A. The installation was made approximately 50 days later.

Q. Fifty days later?

The Court: That is not the reason why you took out the Gocorp, was it?

A. No.

The Court: What difference does it make whether it was 30 days or more?

A. I waited——

Mr. Babcock: Will you mark these, please?

(Whereupon an agreement was marked Exhibit 136 and a check was marked Exhibit 137.)

By Mr. Babcock:

Q. I now hand you a document which has been marked for identification Exhibit No. 136, and ask you if you can identify it?

A. This is the first agreement that was entered into between myself and Mr. Niehaus on January 26.

[fol. 694] Q. This document you signed and gave to him and asked him to just hold it until after the Cleveland show?

A. The convention, that is right.

Q. And Exhibit No. 137 is what, please?

A. That is the check that was handed him at the same time.

Q. And which you later asked him to hold up negotiating?

A. That is right.

Mr. Babcock: I offer in evidence Exhibits 136 and 137.

Mr. Speer: We have no objection.

The Court: They may be received.

By Mr. Babcock:

Q. Mr. Goldcamp, I note in Exhibit 136 on the back of the front page there are listed some items which are perhaps attachments or fixtures to be used with the actual concrete machine, are they not?

A. These items here make the changeover from the one-at-a-time machine to three-at-a-time machine complete.

Q. I see.

A. Mixer, racks, pallets and controls.

Q. The first item on the top of the back of the page is the batch mixer, and the next item is a skip loader?

A. That is right.

Q. The next item electric panel for mixer and the skip loader.

[fol. 695] By Mr. Babcock:

Q. Those were items that were contemplated in your first deal with Niehaus?

A. That is right.

Q. Then when you bought the Gocorp machine, did similar items come along with the Gocorp machine?

A. That's right.

The Court: Niehaus, or whatever his name is, represented the Besser Company?

Mr. Babcock: That is right, your Honor.

By Mr. Babcock:

Q. When you made the contract on July 11, 1949, those items were eliminated because you already had them in [fol. 696] your place of business?

A. The mixer and skip hoist, and the racks were all eliminated, that is right.

Q. And in the proposed contract of January 26, the total cash deposit contemplated was $15,550, wasn't it?

A. That is right.

Q. And in the contract of July 11, the total cash deposit contemplated was $1,000. Is that correct?

A. That is right.

Q. The reason for that difference is made up of the fact that these items we have just been talking about are not included in the contract of July 11; isn't that correct?

A. That would be about that, the difference.

Q. And as indicated by Exhibits 134 and 136, the two lease agreements, the price of the machine itself is the same in both contracts, isn't it, $40,000?

A. That is right.

Q. Now, Mr. Goldcamp, did you ever ask Mr. Park, "How many of these give-away propositions can you afford to make?"

A. I did not.

Q. Did Mr. Park ever say to you, "We will only have to make two or three and Gocorp will be out of business."—that is, two or three give-away propositions?

A. I did not. Could you reread the question, please?

Mr. Babcock: Read the question back, please.

[fol. 697] (Last question read by the reporter.)

A. He did not.

By Mr. Babcock:

Q. Did you ever tell Mr. Eugene F. Olsen that you had asked Mr. Park, "How many of these give-away propositions can you afford to make?"

A. No, sir.

Q. Did you ever tell Mr. Eugene F. Olsen that Mr. Park had stated to you, "We will only have to make two or three and Gocorp will be out of business"?

A. No, sir.

Q. Did you ever tell Mr. Eugene F. Olsen that Mr. Park told you that the Besser Company would install a competitive machine?

The Court: What is your answer?

A. No, sir.

Redirect examination.

By Mr. Speer:

Q. Have you discussed this case at all with any of the counsel for the defendants?

A. I have talked with Mr. Besser, Mr. Babcock and——

[fol. 698] The Court: Your answer is "yes," is it?

A. Yes.

[fol. 699] FRANK E. MILEWSKI, called as a witness on behalf of the plaintiff, being first duly sworn, by the court, testified as follows:

Direct examination.

By Mr. Speer.

Q. Will you state your name and address, please?
A. Frank E. Milewski, Holland, Michigan.
Q. What is your present occupation, Mr. Milewski?
A. President of the Lith-I-Bar Company.
Q. And for what period of time have you been president of the Lith-I-Bar Company?
A. Since 1945.
Q. What is the chief business of the Lith-I-Bar Company?
A. The manufacture and sales of a joist-making machine, and a block-making machine.
The Court: Sales, not leasing?
A. Sales.
The Court: All right.

By Mr. Speer:

Q. What kind of concrete block machines does your company make, Mr. Milewski?
A. An automatic vibrating machine.
Q. What is the hourly capacity of the machine?
A. Rated at 480 per hour.
Q. In your opinion, do you consider that to be a High production machine?
[fol. 700] A. Yes.
Q. Is this machine covered by any patents or any patent applications?
A. Yes.
Q. Are there applications or are there patents?
A. Applications.
Q. Could you tell us when the applications were made?
A. To the best of my knowledge, the major portion of them were filed about September or October of 1945.
Q. And by whom were they made, Mr. Milewski?

A. Mr. Ralph L. Samuelson of Traverse City, Michigan.

Q. Do you manufacture the machines under the application license from Mr. Samuelson?

A. Correct.

Q. In the calendar year 1946, what was the number of concrete block machines your company produced?

A. Two, I believe, that we delivered.

Q. For the year 1947?

A. About 27.

Q. And 1948?

A. 45.

Q. Now, these machines in 1946, 1947 and 1948, were they all of the same kind? That is, was it the same kind of a machine, that is, the 480-block per hour?

A. Yes.

[fol. 701] Q. And what did that machine sell for during those years?

A. $8,760 was the list price.

Q. During that period, did you manufacture any machine employing the tamping principle?

A. Our machine is a combination of vibration and tamping.

Q. Would you give us a brief description of that, that is, what you intend to convey by "vibration and tamping"?

A. What actually takes place in the machine is the fact that the vibration continues as well as the tamping action by the stripper head until that block is down to size, and when it is down to size, by means of an electrical circuit, it strips, the cycle finishes at that point, and the block slips out of the mold box.

Q. Was the first block machine actually produced in 1946, or was there one in 1945?

A. By that question, Mr. Speer, do you mean produced by Lith-I-Bar Company, or by Mr. Samuelson? The first machine was——

Q. (Interposing.) Well, I will ask that, then. In what year was the first machine produced by your company?

A. In 1946.

Q. After the production of your first machine in 1946, have you had any conversations with anyone from the Besser Manufacturing Company about your machine?

A. Yes.

Q. Well, beginning in 1946, up to the present time, approximately how many conversations have you had?

[fol. 702] A. Oh, possibly, if we consider as conferences, whether you mean direct meetings or casual meetings that might have occurred at interims, at various conventions, and so on, I would say maybe ten or twelve.

Q. Could you tell us approximately when was the first time you had any discussions about your machine with anyone at Besser Company?

A. It was some time along in May, I believe, of 1947.

Q. And with whom did you have that conversation?

A. Mr. Jesse Besser, a Mr. John Stark, and a Mr. Delamater, who at that time was affiliated with the Stearns Manufacturing Company.

Q. Where did the conversation take place, Mr. Milewski?

A. In our office, at Holland, Michigan.

Q. Now, can you recall for us what the general substance of the conversation was?

Mr. Babcock: I think we should first inqure whether he can fix who said what, rather than just leave it to the three men, the general substance of what three men had to say. That is asking for his conclusion as to whatever the *the* three of them might have had to say together.

The Court: He first is asked, I believe, what the conversation was about. I think any number of men could gather together and have a general conversation about something and it could be testified to. I think he can answer the question. What was the general conversation [fol. 703] about? Is that the question?

Mr. Speer: That is the question.

The Court: I think he can answer it.

A. Possible patent infringements.

By Mr. Speer:

Q. Now, what in particular, if you recall, was stated about patent infringement?

Mr. Babcock: I think we are entitled——

By Mr. Speer:

Q. And if you can recall by whom, we would like to have that information.

A. Actually at that meeting, as best I can recall, there was no specific direct charge of anything. Only inferences, that there may be something.

Q. Were these inferences made by Mr. Besser or Mr. Stark, or this other gentleman?

Mr. Babcock: I think I will ask that the answer of the witness be stricken. I will object to this question because the answer as given is stating the witness' conclusion as to whether what was said was an inference or was not an inference, which is something the court should draw, and the question as asked is one that calls for the same thing from the witness.

The Court: I think the witness can tell what the conversation was, and the court will decide whether or not there was any inference. And it is not necessary, of course, for the witness to remember who said what. But there were two different companies represented here, Besser [fol. 704] Company and your company, and they had a conversation.

A. Three companies. Stearns Manufacturing Company.

The Court: Stearns.

Mr. Speer: Stearns.

The Court: Stearns. That is right. Give the conversation the best you can.

Mr. Babcock: I think, if your Honor please, that we ought to say to the witness, however, that if he remembers a specific statement by any definite person——

The Court (Interposing): Oh, certainly. If you can remember anyone said any particular thing, made any particular statement, you don't need to give it verbatim, but what he said, you may do so. You should do so, as a matter of fact.

A. Well, the meeting more or less was opened by Mr. Besser, as I recall, making the statement that he was interested in protecting the industry by seeing to it that the

products that were produced were of high quality. Then the trend of conversation dropped off, as I recall, to Mr. Stark reaching into a portfolio and picking out the patents, and some inference that maybe the Lith-I-Bar machine was making——

Mr. Babcock (Interposing): I object to that statement of inference.

The Court: Sustain the objection. Tell what was said as near as you can.

A. That there might be a patent infringement.

[fol. 705] The Court: By the way, at this time, did the Besser people have a substantial block of stock of Stearns, or was Stearns independent?

Mr. Speer: Stearns was independent at this time, your Honor.

The Court: All right. All right, let's proceed.

A. Well, I believe I asked the question that whether the gentlemen present had ever seen a Lith-I-Block machine. Mr. Besser acknowledged that he had. The other gentlemen expressed themselves as not having ever seen one. So I invited them to go over to the plant where at that time we were manufacturing and to see the machine in operation. The invitation was accepted.

A group of us, consisting of Mr. Besser, Mr. Stark, Mr. Delamater, and a Mr. Rice, who had originally filed the original patent applications for Mr. Ralph L. Samuelson, walked over to the factory where the machines were being made and where our machine was on the floor ready to test run, and an operation was viewed by the gentlemen there.

After that, we walked back to our office. The rest of the conversation merely dwelt upon the nice weather, and the tulips, and so on, and, as best as I recall, late in the afternoon they departed.

By Mr. Speer:

Q. Now, at the time that you went over to the plant to see the machine in operation, can you recall what the substance of any conversation was there that might have taken place?

[fol. 706] A. I believe Mr. Besser made the statement that the machine could be altered to vibrate under pressure.

The Court: Yours was a tamping machine, was it not?

A. It is a combination of vibration and tamping.

The Court: Yes. That is what I mean.

A. Correct.

By Mr. Speer:

Q. Did Mr. Stark hand to you these patents that he had extracted from his portfolio?

A. He did not.

Q. Did you know at that time what patents he was referring to?

A. By the name of the patentee.

Q. Did you get that information from Mr. Stark, or did you get it elsewhere?

A. Mr. Stark mentioned Gelbman.

Q. Did Mr. Stark state what particular claims of the Gelbman patents he alleged your machine might be infringing upon?

A. He did not.

Q. Now, approximately at what time was the next conversation or conference that you had with anyone from the Besser Company or the Stearns Company?

A. I believe there was not anything of any consequence until October, about October of 1948.

Q. And where did you have the conference at that time, Mr. Milewski?

A. At our office at Holland, Michigan.

Q. And what persons were present?

[fol. 707] A. Mr. Phil Park, and Mr. Stark, Mr. John Stark.

Q. Did they state what the purpose of their call was?

A. Yes.

Q. All right, what was the purpose of the call?

Mr. Babcock: What did they say, rather than the witness' conclusion as to what was their purpose.

A. Mr. Park——

Mr. Speer: Just wait a second. I have asked this man what the purpose of the call was.

The Court: I have not heard any objection. He may answer.

Mr. Babcock: I do object, if your Honor please, because the question calls for the witness to state his conclusion as to what was the purpose. If he wants to relate the conversation, all right.

The Court: All right.

By Mr. Speer:

Q. What was the general substance of the conversation, and if you can tell us what each individual said, we would appreciate that.

A. As I recall, Mr. Park introduced the subject of the purpose of the meeting by telling me a lengthy story about Mr. Besser's life history, and that Mr. Besser, not having any immediate family, no children, that this block machine that he was manufacturing was his one great love, and that he felt that we were encroaching upon that, and that something would have to be done about it.

[fol. 708] Q. Did you say these statements were made by Mr. Phil Park?

A. Yes.

Q. All right, then was there anything else stated during this conference?

A. Mr. Stark then made some inferences of patent infringements.

Mr. Babcock: I object again.

The Court: I sustain the objection. Tell what he said, as near as you can. You might call it an inference and I might call it something entirely difference. Just say what he said as near as you can remember.

A. I tried at different times to get a specific charge from Mr. Stark, what was the infringement; he always refrained from naming anything. So I do not know how I could call it anything but an inferenee.

The Court: Well, just say what he said. What do you base that conclusion on? You must remember something he said.

A. Simply from the fact that he was insinuating that were infringing on the Gelbman Patent.

Mr. Babcock: I object.

The Court: I sustain the objection.

By Mr. Spear:

Q. Can you tell us wha: Mr. Stark said about these lbman patents?

A. He said that they existed and that incidentally Mr. ark did say that Mr. Gelbman was insisting that the sser Manufacturing Company do something about the l. 709] Lith-I-Bar Company infringing upon the Gelb- n patents.

Q. Now, in addition to that, did Mr. Stark say anything e about patents—strike that, please—Did Mr. Stark say ything about your continued use of your machine?

A. Not Mr. Stark.

Q. Did Mr. Park say anything about your continued use your machine?

A. Yes.

Q. What did he say?

A. In the meeting in the early part of October, Mr. Stark ted that the Besser Manufacturing Company might be ling to have the Lith-I-Bar Company continue for a riod of six months, or possibly a year, and then if I uld agree to discontinue at that time that they would t me on a salary, or same basis of remuneration for a riod of ten years beyond that time.

Q. At this October conference did either of these gentle- n mention anything about the patent litigation?

A. Yes.

Q. What did they say, and if you can tell us which of two made the statement, tell us, please.

A. I believe it was Mr. Park who insinuated that patent gation might——

Mr. Babcock: I object.

The Court: I sustain the objection.

A. Who said that patent litigation might run in expenses to maybe a couple hundred thousand dollars and he did

[fol. 710] not feel that that would be wise for either of the companies to undertake such expenditures.

Q. Did either Mr. Park or Mr. Stark at this time say anything about the Besser Company's intent to put your company out of business?

A. Yes.

Q. What did they say, and which of the two made the statement?

A. On one occasion Mr. Park made the statement that Besser Manufacturing Company could and might enter into the field of making a machine directly competitive with us and undersell us to a point where he would be driven out of business.

Mr. Babcock: I object, if your Honor please, and ask that the answer be stricken. The question as asked was whether any representative of the Besser Company said anything about an intent by Besser to put them out of business. The witness has simply related a statement of what might happen. That is not an expression of intent.

The Court: Well, the answer is not responsive but you cannot object to that. There may be some other ground on which you can object. Read the question against, please.

(The last two questions and answers were read by the reporter.)

The Court: Well, probably the word "intent" should not be in there but I think the testimony may stand anyway. It is for me to say whether that was a proper conclusion [fol. 711] on the testimony, and not for the witness.

By Mr. Speer:

Q. Did either Mr. Park or Mr. Stark at this conference say anything about the competitive position of your company with the Besser Company?

A. Yes.

Q. What did they say or what did he say?

A. Mr. Park stated that Besser Manufacturing Company considered it imperative that the Lith-I-Bar Company be out of business.

Q. At this conference did Mr. Park or Mr. Stark offer to buy the assets of your company?

A. Yes.
Q. What were the terms of the offer?
A. There were several.

Mr. Babcock: I hope the witness will give the conversation in response to that question, and not state his conclusion.
The Court: Yes.

By Mr. Speer:

Q. What was the general substance of the conversation about the purchase of your assets?
A. There were several propositions.
Q. We would be interested in those.
A. One offer was that the Besser Manufacturing Company would purchase——

Mr. Babcock: Now just a minute, I would like to have who is speaking.
[fol. 712] The Court: Do you remember who was speaking, and give what they said rather than your conclusion of what they said.
Mr. Babcock: And at which of these two conversations.
A. Mr. Park.

Mr. Babcock: And at which of these two conferences?

By Mr. Speer:

Q. This is the conference in October of 1948.
The Court: That is right. Mr. Park said what?
A. That the Besser Manufacturing Company would be willing to buy the physical assets of the company, assume the obligations of the lease on the manufacturing plant that was then being used.
Q. At this conference did Park or Stark say anything about your being employed by the Besser Company?
A. Mr. Park said the Besser Company would be most willing to put me on their payroll.
Q. Did Mr. Park state what terms of employment would be?
A. I would not have to do anything.
Q. Anything else?

A. He expressed it that they were willing to pay me for "not growing potatoes."

Q. Can you recall any other thing that was discussed at this October conference of 1948?

[fol. 713] A. There was one suggestion, made again by Mr. Park, that the Besser Manufacturing——

Mr. Babcock: What did Park say, not whether it was his suggestion or not.

A. That the Besser Manufacturing Company would—that is, if I did not care to sell out, would permit me or even help me to manufacture up to 100 machines if I agreed to not sell those machines, but lease those machines.

By Mr. Speer:

Q. What was your answer to that, Mr. Milewski?

A. I was not interested.

Q. What was your answer to the other parts of this conversation, that is, the employment, the buying of the assets?

A. I did not care to do so.

Q. Was there any other conference after October of 1948, with anyone from the Besser Company, and at your plant?

A. Not after the latter part of October of 1948, that I recall.

Q. Well then is it your testimony that this conference in October of 1948 was the last time you conferred with——

A. Well, there were—the last direct conference by their request that I recall was about October 28.

Q. Well now, this other conference in October, approximately what time of the month did that take place?

A. It was about October 11.

The Court: The first conference, or the second conference in October?

Mr. Speer: I beg your pardon.

By Mr. Speer:

[fol. 714] The Court: Is he talking about the first conference in October, or the second one?

Mr. Speer: He had talked about the first one is my understanding. I am going to ask him about the other one on October 28.

The Court: And when did he say the first conference took place?

Mr. Speer: October 11.

The Court: I just asked wheher or not that was the first conference or the second conference. When was the first conference?

By Mr. Speer:

Q. When was the first conference?

A. October 11.

The Court: When was the second conference in October?

A. As near as I can remember, October 28.

By Mr. Speer:

Q. Can you tell us whereabouts this conference took [fol. 715] place?

A. At our office at Holland, Michigan.

Q. And who were present?

A. The same group, Mr. Stark, Mr. Park, and myself.

Q. And what was the general substance of the conversation at that time?

A. It was almost a virtual duplication.

Mr. Babcock: I ask that that be stricken.

The Court: Well, you can draw out whatever you want to on cross-examination. He says they talked about the same things that they did before. Is that what you mean?

A. That is right, sir.

The Court: All right. They talked about the same things they did before, and you may go into it on cross-examination if you desire.

Now, at any time that you conferred with Mr. Stark and Mr. Park——

By Mr. Speer:

Q. During any of your conferences with Mr. Stark, did he ever specify in which respects he claimed the machine [fol. 716] might infringe the Gelbman patents?

A. He did not, to me, at least.

The Court: Your machine is a vibrating machine, isn't that true?

A. Correct, sir.

The Court: Have you seen the Besser machine?

A. Yes, sir.

The Court: How does your machine differ from the Besser machine, other than the tamping instead of the pressure?

A. Well, physically the machine differs very greatly.

The Court: Well, I saw one over at Midland, didn't I?

A. Correct, your Honor.

The Court: What were the distinctions that you brought out at that time as to the difference between these machines? Well, I will help you. The Besser machine, under the Gelbman patent, has a vibrating mold that is separate from the feed box, isn't that true?

A. Yes, your Honor.

The Court: Your machine, because of the iron flanges that are on top of the mold, contacts the feed box, and under your theory the feed box vibrates with the mold?

A. Correct, your Honor.

The Court: Isn't that true? It was admitted, I think, and if it wasn't you can say so, that as there is certain [fol. 717] wear on these flanges, on the iron bars, that there is a disengagement of the feed box and the mold.

A. There is a possibility of that, your Honor.

The Court: Yes. And that they have to be replaced every three months or so?

A. Approximately.

The Court: Your machine has the hopper, has it not?

A. Yes, sir, your Honor.

The Court: It has the feed box?

A. Yes, your Honor.

The Court: The feed box moves on tracks over the mold. That is true, isn't it?

A. Yes, sir.

The Court: And it is the second Gelbman patent, the second one that I had—I don't know how many there are now—but the second one that I had up there, one of the

claims was that it fed the mold as it progressed over the feed box, or over the mold, isn't that true?

A. That is right.

The Court: That is true of every feed box moving over a mold, isn't it?

A. Couldn't help it.

The Court: I was wondering about that. But the mold in the Besser machine has the vibration mechanism on the outside, that is true, isn't it?

A. Yes, your Honor.

[fol. 718] The Court: You have yours where?

A. On the outside.

The Court: On the outside.

A. On the outside of the mold.

The Court: Yes. Have your any irons or anything—I can't think of the word—on the inside of the feed box?

Mr. Stark: Agitator.

The Court: Agitator?

A. Yes, we have an agitator.

The Court: Do they have an agitator in the inside too?

A. Yes, your Honor.

The Court: So that the difference between your machine, as I understand it, and the Lith-I-Bar, is that your——

A. (Interposing.) Ours is the Lith-I-Bar.

The Court: I am sorry. And the Besser, is that you maintain a connection between the feed box and the mold, the mold does not start to vibrate until the feed box is filled, and in the Besser it starts to vibrate the minute the feed box starts over the mold, and yours is a tamping and theirs is a pressure, isn't that right?

A. Your Honor, may I make one qualification here? You make reference to the Besser machine. I do not believe that the Besser machine, since I have observed it, entirely maintains to the related claims in the Gelbman patent. Now, I do not believe——

[fol. 719] The Court (Interposing): Well, I know what your argument is on that. That there is a certain seepage.

A. No. We don't necessarily exactly employ—you are making comparisons between Besser and Lith-I-Block machines. Actually, I do not believe the Besser machine

actually, all the way through, actually employs the Gelbman patent.

The Court: In what way does it not?

A. As the claims exist.

The Court: In what way do they not?

A. I am not exactly familiar with that. For instance, when that feed drawer starts vibrating, I don't know when the feed drawer starts vibrating on the Besser machine. I know what the Gelbman patent says.

The Court: I know it can be controlled both ways. It may run so that the feed box vibrates the minute—not the feed box, but the mold vibrates the minute the material starts to come in.

A. I would imagine.

The Court: Into the feed box. Or it can be held the same as yours?

A. I would imagine it could.

The Court: I am going to build one of these machines when I get through with this case.

A. You might improve upon it.

The Court: All right.

By Mr. Speer:

Q. Mr. Milewski, after October 28, 1948, did you have [fol. 720] any other conferences with Park, Stark, or any other people from the Besser Company?

A. To the best of my recollection, not.

Q. Have you ever discussed the patent license with Besser, or anyone connected with the company?

A. Yes.

Q. And what time was such discussion held?

A. That was in January, 1950.

Q. And whereabouts, please?

A. In Detroit, Michigan.

Q. And who was there?

A. Mr. Besser, Mr. Bailey, Mr. Olsen, Mr. Babcock, Mr. Henry, an attorney appearing with me, Mr. Shivel, and myself.

Q. Now, at that conference, what was the general substance of the conversations, and again, if you can recall individual statements, please do so.

Mr. Babcock: I object, if your Honor please, for the reason that this incident occurred some fifteen months after the filing of the complaint in this case and it cannot be material and relevant to the issues involved.

The Court: Overruled. It could have happened fifteen minutes ago and still be competent. If that is your only objection, he may answer the general question.

A. May I have the question again.

(Question read by the reporter.)

[fol. 721] A. The general substance was the possibility of the Besser Manufacturing Company licensing Lith-I-Bar Company under the Gehman patents.

By Mr. Speer:

Q. Can you recall more in specific detail what the conversation was? Did you ask Mr. Besser if you could obtain the patent rights?

A. I did not.

Q. Well, what were the details of the conversations at that conference?

A. We were offered a license——

Mr. Babcock (Interposing): Well——

Mr. Speer (Interposing): Go ahead. Make your objection.

The Court: As near as he can say, who offered it, and what the conversation was. And the court will determine whether or not it was an offer. I know it is hard.

A. The conversation was primarily carried by Mr. Eugene Olsen.

Mr. Babcock: There, your Honor. That is why it is particularly important in this case, because this witness had several conversations with Mr. Olsen alone and out of the presence of the other gentlemen, during the course of this meeting.

The Court: That hasn't been brought out yet.

Mr. Babcock: No, your Honor. But that is why I wanted to be very careful about who said what at this time.

[fol. 722] The Court: You have the right anyway to know

who said these things at that time. Olsen was connected with the defendant in this case.

Mr. Babcock: Oh, no.

The Court: I mean, at one time he was.

Mr. Speer: At one time.

Mr. Babcock: Not in January, 1950.

The Court: If I said "at that time" I did not mean "at that time." I mean at one time Olsen was connected with the defendant in this case.

Mr. Babcock: Yes.

The Court: And, as a matter of fact, many of the government's cases are made by people who were bed partners years before and no longer are bed partners.

Mr. Babcock: Oh, yes. Yes, when they are testifying about instances that occurred while they were bed partners.

The Court: Yes.

Mr. Babcock: But this occurred later and is something entirely new, which originated in January, 1950.

The Court: This is after——

Mr. Babcock (Interposing): And Mr. Olsen at that time had no connection with any defendant.

The Court: Was that the first time you had talked with Mr. Olsen in connection with this?

A. No, your Honor.

[fol. 723] The Court: Was he at any of the other conferences?

A. No, sir.

The Court: Did you ever have any talk with him connected with the Besser Company, or Stearns?

A. Yes.

By Mr. Speer:

Q. Before we adjourned, I believe you were beginning to tell us about a conference in January of 1950 in Detroit with Mr. Besser, Mr. Olsen, Bailey, Henry, and others. Now, who advised you of such a conference?

A. Mr. Eugene Olsen.

Q. When he advised you of the conference, what did he say about it?

Mr. Babcock: I object to it as a private conversation between Mr. Olsen and Mr. Milewski.

The Court: What is the object of this? I cannot see that, gentlemen.

Mr. Speer: The object, your Honor, is to show that this conference was the plan of the defendant Besser, and he [fols. 724-725] called his——

The Court: All right, if you have that in mind, you may show it.

By Mr. Speer:

Q. At the time you were advised by Mr. Olsen that a conference was to be held, what did he say to you at the time?

Mr. Babcock: I think I should complete my ground for objection, however, by adding that even if Mr. Olsen made statements making reference to Mr. Besser, there is nothing in January of 1950 in their general business relations or otherwise that connects Mr. Olsen with Mr. Besser or the Besser Manufacturing Company as a representative. And even if Mr. Olsen at that time claimed to be representing somebody, they cannot establish the agency by the statements of the agent.

Mr. Speer: I am not attempting to establish any agency at all, your Honor.

The Court: I will take the testimony. I may throw it all out, but I will take it just the same.

By Mr. Speer:

Q. All right, Mr. Milewski.

A. Mr. Olsen called me by telephone and told me that he had been approached by a representative of the Besser Manufacturing Company wanting to know whether I would be amenable to a meeting in which we may discuss the possibilities of a licensing arrangement for our two——

[fol. 726] The Court: Go ahead. "Our two—you mean companies?

A. Companies.

The Court: All right.

By Mr. Speer:

Q. What was your conversation then with Mr. Olsen over the phone?

Mr. Babcock: May my objection continue to the balance of this conversation?

The Court: It may continue.

A. Do I understand I can answer the question?

The Court: Yes.

A. May I have that question now?

(Whereupon the reporter read the last question.)

A. If I would come over to listen.

By Mr. Speer;

Q. And did you actually attend a conference in Jan-
[fol. 727] uary?

A. I did.

Q. And what was the date of the conference?

A. I believe I heard Mr. Olsen testify the other day that——

The Court: Never mind about that.

A. It was January 20.

The Court: You are testifying.

A. I don't remember the exact date. My office would have a record of the exact date.

By Mr. Speer:

Q. Was it between the 15th of January and the end of the month?

A. Yes.

Q. Now then, getting off the track for one second here, have any of your customers been involved in a patent suit with the Besser Company?

A. Yes.

Q. What was the date of the trial of the case?

A. Started January 3, 1950.

Q. And do you know when it ended, if it has ended?

The Court: There is no decision, if that is what you want to know. I am calling them in next Thusrday for a final plea to the court.

By Mr. Speer:

Q. Could you tell us then when the end of the case appeared?

A. The trial?

Q. The end of the trial, yes

[fol. 728] A. The end of that week. I believe we finished on Friday afternoon of that same week of January 3.

Q. All right. Now then, will you tell us what the general substance of the conversation was at the conference in Detroit in January between the 15th and the end of the month?

Mr. Babcock: Well, I must object to any conversations that occurred between Mr. Olsen and Mr. Milewski when they were alone.

Mr. Speer: I am not asking that, your Honor.

Mr. Babcock: Out of the presence of.

The Court: He says he is not asking that.

Mr. Babcock: I want to be sure the witness understands that before he starts to answer, that he relates only conversations in which Mr. Besser or his representatives were present.

The Court: All right.

A. The discussion was the potential possibility of the Besser Manufacturing Company granting licenses to Lith-I-Bar Company, and to the Gene Olsen Corporation.

By Mr. Speer:

Q. Can you remember what person there made such statements?

A. Mr. Olsen led the conversation to a great degree.

Q. But you cannot remember whether or not he made those specific statements?

A. He made statements that the Besser Manufacturing Company would license. Mr Besser concurred in that.

[fol. 729] Q. And at the time Mr. Olsen made the statements, they were made within the presence and hearing of Mr. Besser; is that true?

A. Yes.

Q. Now, were the terms of the proposed patent license discussed?

A. Yes.

Q. What were the proposed terms?

Mr. Babcock: The terms? Or what was the discussion? If the witness is stating a conclusion, I object to it. If he is going to relate a conversation, that is something different.

By Mr. Speer:

Q. What was the conversation, Mr. Milewski, with respect to the proposed terms?

A. The price was named by Mr. Besser.

Q. What was the price, if you recall?

A. $150 per cavity, a mold box.

The Court: Per year, or what?

A. Per machine manufactured and sold.

The Court: That means either $300 or $450?

A. Correct, sir.

The Court: That is rent?

A. No. A royalty.

The Court: I see. And is there something else besides that?

A. Not in payment.

The Court: $450. And how long can you use it, for how [fol. 730] long?

A. That would be a license. That would be a license for each machine. You would pay that. That would be a royalty payment, as I understood it, for each machine manufactured and sold.

The Court: Oh. This is running from you; you would have to pay them?

A. Correct.

The Court: I see. All right.

By Mr. Speer:

Q. Now, in addition to the payment of this fee, was there any other discussion about the proposed terms of this patent license?

A. There was a restriction, that as far as the Lith-I-Bar Company is concerned——

Mr. Babcock (Interposing): Wait a minute. Who is talking now, please?

The Court: Who is supposed to be saying what you are saying?

Mr. Speer: If the court please—may I?

The Court: Yes.

Mr. Speer: I believe he has testified to the best of his recollection the statements about the proposed license were made by Mr. Olsen in the presence of Mr. Besser.

The Court: All right.

[fol. 731] By Mr. Speer:

Q. And is still part of it?

A. This next statement, may I qualify the answer on this next one. It will need some description. There was a point in that meeting when—I don't recall who it was; I believe it was Mr. Babcock, if I remember correctly——

The Court (Interposing): Was he at the meeting?

Mr. Speer: Yes, your Honor.

A. (Continuing.) —suggested that they would like to be excused for a private discussion. Mr. Shivel, my attorney, and myself left the room and went into another room where we waited for some little time.

The Court: What became of Olsen?

A. I don't know where Olsen was at that time.

The Court: Who was left in the other room?

A. When we departed, I believe it was Mr. Olsen, Mr. Besser, Mr. Bailey and Mr. Henry, and Mr. Babcock, I believe, were there.

The Court: I asked you what became of Olsen and you said you didn't know.

A. I assumed he stayed there.

Mr. Speer: He assumed he stayed there.

The Court: You mean when you left he was in the room?

A. Yes.

[fol. 732] The Court: All right.

A. In a matter of maybe twenty minutes or fifteen minutes or so, Mr. Olsen returned to the room that Mr. Shivel and I were in and said that there was—the decision was——

Mr. Babcock (Interposing): This I object to, the conversation or statements made by Mr. Olsen just to Mr. Milewski and Mr. Shivel alone, out of the presence of any of the defendants.

The Court: This is by Olsen, now?

Mr. Speer: Yes, your Honor.

The Court: Out of the presence of the others?

Mr. Speer: Yes, your Honor.

The Court: Where was this conversation held? In one of those rooms there?

Mr. Speer: In the Detroit Club.

The Court: You mean the Detroit Club or the DAC?

Mr. Speer: Well——

Mr. Babcock (Interposing): Detroit Club it was, your Honor.

The Court: You left Mr. Olsen in the room with them and then afterwards Olsen came over to talk to you, to tell you something?

A. That is correct, your Honor.

The Court: You may answer.

[fol. 733] A. He stated that there was a restriction put on, that with Lith-I-Bar it was done, if this agreement was entered into, it was done or would be, that they would have to agree to manufacture a machine no larger than a two-block machine.

By Mr. Speer:

Q. After that statement or that conversation between you and Mr. Olsen, did you then return to the room where the others had been?

The Court: You mean Olsen and him?

Mr. Speer: Olsen and Milewski and his attorney had this conversation, and then I am asking if they returned to the other room in which Messrs. Besser, Bailey and Babcock were.

A. The other group of gentlemen came into the room we were in.

By Mr. Speer:

Q. And then did the conference go on, or was that the end of it?

A. The facts of the monetary consideration and the consideration of elimination of any larger than a two-block machine was discussed.

Q. In the presence of Mr. Besser?

A. In the presence, yes.

Q. It was discussed?

Mr. Babcock: Can he fix by whom?

A. I believe Mr. Shivel had asked the question whether that was the understanding or whether those were the terms.

The Court: That is your attorney, wasn't it?

[fol. 734] A. Yes.

The Court: When did he say this happened?

Mr. Speer: At some time between the 15th of January and January 31st.

The Court: After the case up in Bay City?

Mr. Speer: Yes, your Honor.

By Mr. Speer:

Q. Now, was there anything else discussed at that time, after your attorney discussed the proposed terms of the proposed agreement?

A. I believe it was at that point that Mr. Shivel raised the question to the other attorneys present as to what might be the view-point of the Department of Justice if the Lith-I-Bar Company entered into such an agreement.

Q. And do you recall the comments of the other attorneys to that question?

A. Not too specifically.

By Mr. Speer:

Q. Can you recall what the other attorneys said in reply to your attorney's question as to the attitude of the Depart-

[fol. 735] ment on such a proposed agreement?

A. My recollection on that is not clear enough to make a specific statement.

Q. Did these other attorneys make any comments about the case the Government had filed against the defendant Besser and others?

A. Yes. There were comments.

Q. Could you tell us what those comments were?

Mr. Babcock: Who made them?

By Mr. Speer:

Q. And who made them, if you can recall.

A. I couldn't be sure as to which of the individuals had made them.

Q. Well, if you cannot be sure of that, can you tell what the general substance of the comments were?

A. General belief that the case was not a good one, that the Government didn't have a——

The Court (Interposing): That is what they have been telling me here for some time.

Mr. Babcock: That has been our position consistently.

By Mr. Speer:

Q. Well, now, was there anything else that occurred? Were there any other conversations at this conference in Detroit, Mr. Milewski?

A. I am not sure whether it was Mr. Henry or Mr. Babcock who informed us that it was desirable to have an early decision.

[fol. 736] Q. On what?

A As to whether we would agree to this license arrangement, inasmuch as Mr. Shivel had stated we would not answer that day. And it was agreed upon that Mr. Shivel would reply for us by mail within a very short time: I believe the time was set somewhere within a week, that Mr. Shivel agreed to reply.

Q. Then did you actually authorize your attorney to send a reply?

A. Yes.

Q. And what was the authorization?

A. Declining.

Q. Declining. Now, Mr. Milewski, have you ever had any oral conversations, either in person or over the telephone, with any of your customers or potential customers with respect to the fact that they had had conversations with employees of the Besser Company about your block machine?

A. Yes.

Q. Could you tell us the date of a conversation and with whom it was held?

A. One specific instance was a Mr. Lawrence Miller, who testified in this court last week.

Q. What was the date of that conversation with him?

A. Somewhat prior to November 1st, 1948.

Q. And what was the substance of the conversation?

[fol. 737] Mr. Babcock: I object to it, if your Honor please.

The Court: That is one of these same kind of cases, is it not? Same ruling.

By Mr. Speer:

Q. What was the substance of your conversation with Mr. Miller?

A. Well, Mr. Miller stated that a representative of the Besser Manufacturing Company had told him if he did purchase a Lith-I-Block machine he would be sued for patent infringement.

The Court: Is it the claim of the Government that a patentee hasn't got that right, if he has got a good patent?

Mr. Speer: I believe it is the position of the Government, and I believe we are sustained by the courts, your Honor, that the only right a patentee has is to go to the court and have the patent discussed there.

The Court: What do you mean? Suppose he has been through the courts?

Mr. Speer: If he has been through the courts, yes, your Honor, that is a very important point.

The Court: Well, suppose I have a patent and feel that I have a good patent, and I see that you are about to violate or infringe upon my patent. Do you mean that I can-

not say to you, "You go ahead and use this kind of a [fol. 738] machine and I will sue you." Do you mean to tell me that? Is there a case that holds that?

Mr. Speer: There are cases that hold this, your Honor, that where it is proven that it is upon a pattern employed by the defendants and where the patents have not been adjudicated by the court——

The Court: I want to see those cases, because that is not my understanding of the law. If that is the law, I am not confirmed in the opposite position. It is just my understanding. And I know there are cases to this effect, that if I permit you to go ahead, knowing that you are building this kind of a machine and that you are going to sell it and use it, and I permit you to incur cost of putting up buildings and all that, that I might be estopped from denying the right after a while. It is my duty to tell you.

Mr. Speer: Yes, that is true.

The Court: I am not saying whether they have or have not a good patent right now. I don't know. But if they have a good patent or think they have a good patent, I would like to see some cases that tell me that they have not the right to tell the other fellow. Do you have any case on it? If you do, I want to see it.

Mr. Babcock: Yes, I have, your Honor.

The Court: What is your position?

Mr. Goreff: I understood that Mr. Gelbman had sub- [fol. 739] mitted a memorandum to your Honor. I don't know whether you have received it in the mail or not—covering that point.

The Court: Maybe I have.

Mr. Goreff: Our position is that not only is it our right but it is our duty to assert any rights we have and to notify any infringer or anyone who is believed to be infringing, that we so believe, and to prosecute if we are so advised. And I think the law has been stated by your Honor, and our position is precisely as stated by your Honor.

The Court: Well, go ahead. What did you want to say?

Mr. Neville: I was going to say, your Honor, that the position of the government is, that no matter how innocent these transactions are, taken by themselves, if they are all part of a plan or contribute to a plan which is going to

wind up in monopoly, that they are competent evidence in a monopoly case.

The Court: I did not say it was not competent evidence at all.

Mr. Neville: I gathered, your Honor, that the inference was that while they had a right to sue on their patents, that your Honor was not able to reconcile that with the allegations of the government that they were doing something wrong.

The Court: I do not think, offhand, it is wrong for them [fol. 740] to tell this man that they think he is infringing their patent, or to tell anybody else.

Mr. Neville: Perhaps not, your Honor.

The Court: Because the user can also be sued, you know.

Mr. Neville: Granted, but again if that is part of a plan——

The Court: Part of what kind of a plan?

Mr. Neville: Part of an overall plan leading to monopoly.

The Court: To monopoly of what? Monopoly on their part of their invention?

Mr. Neville: No, not monopoly in the sense that they have a patent monopoly, but monopoly in the industry. I can cite one authority by name without the exact citation, the Swift case which was decided in the Supreme Court, where I think the statement is made very clearly that no matter how innocent the individual acts are, if they contribute to a general plan or a result which is monopoly, that——

The Court: It all depends upon what you mean by "contribute."

Mr. Neville: Well stated otherwise, that they are a factor, that they help in any way.

Mr. Goreff: As I understand the government's position, any patentee that asserts there is an infringement and [fol. 741] threatens prosecution of an infringer, whether it be of the manufacturer or the user of the infringing product, he is thereby contributing to a monopoly and a combination in restraint of trade.

The Court: That is not the way I understand the law. I will tell you that. However, as to whether or not it is competent testimony, that is something else. I never saw

the Gocorp machine. I saw the Besser machine. I saw the Lith-I-Bar machine,—I mean the Lith-I-Block machine, but at this moment I am unable to say whether the Lith-I-Block machine violates or infringes upon the Besser machine—right at this moment.

Mr. Speer: Your Honor, our case does not stand on whether or not these patents are good or whether or not they are not good.

The Court: Well, you seem to take the position that it is wrong for them to tell somebody not to violate their patents, and so far as I know, until you show me a case to the contrary, I do not think that is true.

Mr. Neville: If your Honor please, insofar as that goes, telling somebody that they cannot infringe upon your patents—period—that is granted. That is so.

The Court: Well, I see them doing that. I say, "You are iffringing on my patent and if you do, I am going to sue you." I think you have a right to do that.

Mr. Neville: You have a right to do that—period; but if [fol. 742] that is part of an overall plan where the result is monopoly, there you do not have a right to do it.

The Court: An overall plan? It is so overall that I am going to try to stop everybody that I find doing it. I have that right. If I can stop John Doe, I can stop Bill Smith, and I can stop John Green who is starting it over here. If you call that overall, it is overall. Now, I know that your whole case does not depend upon that. I think your main case must depend upon the acquisition of the stock of these companies that gave this tremendous power to the Besser Company.

Mr. Neville: That is a very important part of our case.

The Court: The fact that they are going out to stop people from using their patent to me is not only their right, but it is their duty.

Mr. Speer: But if your Honor please, it is also the way in which it is done. The courts have established that if a man is protecting his patent, he tells them what claims he thinks they are infringing upon, specifically.

The Court: That might be, but to the average man, you come in with the claims and he would not know what you are talking about. The average lawyer does not know

what you are talking about when you are talking about claims in a patent. Perhaps he has vaguely heard something about the claims. And I know there are a lot of Judges that have never heard the word "claims" in con- [fol. 743] nection with a patent suit—not Federal Judges but others.

Mr. Speer: I believe it is a fact that the Besser Company has employed a patent attorney, John Stark.

The Court: Well, what of that?

Mr. Speer: It is the position of the government, your Honor, that his claims of infringement have been made in an unwarranted scope and we intend to show that when all the evidence is in.

The Court: I will take care of that in a patent case, but you have got to get something better than that. I am permitting the testimony to be taken but I do not see anything wrong in the simple act of telling somebody, "You are violating my patent rights, and if you do I am going to sue you."

Mr. Neville: There is no disagreement on the part of the government with that proposition.

The Court: I am glad you are convinced on that, because I was afraid that was what you were depending upon entirely.

Mr. Neville: No.

The Court: I think the person would have a right to know, "How do you claim that I infringe your patent?" He might have that right. He cannot just vaguely go around the corner looking into the window to scare you. I cannot do that. If Mr. Besser has gone around or anybody of his organizatio-, or even his attorneys doing that, [fol. 744] that might be evidence. The rest of it——

Mr. Goreff: As long as this matter has been raised at this stage—Maybe I am out of order, your Honor—but the defendants Andrus and Gelbman can and will concede that when an infringement was brought to their attention, or what they believed to be an infringement, they notified the infringer and they did threaten suit.

The Court: I think the courts hold that you have got to do that.

Mr. Goreff: But we go further and say that we did make

Plaintiff's Exhibit No. 10, which is in evidence here, and which gave an exclusive license to Besser and Stearns. If that is all the government wants from us in the case——

The Court: Well, that is not all they want from you. They think you entered into an agreement that is not good, that tends toward monopoly. Isn't that right?

Mr. Neville: That is right, your Honor.

Mr. Goreff: You mean the agreement itself, Exhibit No. 10?

The Court: Yes.

Mr. Goreff: We will stand on that agreement.

The Court: I guess you have to.

Mr. Goreff: I mean if that is all the government has against us—the fact that we made this agreement.

The Court: You contributed toward the monopoly, in [fol. 745] their way of thinking.

Mr. Neville; That is a correct statement.

The Court: All right, go ahead, but I want you to know that as far as this court is concerned a man has a right to protect his patent rights, and I don't know why you brought this man Goldcamp here, and I wondered why he was even cross-examined.

Mr. Neville: Yes, and we went to considerable trouble to get him here. He did not respond to the subpoena and he was here today because we had the F. B. I. after him, and he was practically brought here bodily. He was an unfortunate choice as a witness.

The Court: Yes, I know. He did not tell anything except that these people all did their best trying to sell their products, and not only did they fail to scare him; he tried out their machines for 45 days and kept them there for 60 days, and it was not because they scared him at all; but the evidence shows it was because the machine did not work.

Mr. Speer: I believe he stated that when the question of the patent was brought up, he immediately called the Gene Olsen Corporation and was told by that company that they would stand in back of him if there were any patent suits.

The Court: It all depends upon what kind of a company it is what they mean by standing back of you.

[fol. 746] Mr. Babcock: On cross-examination I asked him

if that influenced his judgment any about the machine and he said no.

The Court: I think we are agreed it was an unhappy choice.

Mr. Babcock: I think it was a very happy choice myself.

The Court: I anticipate that you might think so under the circumstances. All right, go ahead.

By Mr. Speer:

Q. What was the general substance then of your conversation with Mr. Miller.

Mr. Babcock: My previous objection continues, does it, your Honor.

The Court: It may continue; overruled.

A. Mr. Miller stated that he had this threat and later confirmed it in writing.

Mr. Babcock: I ask that be stricken as the witness' conclusion.

By Mr. Speer:

Q. To you?

A. Yes.

The Court: Did he use the word "threat"? I thought the way he said it that he used the word "threat."

By Mr. Speer:

Q. Is this the correspondence, Mr. Milewski, that you received from this potential customer?

[fol. 747] A. Yes.

Q. All right, let me have it.

(Whereupon a letter dated November 1, 1948 was marked as Exhibit 138 by the reporter.)

Mr. Speer: I offer Exhibit 138.

The Court: What does it purport to be? A letter from Mr. Miller to Lith-I-Bar?

Mr. Speer: Yes, your Honor.

Mr. Babcock: Primarily it is a letter from Mr. Milewski of the Lith-I-Bar Company to the Miller Block Company,

on which it purports to be that Mr. Miller endorsed his reply.

The Court: Is there any objection?

Mr. Babcock: I have not read it yet, your Honor.

The Court: Do you base your objection on the contents or whether or not it is admissible in the first place? Have you any objection?

Mr. Babcock: I object to the exhibit for the reason that it is unrelated to the defendants and does not identify any individual connected with the defendants as having made the alleged statements, and being brought in at this time subsequent to the production of Miller himself does not even give us an opportunity to cross-examine Miller. Miller has been here, has he not?

Mr. Speer: Yes, he was here.

Mr. Babcock: He was here. It is entirely immaterial and [fol. 748] irrelevant. I think its offer at this time, without an opportunity to cross-examine Miller, is unfair and improper.

The Court: Well, were you here when Miller was here?

A. Yes, I was.

The Court: I am going to permit it.

(Exhibit 138 reads as follows:)

"Miller Block Company
316 Goodsell St.
Evansville, Indiana.

Attention: Mr. Lawrence Miller.

Dear Mr. Miller:

"I am curious to know something in relationship to our competitors, primarily Besser Manufacturing Company or Stearns Manufacturing Company.

"We know that here and there some of their men have made a practice of throwing a lot of threats around about what they were going to do to people who buy our machines. Usually that sort of thing is carried on before the man makes a purchase.

"I am trying to track down some of that—if you have had such an experience I would appreciate you

writing me about it. We have in the past found some instances, and I would like to have as comp-ete a rec-
[fol. 749] ord of them as we can accumulate.

"Thanking you for your cooperation, I remain

Yours very truly,

F. E. Milewski, Pres.
Lith-I-Bar Company

FEM:ep

"Frank, I will give you a quick reply on this using your letter of inquiry. As you know when I came up and bought my machine I was definitely worried on this score and you related how you had talked to Mr. Besser and Gene Olsen at one time about this and your attorney believed you had - thing worked out. Mr. Glenn Leemon who now is representing Besser around here had definitely told me that Jesse Besser would not let me operate a Lith-I-Bar machine in case I purchased one. He threate-d me considerably before we set up the machine but P have never seen him since although Besser men have been here in Evansville since that time. He pointed out how much Besser had in patent rights and that they would come pack on me for damages rather than the manufacturer and break me up. As I told you before my trip to Holland this same Mr. Leemon told me that you were finishing up the few machines you had on the assembly line and that they were insisting that you not manufacture any more.

[fols. 750-751] "So far as I can see now it was a drastic threat, but an idle one.

"We are doing better all the time with our machine and think a lot of it. I will be happy to show our equipment to anyone who comes in and appreciate your help in solving our early difficulties.

Sincerely yours,

Lawrence E. Miller
Miller Block Co."

[fol. 752] By Mr. Speer:

Q. Now, then, have you had any other conversations with customers or potential customers that they had been approached by employees of the Besser Company with respect to your machine?

A. Yes.

Q. All right. What was the name of the customer or prospective customer at the date of the conversation?

A. It was a Mr. Lacey.

Q. And where did the conversation take place?

A. At Holland, Michigan.

Q. And who is he, please?

A. A partner of a block manufacturing concern in Witheville, Virginia.

Q. What was the substance of the conversation, Mr. Milewski?

Mr. Babcock: Same objection, please.

The Court: Same ruling.

A. That the Besser Company's representative in that territory made a statement that if they bought anything but a Besser machine Besser Manufacturing Company would see to it that a competitive plant was put across the street from them.

Q. This was an oral conversation, was it?

A. It was oral, and I asked at that time Mr. Lacey write it.

[fol. 753] Q. And do you have a copy of that statement?

A. I have, sir.

Q. And this is a copy of the signed statement (showing document to the witness)?

A. Yes.

Mr. Speer: Will you identify it pl-ace?

(The document was thereupon marked by the reporter as Exhibit 139.)

The Court: Who is this man?

Mr. Speer: This is a man who installed a machine by Mr. Milewski down in Witheville, Virginia.

The Court: What is his name?

A. Lacey.

Mr. Speer: L-a-c-e-y.

The Court: He hasn't been up here, has he?

Mr. Speer: No, he hasn't.

I offer Exhibit 139.

Mr. Babcock: I object to the exhibit, your Honor please, for the same reasons stated as to the objections to the various conversations had with customers and potential customers, no identification of the individual at all, simply a reference to a representative.

The Court: Well, I have permitted them to go ahead with a certain understanding. They do not prove the fact in issue at all. But as having been received by the witness, [fols. 754-757] that is all.

(Exhibit 139 reads as follows:)

"Some time ago in negotiating for new block manufacturing machinery the Besser Manufacturing Company's representative told us that if we installed a Lith-I-Block machine they would see to it that a competitive plant with their equipment was put in across the road and we would be driven out of business.

"September 2, 1949. "Wytheville Block Co.
J. M. Lacey."

By Mr. Speer:

Q. Have you had any other conversation with any other customer or prospective customer that they had been approached by employees of the Besser Company?

A. Yes.

[fol. 758] By Mr. Speer:

Q. Have you had any other oral conversations, Mr. Milewski, with any customer or prospective customer that they had been approached by an employee of the Besser Company?

A. Yes.

Q. All right, what is the name of the person with whom you had the conversation?

A. Mr. Harry Longenecker.

Q. And what was the date of this conversation?

A. A telephone conversation yesterday.

Q. And what was the substance of the conversation?

Mr. Babcock: Just a minute; I not only have the objection previously stated to this type of evidence, but object to the present question because except for the witness' conclusion we have no evidence that he is a customer or a potential customer.

[fol. 759] The Court: Let us find out; was he a customer?

A. Not a customer at present.

The Court: Someone you tried to sell a machine to?

A. One of my men has been negotiating with him.

The Court: For how long? Then he is a prospective customer, or has been.

A. Yes.

The Court: What is the objection to that?

Mr. Babcock: Up to that time we had no indication that he was a customer or anything about it.

The Court: All right; he may answer.

Mr. Babcock: I still have the benefit of my other objection?

The Court: Oh yes.

By Mr. Speer:

Q. All right, Mr. Milewski?

A. What is the question now?

Q. What was the general substance of your conversation with this prospective customer?

Mr. Babcock: I think I should state this further objection, however, to the competence of it. The witness has said that up to the present time one of his employees has been negotiating with this man. That background does not give Mr. Milewski any capacity to identify the individual and it is a telephone conversation and we don't know——

The Court: Do you know what your man's name is down [fol. 760] there?

A. Oh yes.

Mr. Speer: I will go into that if you want me to, your Honor.

The Court: Yes, let us find out what his name is.

By Mr. Speer:

Q. Have you been advised by any of your employees that they have contacted Mr. Longenecker in attempting to interest him in a Lith-I-Block machine?

A. Yes.

Mr. Babcock: I object to the conversation between the witness and his employees.

The Court: He may answer.

By Mr. Speer:

Q. And what was the name of the employee.

A. Mr. Walter S. Giddings.

Q. And what was the substance of Mr. Giddings' conversation with you?

Mr. Babcock: I object to that.

The Court: I admit this. That is something else that he got from his employee. Did he talk to the man himself on the telephone yesterday?

Mr. Speer: He did, yes sir.

The Court: I do not mean the employee.

Mr. Speer: I understand what you mean; and he talked to the prospective customer on the telephone.

The Court: I will let that conversation in but I won't let [fol. 761] the other in.

Mr. Speer: As I understand it, the defense counsel objected that there was no proof that the gentleman with whom Mr. Milewski had the conversation was a prospective customer. Now I am trying to show, your Honor, that this gentlemen had a conversation with his employee, that the employee had been in contact with Mr. Longenecker, to show that he was a prospective customer.

The Court: All right, that part is in; but if you are trying to tell the conversation between him and his employee that is out.

Mr Speer: I don't understand what the court means when he says the employee and him.

The Court: The witness and the employee, his own employee; ish't that true?

Mr. Speer: Yes.

Mr. Neville: That is the one that Mr. Speer wants to get in.

The Court: I am not ruling that out, and they only make their usual objection to that, and I overrule that, so go ahead.

Mr. Speer: That is all I am interested in.

The Court: The conversation he had with the customer but not with the employee, what the employee told him.

[fols. 762-768] Mr. Babcock: The court understands that my previous objection was that there has been no evidence identifying the man with whom Mr. Milewski talked as Harry Longenecker; no previous acquaintance to recognize a voice or anything of that kind to identify him.

The Court: We will see how it happened. How do you know you were talking to Mr. Longanecker?

A. I have known Mr. Longanecker for several years.

The Court: All right; did you recognize his voice?

A. Yes.

The Court: Did you call him or did he call you?

A. I called him yesterday.

The Court: Person to person?

A. Person to person.

The Court: All right.

By Mr. Speer:

Q. Will you tell us, please, what was the general substance of that conversation?

A. I asked him to verify what had previously been reported to me, and he is so doing by letter which he mailed yesterday, which should be here in the city today.

[fol. 769] Cross-examination.

By Mr. Babcock:

Q. Mr. Milewski, will you tell me, please the total number of concrete block machines manufactured for your company, or by your company for the year 1946?

A. Two, sir.

Q. And for the year 1947?

A. Twenty-seven, I believe.

Q. And for the year 1948?

A. Forty-five.

Q. And what were the total sales in dollars of concrete block machines by your company, excluding repair or replacement parts, attachments or other concrete product machinery, for the year 1946?

A. I haven't those exact figures here. I don't recall them.

Q. Would your answer be the same with reference to 1947?

A. Yes.

Q. Upon your return to Holland, would you check your figures, please, and advise us?

[fol. 770] A. Yes.

Q. Just by letter.

A. Yes.

Q. Now, you have in mind the figures I have asked you about?

A. I will make notes of them.

Q. Total sales in dollars.

A. Dollars. In 1946.

Q. '47 and '48.

A. '47 and '48.

Q. That is for concrete block machines, excluding any items of repair or replacement parts, or concrete products other than the block machines that you make. Do you make any more than the one model?

A. Since——

Q. (Interposing) Perhaps I should limit that. Did you, during 1946, '47 and '48 make any more than the one model?

A. No.

Q. And that did not utilize the tamping principle?

A. Yes, it utilizes tamping.

Q. I see. In the sense that your machine combines vibrating and tamping, is that it?

A. Correct.

Q. Now, then, the figures of the number of machines which you gave me before, since you make only the one model, would be the same figures for the number of machines manufactured by your company utilizing the principle of

[fol. 771] tamping; is that correct? The figures of two for 1946?

A. Yes.

Q. Twenty-seven for '47, and forty-five for '48?

A. Yes.

Q. And would it be those same figures as to the number of models utilizing the vibrating principle?

A. Yes.

Q. What is the production capacity, or what was, during 1946, '47 and '48, the productive capacity of your machine, assuming it to be producing a block 8x8x16, per 8-hour day?

A. The machine has the capacity of four cycles per minute, or, in other words, eight such blocks per minute, or 480 an hour.

Q. That would be 3,840 a day?

A. About right.

Q. An 8-hour day?

A. Assuming the machine to be operating.

Q. Assuming it to be working constantly?

A. Assuming that the machine was constantly operating and other factors were favorable.

The Court: You don't very often get that, though, do you?

A. No.

The Court: What do they usually run? There must be some figure.

[fol. 772] A. Well, the actual correct average is probably nearer to 420, somewhere along there.

The Court: Is that right? 3200 a day?

A. Oh, yes.

The Court: All right.

By Mr. Babcock:

Q. What do you understand to be the example or the definition of a machine classified as a high production machine?

A. I would say any machine that has a capacity of 400 or more block an hour.

Q. Wouldn't that term "high production" be somewhat of a relative term, depending on the needs of a community?

Mr. Neville: The government objects to that question because it is not clear.

The Court: Well, I don't know. If he said that I would not believe him.

A. I cannot see any relationship between the productive capacity of a machine and the community.

The Court: No. You might not need a single block and still it would be a high production machine. It is the comparative number of blocks turned out, compared with the old system. Isn't that it?

A. That I think would be the comparison.

By Mr. Babcock:

Q. If the building needs of a certain community can be— [fol. 773] comfortably supplied by a machine that turned 200 blocks an hour, wouldn't that be a high production for that community?

Mr. Neville: Same objection, your Honor.

The Court: I sustain the objection. The needs of the community have absolutely nothing to do with whether a machine is a high production machine or whether it is not. You have your men here who know these machines and they ought to be able to tell you whether that is true or not.

Mr. Babcock: Well, I would like to say to your Honor that the men to whom you have referred have a different opinion from that which has just been expressed.

The Court: You mean they think the needs of the community——

Mr. Babcock: In other words, if a certain community— if the needs of a certain community are so small that it could not support the cost of the type of machine that we have been talking about and it cannot afford to put one in there, then that machine is simply foreign to that particular community.

The Court: Well, that is an entirely different thing. If the community cannot support a high production machine, that is one thing, but the needs of the community and the high production machine are not the same at all. If you [fol. 774] want to ask the question as to whether or not a high production machine would pay in Hemlock, Michigan, for example, that is one thing, but it is still a high production machine if there are not ten people in the town. Am I wrong on that, Mr. Besser?

Mr. Babcock: I am not denying that it would still be a high production machine, but in that community one producing less would be a high production machine.

The Court: No, the relation of the community—Mr. Besser, you know a high production machine. Does the need of a community have anything to do with whether or not a machine is high production or not?

Mr. Besser: No, sir.

The Court: What is that? I say, do the needs of the community have anything to do with whether a machine is a high production machine or not a high production machine?

Mr. Besser: Not stated that way.

The Court: No, certainly not.

By Mr. Babcock:

Q. You are familiar, are you not, Mr. Milewski, with the magazine or publication known as "Pit and Quarry"?

A. Yes.

Q. Would you just tell us briefly what that is?

A. It is a trade publication.

Q. Published how frequently?

[fol. 775] A. Twelve times a year.

Q. And has been published in the industry for some period of time, has it?

A. I have known it for possibly 18 years or so.

Q. And it is quite the regular practice of manufacturers of concrete machinery, including concrete block machines, to advertise in the trade publication, is it not?

A. It is used for that purpose.

(Whereupon the May, 1949, copy of the magazine "Pit and Quarry" was marked by the reporter as Defendants' Exhibit No. 140.)

Q. Do you recognize the document I have now had marked Exhibit 140 as being one of the issues of that trade publication? For the month of May, 1949?

A. It is so entitled.

Mr. Babcock: I offer in evidence Exhibit 140, intending to make reference, for the purpose of this examination, to

certain pages which I will identify in the course of the examination, the pages being advertising matter only and not text matter.

[fol. 776] The Court: There might be some item in there that might throw some light on that subject. I don't know. Anyway, they are entitled to put them in.

[fol. 777] By Mr. Babcock:

Q. Turning now to page 245 of Exhibit 140, we find there, do we not, an advertisement of the Fleming Manufacturing Company of St. Louis, Missouri?

A. Yes.

Q. And that advertisement advertises a concrete block machine, doesn't it?

A. It does.

Q. And the concrete block machine of the vibrating type, is that true?

[fol. 778] A. It is a combination vibration and tamping.

The Court: Oh, yes, but I mean the combination.

A. There are machines on the market that are strictly just tamping only.

The Court: Oh, yes, I suppose so. But how many will they make, of blocks, a day?

A. Oh, possibly a thousand to fifteen hundred, somewhere along in there.

The Court: That many with a tamping machine alone?

A. Yes. There are some types of tamping machines that will.

The Court: Just tamping?

A. Yes.

The Court: Pouring in the concrete and just tamping?

A. They are power driven tamping machines.

The Court: I see. No vibration, though?

A. No, they do not employ vibration.

The Court: All right.

[fol. 779] By Mr. Babcock:

Q. Now, are you somewhat familiar with the machine described in that advertisement, Mr. Milewski?

A. Not particularly. I have seen one.

Q. You have seen one.

The Court: That is tamping and vibrating, is it?
A. No.

Mr. Babcock: It is advertised as a vibration, your Honor.

A. Plain pallet vibrator.

By Mr. Babcock:

Q. Do you regard that machine as being in competition with your machine, Mr. Milewski?
A. No.
Q. Do you regard that machine as being in competition with the Besser products?
A. No.
Q. Do you regard that machine as being in competition with the Stearns product?
A. Some models of Stearns machines.
Q. Which models?
A. I believe Stearns make a machine that is known in the trade as the clipper stripper, and I believe they manufacture one model of Jolterete that that might be competitive with.

The Court: May I see that ad, please?

(Document handed to the court.)

A. I believe, if I am correct, that 180 uses the model number.

[fol. 780] The Court: This just says a plain pallet vibrator. It doesn't say whether there is any tamping or pressure used at all. It is just a vibrator. Is that right?
A. Correct.
The Court: It turns out 1600 a day there according to that. Why do you say it isn't in competition with your machine? Because of the number that it turns out?
A. The capacity.
The Court: All right.
A. The selling price. The fact it is partially manual operation.
The Court: All right.

[fol. 781] By Mr. Babcock:

Q. The Fleming Manufacturing Company is still manufacturing and selling this machine, is it not, Mr. Milewski?

A. As far as I know.

The Court: Do you know whether or not they had the Scott patent in that machine, or don't you know?

A. I do not, sir. They must employ some method of suspending the mold box.

By Mr. Babcock:

Q. Now, I refer in Exhibit 140 to page 241, on which we find the advertisement of the Kent Machine Company of Cuyahoga Falls, Ohio. Does that company manufacture [fol. 782] concrete block machines, Mr. Milewski?

A Not to my knowledge.

Q. I am not taking issue with your statement but just looking for information; what is the Kent Lintelator?

A. That is a device for making lintels.

The Court: For making what?

A. Making lintels, pieces of concrete masonry that go over windows and over doorways.

The Court: L-i-n-t-e-l-s?

Mr. Stark: One l, did you say?

The Court: Are there two l's?

Mr. Stark: No, one l.

The Court: Yes, that is what I said.

By Mr. Babcock:

Q. Are you familiar with, or at least know about the concern in St. Petersburg, Florida, known as the Appley Company?

A. I know of them, yes.

Q. Are you acquainted with the concrete block machine manufactured by them?

A. I have seen them, yes, seen their machines.

Q. What is the type of machine they manufacture?

A. The machines that I have actually seen of theirs are small vibrators.

Q. Do you know the production capacity of their machine?

A. I do not.

[fol. 783] Q. Do you regard the Appley machine as being in competition with your machine?

A. I do not.

Q. Do you regard the Appley machine as being in competition with the products of the Besser Manufacturing Company?

A. I do not.

Q. Do you regard the Appley machine as being in competition with any of the products of the Stearns Manufacturing Company?

A. No.

Q. As far as you know, the Appley machine is being made and sold today. Is that correct?

A. I do not know. I have heard to the contrary.

By Mr. Babcock:

Q. Now, referring to page 239, we find there the ad of the Roy Darden Industries of Atlanta, Georgia. Do you recognize that as an advertisement of a concrete block machine?

A. Yes.

[fol. 784] Q. Are you familiar with that machine?

A. Very casually.

Q. Is the trade name of that machine, the one given in the ad there Rockcrete?

A. The illustration so states.

Q. Do you know whether or not that machine employs the vibrating or tamping principle?

A. When it was made I believe it employed vibration.

Q. Are you familiar with its production capacity?

A. No.

Q. Or claimed production capacity, pardon me?

A. Indirectly.

Q. What is your information as to its claimed production capacity?

A. The only thing I know about it is that in one instance we replaced two of those machines with one of ours and that one is out-producing the two that there were formerly in that plant.

Q. That is the only source of information you have about the Darden machine's productive capacity?

A. That is right.

The Court: What kind of a machine is it?

A. It was a vibrator. My basis of information on it is

this man Witiman up at Midland; he had two of those before we sold him the machine that he has up there now.

The Court: Just a vibrator?

[fol. 785] A. I understood it had some method of either compacting the top surface by top pressure, or by tamping, I do not know which it was. It has been out of the market now, as far as I know.

By Mr. Babcock:

Q. It has been out of the market for some time?

A. As far as I know.

Q. Do you mean by "for some time" beyond 1946, 1947 and 1948?

A. No, I believe your client can answer that better than I can.

Q. But my client is not on the witness stand, Mr. Milewski, and you are.

A. I don't know.

Q. I am trying to find out what you mean by "for some time."

A. Well, possibly three years.

Q. Possibly three years. Prior to being taken off the market, was that machine competitive with your machine?

A. On the basis of the experience I just cited, I don't believe so.

Mr. Babcock: Will you mark this, please?

(A photograph marked Defendants' Exhibit 141.)

By Mr. Babcock:

Q. Now, going back for a moment to the Appley machine, does Exhibit 141 fairly present a picture of the Appley machine as you know it?

A. That, as far as I know, and as far as I can see in this illustration, that presents several machines.

Q. Well, included among them, does it fairly present the Appley concrete block machines?

A. Looks to me like about three machines there.

[fols. 786-788] Q. Included among them, does it fairly present the Appley concrete block machine?

A. I don't know the Appley machine well enough to tell you from this that that is an Appley machine.

The Court: Let me see it.

(Document handed to the court.)

By Mr. Babcock:

Q. Weren't you in the Appley plant quite recently?

A. Yes.

Q. And looked over their machines?

A. No.

Q. How recently were you in their plant?

A. Either about the latter part of March or first part of April.

Q. Of this year?

A. Yes.

Q. When you were in the plant, were they in the process of manufacturing concrete block machines?

A. No, sir.

[fol. 789] By Mr. Babcock:

Q. Do you know of the General Engine Company of Philadelphia, Pennsylvania?

A. I know of it, yes.

Q. Is that company a manufacturer and seller of concrete block machinery?

A. Not a manufacturer, that I know of.

Q. Do they sell concrete block machinery?

A. As far as I know, used equipment only.

Q. Are you familiar with the Anchor Concrete Machinery Company?

A. I know that they exist.

Q. Where is that located?

A. I believe the advertisements say Columbus, Ohio.

Q. Is that company in the business of selling concrete block machinery?

A. I don't know.

Q. Are you familiar with the Multi-Plex Concrete Machinery Company?

A. Yes.

Q. Where is that located?

A. At Elmore, Ohio, I believe.

Q. Is that a manufacturer of concrete block machinery?

A. Yes.

Q. Are you familiar with the machine that they manufacture?

A. Not, only from the advertisements.

[fol. 790] Q. Were they in the business of manufacturing concrete block machines during the years 1946, 1947 and 1948?

A. As far as I know, yes.

Q. And as far as you know, they are still in business, in the same business?

A. Yes.

Q. You know nothing of their machine except what you have read in the advertisements?

A. Right.

Q. Is that correct?

A. Correct.

Q. Do you know of a concern known as the Praschak Machine Company?

A. The same way, only from their advertisements.

Q. Do you know of a concern known as the H. R. Sutter Company in Buffalo, New York?

[fol. 791] By Mr. Babcock:

Q. Did you tell me whether you knew of the H. R. Sutter Company, Mr. Milewski?

A. I have seen an advertisement or two of theirs. That is all.

Q. You haven't seen their machine?

A. Never have seen their machine. I don't know of anybody that owns one.

Q. Do you know of the Columbia Machine Company of Portland, Oregon?

A. By the same method, by the ad, their advertising.

Q. You have never seen their machine?

A. Never have seen their machine.

Q. Do you know of the Dunn Company of Holland, Michigan?

A. Yes.

Q. Do they manufacture a concrete block machine?

A. Dunn Company? Well, it is one of their subsidiaries.

Q. The Concrete Equipment Company, is it?

A. Yes.

Q. Well, then, we will refer to it as the Concrete Equipment Company of Holland, Michigan. Do they manufacture a concrete block machine?

A. Yes.

Q. Are you familiar with that machine?

[fol. 792] A. The older models.

Q. And by the older models, what distinction do you make between older and newer?

A. The models manufactured prior to 1945.

Q. You are not familiar with any models they have manufactured since 1945?

A. No.

Q. Do you know whether or not they are still manufacturing concrete block machines?

A. Yes.

Q. Are you familiar with the Van Orman organization of Westmont, New Jersey?

A. Only through their advertising.

Q. And you have never seen their machine?

A. No.

Q. You are not familiar with the machine except what has appeared in advertising?

A. That is right.

Q. During the course of your direct examination yesterday when you were making reference to a meeting in Detroit on January 20 at the Detroit Club, you said in substance that Mr. Shivel raised the question of what might be the viewpoint of the Department of Justice if a license agreement between Lith-I-Block and the patentees and the exclusive licensees under the Gelbman patents were entered into, and that one of the attorneys undertook to say to you that the Department of Justice would not be concerned or dis-

[fol. 793] turbed about the matter. Are you sure in your memory that anyone present undertook to express the views of the Department of Justice?

Mr. Neville: Now, objection, because you cannot draw that implication from what Mr. Milewski testified to yesterday and from what Mr. Babcock has just said.

The Court: Well, I did not get that impression but——

Mr. Babcock: Well, then I will withdraw the question if the court and counsel are agreed that that is the situation.

The Court: I thought somebody just expressed an opinion, just like they would on any other matter. They were not trying to tell what the Department of Justice would do. That is, they were not expressing any view as the view of the Justice Department at all. At least I did not understand that.

Mr. Babcock: Well, I did not want the record to appear that any of us had been presumptuous enough to attempt to speak the opinion of the Department of Justice.

The Court: But you certainly have a right to anticipate what the attitude of the Department of Justice would be.

Mr. Babcock: As a matter of our own opinion.

The Court: Certainly, and that is what you are lawyers [fol. 794-798] for. That is why people come to you. Of course, you do not always anticipate it the right way, or they do not always go the right way. You know that. But there is nothing wrong and the court got nothing wrong out of that at all.

By Mr. Babcock:

Q. Now, do you recall also, Mr. Milewski, that at the conclusion or towards the conclusion of the conference, about the time that you mentioned when Mr. Shivel agreed to write a letter expressing your decision, that Mr. Henry said the Besser Company has not had and has not now any proposition to make; we are glad to participate in the conference and to receive any suggestion that might be offered?

A. I believe that is correct.

[fol. 799] Redirect examination.

By Mr. Speer:

Q. Do you refer to your machine fundamentally, Mr. Milewski, as a vibrating machine or as a tamping machine?

A. Vibrating machine.

Q. Do you advertise in any of the trade journals?

A. Yes.

Q. In those ads, do you describe your machine as a vibrating machine?

A. A plain pallet vibrating machine.

The Court: You do not mention tamping at all, do you?

A. No, do not discuss it, talk about the automatic and——

The Court: I understand a vibrating machine that only [fol. 800] uses vibration, the highest number that any of those machines have produced up to this time is around probably 1600 a day, in an eight hour day, or around 200 blocks per hour. Do you know of any vibrating machine, just a vibrator, that produces any more blocks than that?

A. No, your Honor.

The Court: All right. Now, your machine is a vibrafor-tamper, is it not?

A. Correct.

The Court: And your machine produces around how many? Well, you produce four cycles per minute, three blocks, that is twelve blocks per minute, or about thirty-two hundred a day?

A. Well, the two block.

The Court: The two-block?

A. The two-block machine. Two blocks on a pallet.

The Court: Yes.

A. Two eight-inch blocks on a pallet would give you about the maximum capacity of 3800 and some, and the average operation would be——

The Court (Interposing): All right, now I have got it. The Besser machine is a vibrator-pressure machine, and that produces, with the two, about the same work that you do, isn't that right?

A. I don't know anything about the two-block machine. [fol. 801] I don't know that they have ever marketed one.

The Court: What does the three-block machine produce?

A. I believe I have heard it rated 720 an hour. I believe somewhere around in there.

The Court: That is almost 6000. Has that claim been made at any time, gentlemen? Could you tell me offhand what the three-block machine of the Besser turns out an hour, Mr. Henry?

Mr. Henry: Rated at 600 an hour, but we call them 4500 blocks a day.

The Court: Forty-five hundred?

Mr. Henry: Yes.

The Court: That is three?

Mr. Henry: That is right.

The Court: The two is about 3200, is it?

Mr. Henry: Yes.

The Court: That is right. All right. If you advertise your machine as a vibrator, and the fact is it is a vibrator-tamper, how do I know what these other machines that are advertising themselves as vibrators are, whether they are vibrator-tampers, or what?

Mr. Babcock: That was why, your Honor, in my examination of Mr. Milewski, I stopped when I found he said he knew nothing except the advertising.

[fol. 802] The Court: All right. Great minds in the same channels, they tell me. All right.

By Mr. Speer:

Q. When you refer, Mr. Milewski, to the principle of vibration, what part of the concrete block making process do you refer to?

A. Will you restate the question?

Mr. Speer: Would you please read the question, Mr. Severance?

(Question read by the reporter.)

A. That is a step in filling the mold box and compacting the material in that mold box. That is part of the step in the process.

Q. Now, before the principle of vibration was introduced into the industry, how was the mix in the mold compacted?

A. By some means of tamping, either by hand or mechanically.

Q. Then is it fair to say that when the people in the concrete block machine industry refer to vibrating and tamping, they refer only to the means by which the mix in the mold is compacted?

A. That is right.

[fol. 803] RALPH SAMUELSON was thereupon called as a witness on behalf of the Plaintiff, and having been duly sworn by the court, testified as follows:

The Court: What is your name?

A. Ralph Samuelson.

The Court: You are from Traverse City, or some place?

A. Yes, sir.

The Court: All right.

Direct examination.

By Mr. Speer:

Q. What is your present occupation, Mr. Samuelson?

A. I manufacture blocks and produce gravel and sand.

Q. Have you ever been in the business of manufacturing a concrete block machine?

A. Just for my own use.

[fol. 804] Q. At what time did you build one, build your first concrete block machine?

A. About 1935.

Q. Is that machine the one that you are now employing in your concrete block plant?

A. No, sir.

Q. The machine that you now have in your plant, in your concrete block plant, when was that built?

A. In the winter of 1945.

Q. Could you give us a brief description of the block machine which you built in 1935?

The Court: When is this?

Mr. Speer: 1935, your Honor.

A. It had a mold that was mounted on rubber mounts at each corner. It had mechanical vibrators attached to it so that the mold vibrated. And there was what we called a

stripper head above the mold that would come down on the material and press it down while it was vibrating.

Q. So that the aggregate was compacted in the mold by this system of vibration, is that true?

A. Yes, sir.

Q. The machine which you now use in your plant, does that employ the principle of vibration?

A. Yes, sir.

[fol. 805] Q. Do you own any patents covering this machine that you are now using in your plant?

A. I have applied for patents.

Q. You have applied for patents on the machine. Approximately when did you make such applications?

A. 1946, I think.

Q. Have you ever had any conversations with anyone connected with the Besser Company with respect to patents on your block machine?

A. Yes, sir.

Q. With whom did you have such conversations?

A. With Mr. Stark and Mr. Besser.

Q. Could you tell us approximately at what time the conversations took place?

A. It was September 30, 1947, I think was the first time I had met Mr. Stark.

Q. And could you tell us, did this conversation take place in your plant?

A. That is where they came to see me.

Q. Would you tell us the general substance of the conversation, and if you can tell us what each of the individuals said?

A. Well, Mr. Stark and Mr. Olsen, who was with Besser Manufacturing Company——

Q. (Interposing) Excuse me for just a minute. Is this Mr. Olsen the Mr. Olsen who was the former president of [fol. 806] the Stearns Company?

A. No, sir.

Q. All right.

A. I think he is a salesman for Besser.

They came in and I was working at the bench. We talked a while. They wanted to see my block machine, so we went out together to look at it. Mr. Stark noticed the brakes on

the motor, and he called in two other men from Bessers that were out in the car. The four all together, this was, they looked the machine over. But it was after quitting time so we were not running.

They asked if they could come back and see it run the next day.

About six o'clock they left and they invited me to have dinner with them, and I went with them, and we discussed block machines. I told them that I had built three since I started fussing around with the first machine around about —I have it here, about '33 or '34—and I had used these machines at my plant for making blocks. And I was trying to be careful about infringing on anyone else's machine.

Mr. Stark said that they did not want to have four blocks being manufactured because it hurt the industry, and we talked about a Mr. Leemon who had built a block machine and sold it in Charlevoix, and they had been to see that. They had also been to see a Lith-I-Block machine at Petoskey.

[fol. 807] And Stark asked me if I had terminated Milewski's license to build these machines.

After we ate, Mr. Stark and Mr. Olsen and I went up to their room in the hotel, and I asked Mr. Stark then if he was a patent attorney, and he told me that he was. And Mr. Stark started to talk about infringement. He said that lawyers were the only ones that profited by a lawsuit. And he read the Gelbman claim on the feed drawer and I told him I had investigated that and I was told and honestly thought I was not infringing on that Gelbman feed drawer patent.

And he mentioned, he read a claim of what was this Scott patent, supposed to have been a patent that covered any mold that vibrated. He said that I was infringing on that and, well, I said I did not think anyone had a patent that could control any mold that vibrated.

Q. Excuse me just a minute. Did Mr. Stark say that the Scott patent was then under the control of the Besser people or was owned by the Besser people at that time?

A. He did not say. He just read it from a copy of the patent.

Q. All right, go ahead.

A. Then he suggested that I sign some papers to release me of possible damage suits. He said that if I would sign an agreement and stop Milewski from building machines that they would allow me to use my machine for my own use, and that they would pay Gelbman any royalties that might be due them because of my machine.

[fol. 808] He mentioned several times that Gelbman was the one that was complaining about this thing, Gelbman was after them to get this thing stopped. That Gelbman was threatening to sue.

I told him that I had spent considerable time and money to make sure I was not infringing on anyone's machines, and that I honestly thought that I was not infringing, but if he would tell me the next day up at the plant—we were at the hotel at this time—I told him, "If you tell me tomorrow morning what you think I am infringing on," that I would have to ask my patent attorney to see where I was. I was not enough of an attorney to know whether I was, for sure, whether I was or not, but if he would tell me what I was infringing on I would ask my attorneys, and if they said I was infringing I would stop using my machine and I would stop Milewski from building machines.

Well, I left them about 11:15 that night, and next morning at around ten o'clock they came up and the machine was running, and they kept feeling around the whole machine to see what was vibrating and what was not vibrating, and they were impressed by the lack of noise and one gentleman was surprised to think I had built the machine myself.

I called their attention to the feed drawer. About 11:15 they were getting ready to go, and there was nothing said. There was nothing said about infringments that morning. [fol. 809] They just felt the machine and looked around, and finally they were ready to go. And I asked Mr. Stark if he thought I should close up or quit. He said no, but he said he would like to have me stop Milewski from building machines.

They left my place, and I found out later they went down to Manistee, to look at a machine that was built by a man who had worked for me.

Mr. Babcock: Well, I——

By Mr. Speer:

Q. All right, O. K. That is fine, Mr. Samuelson.

By Mr. Speer:

Q. Now, then, Mr. Samuelson, after that conversation in September of 1947, have you ever had any other conversation with Mr. Besser or Mr. Stark?

A. In the summer of 1948, Mr. Stark and Mr. Besser came over to see me.

Q. I see.

A. And asked if I would meet them down at the hotel. I went down there and met them. And we went out in Mr. [fol. 810] Stark's car and finally got around to talking about the block machine.

Mr. Besser said if they allowed everyone to build machines that it would hurt the industry, and he just said that I simply had to stop Milewski from building machines, and he hoped—he said that they did not want anyone to build machines.

I told Mr. Stark and Mr. Besser several times that I had admired their courage in thinking that they could stop everyone from building machines. I told Mr. Stark that Mr. Besser had given him a big job to do if he was going to stop everybody in the United States from building block machines. That is about the last time that I talked to them.

Q. Did you grant a patent application license to Lith-I-Bar Company?

A. Will you read that please?

(Last question read by the reporter.)

A. I granted them a license to build the machines.

The Court: That is what he means.

A. Yes.

By Mr. Speer:

Q. All right, can you tell us approximately when you gave them this license?

A. I think it was 1946.

Q. Did you attend this recent patent case that we referred to in January of 1950?

[fol. 811] A. Yes, sir.

Q. Did you hear at that time anyone make any statement to the effect that if the Besser Company did not prevail in the suit they would file one some place else?

A. Yes, I was at the trial and during the intermission Mr. Park from the Besser Company, and Mr. Whitman and Mr. Whitman's foreman and myself were out in the hall and Mr. Park made the remark that it didn't make much difference how this case turned out because if they lost, they would just start another suit.

Mr. Speer: That is all I have, your Honor.

Mr. Babcock: I have no questions.

The Court: Any questions?

Mr. DeGree: None.

The Court: The machine I saw over at Midland is your machine then, isn't that right?

A. Mine was similar, your Honor.

The Court: Well, if the Scott patent is a patent on vibration, that will put all of these machines out of business, will it not, if it is good?

A. That is right. I just cannot believe that that can hold. And I told Mr. Stark that when he mentioned *to* it to me the first time. I told him it reminds me of the farmer that went to the zoo for the first time and saw the giraffe and said there was no such animal. I just could not believe a person could have a patent that would stop you from [fol. 812] vibrating a mold.

The Court: Well, you have a vibration. What is the distinction between your machine and the Besser machine? They both have vibrators?

A. Yes.

The Court: What do you claim your distinction is?

A. The head that comes down on top of the material compacts the top, instead of coming down and staying there until it settles down to the right height, we can lift that head any number of times that we want to. In other words, we have a method of lifting it and dropping it again any number of times.

The Court: So that is tamping?

A. You could call it tamping, yes, sir.

The Court: And can you also manipulate your machine so that it becomes pressure?

A. Yes.

The Court: That is a feature of the Besser machine, isn't it?

A. Any machine that I have seen in recent years has something to come down and finish the top off.

The Court: That is not the question at all. The question is this; the machine I saw at Midland was tamping, as I remember it, wasn't it?

A. Yes.

The Court: You were over there with me, were you?

[fol. 813] A. Yes.

The Court: I thought so. That was a tamping machine. The Besser machine is not constructed so that it either tamps or presses, is it?

A. I do not believe so.

The Court: It is a pressure. And your machine is constructed so that it can infringe—if that is a valid claim—it can infringe upon the Besser machine or not, so far as the pressure is concerned.

A. That is right.

The Court: Well, what other feature have you got besides that?

A. Well, the general design of the machine is entirely different. It is all controlled by air cylinders instead of mechanical cams.

The Court: Well, they have not attempted to get a patent on the source of power, have they?

A. No.

The Court: How does your machine differ from the Besser machine? Forget for the time being the pressure and the tamping. What else is there? You have a suspended mold?

A. Yes.

The Court: You have a feed box that travels all over the mold? It cannot be possible that I know your machine better than you do? Isn't it your claim that your mold and feed box contact?

[fol. 814] A. Yes.

The Court: And that when the mold vibrates the feed box also vibrates?

A. Yes.

The Court: Isn't that one of your features?

A. Yes.

The Court: Actually that is not always true, after the wear of the flanges or irons that they have on the top of the mold box; isn't that right? They have to be replaced.

A. Well pardon me, but when you were over at Midland to watch Mr. Whitman's machine you had trouble deciding whether or not that feed drawer was vibrating much. If you could feel the feed drawer on my machine there would be no question in your mind but what it was vibrating.

The Court: I do not make up these cases. I just see the evidence as it comes to me. And I was taken over there to see that machine.

A. That's right.

The Court: And whether I had trouble or not, I didn't express any trouble at that time on anything. As I remember, I even opened the feed box or stuck my hand in there and let it vibrate. Then I tried to see whether there was clear passage. What other feature have you?

A. The feed drawer of my machine when it is over the mold is definitely vibrating. There is no argument about it. You don't have to feel it. You can see it. It is definitely vibrating.

[fols. 815-816] The Court: Was that true at Midland?

A. No I wouldn't say that it was. It was not brought out there. All I know about is my machine.

The Court: You mean at your place?

A. At my place.

Mr. Babcock: I wonder if the witness is not making a distinction between his machine and Milewski's machine?

The Court: I am wondering. How is the Besser mold suspended? By springs?

A. As I understand, the Besser mold there really is—it is really suspended by the pallet I think while it is vibrating. It just sort of floats in the air.

The Court: What by what is yours suspended?

A. Rubber mounts.

The Court: Doesn't the claim of the Gelbman patent read on springs?

Mr. Stark: The Scott patent.
The Court: Oh, the Scott patent is on springs.
Mr. Stark: Or resilient means; some form of spring.
The Court: I see.

[fol. 817] LUTHER G. RANDOLPH, a witness called on behalf of the Plaintiff, having been first duly sworn by the Clerk, testified as follows:

Direct examination.

By Mr. Speer:

Q. Will you state your name and address, please?
A. Luther G. Randolph, Ann Arbor, Michigan.
Q. What is your present occupation, Mr. Randolph?
A. Concrete products manufacturer.
Q. And for what period of time have you been in the concrete products business?
A. Continuously, since March, 1923.
Q. What kind of a concrete block machine do you employ in your plant?
A. One of our own make.
Q. You mean a machine which you manufactured in your own plant?
A. Yes.
Q. Would you give us a brief description of that machine, please?
A. The machine is hydraulically operated; the compaction of the block is produced by vibrating.
Q. And what is the hourly capacity of the machine when you are producing an eight by eight by sixteen block?
[fol. 818] A. Oh, we can get up around 600 blocks an hour.
Q. Six hundred blocks an hour. What kind of a machine did you use before you manufactured your own machine, Mr. Randolph?
A. The Stearns Number Nine.
Q. Do you have any patents which cover your present machine?
A. I have no patents.
Q. Are you operating under a patent license from anyone?

A. We helped to work out a patent, work out a vibrator that is patented.

Q. And who is the patentee?

A. The O'Connor Machine Company.

Q. What?

A. O'Connor Machine Company. John O'Connor, possibly, the patent is under.

Q. And what part of your machine does the patent include?

A. The vibration only.

Q The vibration only?

A. That's right.

Q. What is the feature of the vibrator that you have the patent on?

A. I didn't get the patent. It is a spring arrangement; the vibrator carries the mold box and everything.

The Court: Everything?

A. That's right. That is the feed drawer, mold box——

[fol. 819] The Court: (interposing) Are they all together?

A. No, the feed drawer is separate; it travels over the mold box and the vibrator is a spring-inducted—that is, the power is inducted into the spring and we get vibration from that.

The Court: It is a spring suspended——

A. (Interposing) That's right.

The Court: That is the same as the Scott patent, isn't it?

A. I am sure I don't know. This morning is the first I ever heard of the Scott patent.

The Court: And your feed box moves over the——

A. (Interposing) Over the mold box.

The Court: Over the mold; and when the mold vibrates does the feed box vibrate too?

A. Well, the feed drawer is over such a short length of time that if there is any vibration it would be nil.

The Court: You mean it just goes over——

A. (Interposing) And drops its material and moves away again, back and forth.

The Court: They all do that:

A. I don't believe anyone would argue the point that there is any vibration of the mold box—of the feed drawer, rather.

The Court: All right.

By Mr. Speer:

Q. Have you ever had any discussions with anyone con-
[fol. 820] nected with the Besser Company or the Stearns Company with respect to your concrete block machine?

A. Yes.

Q. And approximately when did these discussions take place?

A. I think sometime in 1948.

Q. Can you recall what part of 1948?

A. Possibly the early part.

Q. And did the discussions take place at your plant in Ann Arbor?

A. That's right.

Q. And what persons were there, Mr. Randolph?

A. Mr. Besser, Mr. Stark, Jim Rhoades. I cannot recall whether there was anyone else there.

Q. Now, at that time, what was the substance of the conversation if you recall?

A. Well, the matter that I was infringing the Gelbman patents.

Q. Can you remember which of these three persons made that statement?

A. I can't specify or definitely say whether it was Mr. Stark or Mr. Besser.

Q. Did they refer to any patent, or did they merely state the "Gelbman patents"?

A. It has been quite a long time; I think probably that the statement was "the Gelbman patents".

[fol. 821] Q. Did they specify any particular claim of the Gelbman patent?

A. No, I don't think any particular claim was designated.

Q. Was there anything else discussed at this time?

A. Yes.

Q. What was that?

A. I told the gentlemen that if there was any patent infringement that I would be infringing upon the Stearns Corporation rather than the Besser Corporation, and that I would like to hear—that I would like to have Mr. Olsen sit in on any of the discussions there might be. Gene Olsen.

The Court: When was that?

Mr. Neville: 1948.

Mr. Speer: That was in——

The Court: (Interposing) What is that?

Mr. Neville: Early part of 1948, your Honor.

The Court: When did the Besser Company acquire the Stearns?

Mr. Speer: In the spring.

Mr. Neville: March 26, 1948.

The Court: 1948. This is before?

Mr. Speer: Just before that transaction.

By Mr. Speer:

Q. Now, did you have any other conversations with Mr. Stark or Mr. Besser?

A. Yes. They made an arrangement. Mr. Olsen came [fol. 822] and sat in on a meeting.

Q. Was this also at your plant?

A. Yes.

Q. At Ann Arbor?

A. Yes.

Q. And what was discussed at that time, Mr. Randolph?

A. Well, the general theme of the thing was the fact that we might be infringing, and the substance of the meeting was the fact that there might be an agreement reached where I would never manufacture any of those machines for sale.

Q. And was such an agreement actually reached?

A. No. No agreement was ever signed.

Q. I see.

A. I never saw any. That is, I never saw it in an agreement, in writing.

Q. Is that the extent of your experiences with these particular people, or have you had any other interviews?

A. Mr. Stark came once after that, and wanted to know if I would sign an agreement. I told him that I couldn't see any point in it. That is as far as it has ever gone.

Mr. Speer: I see. Thank you. That is all I have, your Honor.

The Court: Any questions?

[fols. 823-829] Cross-examination.

By Mr. Babcock:

Q. Didn't you tell Mr. Stark and Mr. Besser you had no thought of manufacturing concrete block machines for sale?
A. I never had a thought. All I wanted was for myself.
Q. You told them that, didn't you?
A. That is right.
Q. But all you wanted was just to use this machine in your own plant?
A. That is right.
Q. And in view of that fact, there wasn't any point in signing a written agreement?
A. That is right.

Mr. Babcock: I have no further questions.
The Court: That is 'way back in 1948. Nobody has interfered with you since?

A. No, sir.
The Court: Still making 600 an hour?
A. Yes, whenever we can keep the machine in condition to do it.

[fol. 830] Harry H. Longenecker, being called as a witness on behalf of the plaintiff, having been first duly sworn by the Clerk, testified as follows:

The Clerk: What is your full name, please?
The Witness: Harry H. Longenecker.

Direct examination.

By Mr. Neville:

Q. Would you kindly state your full name?
A. Harry H. Longenecker.
Q. Where do you live, Mr. Longenecker?
A. I live at 347 Strathmoor Road, Havertown, Pennsylvania.
Q. Are you here this morning in answer to a subpoena?
A. I am.

Q. What is your business or profession?

A. Manufacturing cinder concrete building units.

The Court: Now, in this big room there is no reason why we should have to strain ourselves to hear you, is there?

A. No, sir.

The Court: All right.

By Mr. Neville?

Q. If you will just raise your voice a little I think everything will be all right. How long have you been engaged in this type of business, Mr. Longenecker?

A. Since 1921.

Q. You are the president and sole owner of the Building Units Company of Primos, Pennsylvania, are [fol. 831] you not?

A. Building Units, Incorporated, yes, sir.

Q. And is this a block manufacturing concern?

A. Yes, sir.

Q. You have interests in other block manufacturing concerns, have you not?

A. I do.

Q. What are those interests?

A. Principal stockholder in the holding company of Washington Concrete Products Corporation, of Arlington, Virginia; Geneva Brick Products Corporation, of Geneva, New York.

Q. What is your title or your interest in those companies?

A. I am president of the Geneva Brick Products, and vice president of the Washington company.

Q. You are also secretary-treasurer of the National Cinder Products Association, are you not?

A. The National Cinder Concrete Products Association, yes, sir.

Q. Since what time have you occupied that position?

A. 1923.

Q. Now, Mr. Longenecker, these block producing plants in which you have an interest are equipped with automatic block producing machines, are they not?

A. Yes, sir.

Q. I take it that you are familiar with the so-called vibrating machine as distinguished from the tamping machine?

[fols. 832-833] A. Yes, sir.

Q. Did you in the fall of 1946 undertake to purchase a vibrating machine from the Besser Manufacturing Company?

A. I did.

Q. With whom did you do business?

A. With Mr. Judson Staley.

Q. Who is Mr. Staley?

A. A representative of the Besser Manufacturing Company.

Q. Did you place an order for the purchase of a machine?

A. I did.

Q. Did you give the order to Mr. Staley?

A. I did.

Q. Did you give him any money?

A. I did.

Q. How much?

A. Two checks totaling $3,500.

[fol. 834] By Mr. Neville:

Q. Did you receive delivery of the machine, Mr. Longenecker?

A. Do you mean a delivery of the machine that was to be purchased?

[fol. 835] Q. Yes.

A. Not the one to be purchased, no.

[fol. 836] By Mr. Neville:

Q. Did Mr. Staley give you a shipping date?

A. Yes, sir.

By Mr. Neville:

Q. Was the shipping date referred to in the purchase order?

[fol. 837] A. Not as a definite date, such as January 17, no.

By Mr. Neville:

Q. I would like to ask you, Mr. Longenecker, if there was anything that you can recall in the purchase order which dealt with a shipping date?

A. Yes, sir.

Q. Did you receive the machine on the date that you expected to receive it?

A. No, sir.

Q. Did you talk to Mr. Staley about that?

A. Yes, sir.

Q. What did Mr. Staley say?

[fol. 838] A. Postponed the shipping date about one month.

Q. Did he give you a new shipping date then?

A. Named approximately one month, yes.

Q. And when would that be, if you can recall? I am speaking now of the month and the year.

A. July.

Q. Was delivery made on this new shipping date?

A. No, sir.

Q. Did you talk to Mr. Staley at this time?

A. Yes, sir.

The Court: What year did he say that was?

Mr. Neville: '47.

A. 1947.

By Mr. Neville:

Q. What did Mr. Staley say this time?

A. He said he couldn't get any information as to when it would be shipped.

Q. I see. Did you see Mr. Staley in conference with Mr. Park following this conversation with Mr. Staley?

A. Yes, sir.

Q. When?

A. October of 1947.

Q. Where did you see these gentlemen?

A. In my office at Primos, Pennsylvania.

[fol. 839] By Mr. Neville:

Q. What was the occasion of their call?

(Discussion off the record.)

By Mr. Neville:

Q. What was the occasion of this call, Mr. Longenecker?

A. The occasion of this call was to inform me that the

Besser Manufacturing Company would not fill the purchase order as made with them.

Mr. DeGree: As made what?

A. As made with them.

By Mr. Neville:

Q. Who was the gentleman who made that statement?
A. Mr. Park.
Q. Mr. Park.

[fol. 840] By Mr. Neville:

Q. Did Mr. Park say why the Besser Manufacturing Company would not go through with the sale?
A. Yes.
Q. Of the machine?

[fols. 841-842] By Mr. Neville:

Q. What was the reason?
The Court: You said "why?" Because——
A. I had a purchase order with the Besser Manufacturing Company and I wanted to own a machine and not lease one.
The Court: Haven't you got a copy of that purchase order?
A. Not with me, no, sir.

[fol. 843] By Mr. Neville:

Q. What did you do following this conversation with Mr. Park and Mr. Staley?
A. Consulted my attorney.

[fol. 844] By Mr. Neville:

Q. What is your lawyer's name, Mr. Longenecker?
A. Roy Martin Boyd.
Q. Where does he have his office?
A. Philadelphia, Pennsylvania.
Q. When did you see Mr. Boyd?
A. The afternoon following Mr. Park's and Mr. Staley's visit to my office that morning.
[fol. 845] Q. Did you go to Mr. Boyd's office alone?

A. No, sir, with Mr. Staley and with Mr. Park.

Q. Now, did you state your problem to Mr. Boyd in the presence of Mr. Park and Mr. Staley?

A. I did.

[fol. 846] By Mr. Neville:

Q. What did you say to your lawyer in the presence of Mr. Staley and Mr. Park?

A. I told my attorney that I had entered into a purchase—had given the Besser Manufacturing Company a purchase order for a Super Vibra-Pack.

The Court: An order for what machine?

A. Super Vibra-Pack.

The Court: All right. Is that a trade name for your machine?

Mr. Babcock: Yes, your Honor.

The Court: Super Vibra-Pack, all right.

A. And had given them two checks, one for $3,000 and one for $500, as a down payment on the purchase order, and that morning I was informed by Mr. Park that the Besser Manufacturing Company would not fill that order, that their policy had changed and that they were now leasing machines only, and that I was the first one approached by the Besser Manufacturing Company to take the lease.

[fol. 847] By Mr. Neville:

Q. What did Mr. Boyd say?

A. Mr. Boyd informed me in the presence of Mr. Park and Mr. Staley that we had given the Besser Company a bona fide order and that it was up to them to fill it. If the Besser Manufacturing Company did not honor the order as Mr. [fol. 848] Park stated, Mr. Boyd said they have cashed the two checks that accompanied the purchase order, which was acceptance of the order. He also told me——

The Court: You started to say "if they did not" and then you went off on another tangent. What was to happen if they did not?

A. If they did not he informed me I had three choices to follow; one to formally insist upon them filling the order; second, purchase another machine and take action against

the Besser Manufacturing Company for damages; and third, to enter into the best possible lease agreement I could get with them.

By Mr. Neville:

Q. Now, what did you decide to do?

By Mr. Neville:

Q. What course did you follow, Mr. Longenecker?
A. Entered into a lease agreement.
Q. Why did you follow that course?
A. Because I had a deposit.
Mr. Babcock: I object to that, if your Honor please.
The Court: He may answer.
A. I had a deposit of $3,500 with the Besser Manufacturing Company.
[fol. 849] A. It was the best course possible for me to follow.

By Mr. Neville:

Q. Did you enter into a lease with the Besser Manufacturing Company?
A. I did.
Q. Did you receive delivery of a machine under the lease?
A. Yes.
Q. When?
A. December of 1947.
Q. Was this the same machine as the machine that you expected to receive under the purchase order?
A. No, sir.

Mr. Babcock: Just a minute. I do not know whether the question means the same type of machine, or whether he means the identical machine. If we are going to try to identify the machine by serial number or something of that kind, that is one thing.

The Court: Do you mean the type of machine?
Mr. Neville: The type of machine.
The Court: He says the type of machine.
[fol. 850] A. It was a Super Vibra-Pack type.

The Court: He asked you the question if it was the same type of machine. Was it or wasn't it?

A. It was the same type of machine, with some parts missing.

By Mr. Neville:

Q. What parts were missing?

A. The automatic front pallet return.

Q. And how was this machine equipped insofar as a feed was concerned?

A. The pallets were fed from the back of the machine by hand.

Q. So what would the difference be between the machine you received and the type of machine that you had ordered under the purchase order?

A. The machine ordered on the purchase order called for a front pallet feed which needed two men to operate; the machine that arrived called for three men to operate because the pallets had to be fed in from the rear by hand, hand labor.

Q. Did you discuss this with Mr. Staley?

A. I did.

Q. When?

A. Immediately upon arrival of the machine.

Q. What did Mr. Staley say?

A. Mr. Staley's advice was that he understood the front pallet return had not been perfected yet, so it could not be on the machine at the time it was shipped.

Q. Did he say anything about replacing the machine at [fol. 851] a later date?

A. No, the front pallet feed was to be put on immediately upon its perfection.

Q. So that he promised to supply you with the front pallet feed as soon as it was available?

A. Yes, sir.

Q. And did you operate the machine in the condition that it arrived?

A. Yes, sir.

Q. How long?

A. From January of 1947 to May of 1948.

Q. What happened in May of 1948?

A. In May of 1948, the machine——

Mr. Babcock: Pardon me, I wonder if the witness is not confused. As I understood he previously testified that he received the machine in December of 1947, so he could not have operated it from January of 1947.

The Court: Did you misspeak yourself?

A. No, the machine arrived in December of 1947 and was placed into operation in January of 1948.

The Court: That is what Mr. Babcock was saying.

A. The machine was replaced in May of 1949. If I said 1948, I meant 1949.

The Court: Mr. Babcock was trying to help you out, so that you would not say something about the machine before [fol. 852] you got it.

By Mr. Neville:

Q. All right, now what happened in May of 1949?

A. The machine that we had been operating since January of 1948 was shipped back to the Besser Manufacturing Company and the machine as called for in the lease was received by them at that time and installed.

Mr. Babcock: Pardon me. At this point I must object. The witness says, "the machine as called for in the lease." Now, if we are going to talk about the contents of a written document, I want it produced.

The Court: You do not have that contract with you, do you?

Mr. Babcock: No, your Honor, but we can get it from Alpena. We do not have it here in Detroit.

The Court: All right. I sustain the objection. I would think that you would have somebody call Pennsylvania right now and have them send it air mail.

[fol. 853] The Court: Received "by them"? By whom do you mean?

A. By us, Building Units, Incorporated.

The Court: I will permit that. You could not have said "by them," could you?

A. No, by us.

[fol. 854] By Mr. Neville:

Q. When did you receive the latest machine?

A. May of 1949.

Q. Now, will you describe that machine?

[fol. 855] A. That machine was a Super Vibra-Pack with an automatic front pallet feed.

Q. Did that come with other equipment especially adaptable to that particular machine?

A. Well, that machine replaced the one that we used previously, which did not have the front pallet feed. All of the other parts incidental to the operation of the machine had been received by us with the previous machine, except racks.

Q. Did you get the racks together with the new machine?

A. With the machine in May of 1948, yes—1949.

Q. 1949. When did you put that machine in operation, if you did?

A. In May of 1949.

Q. Did it function properly?

A. It did not function as well as the machine that we had been using previously and returned to the Besser Manufacturing Company.

Q. What was wrong with it?

A. It did not compact as much material in the mold box as the previous machine.

The Court: It did not compact?

A. Compact.

The Court: As much material in the mold box. How could that possibly be, because the mold box is the mold box, and the mold box accepts all of the mix that comes in it from the feed box, and the feed box contains enough mix so that when properly pressed or tamped, it makes an eight-[fol. 856] inch block. Explain what you mean by that. I don't understand it.

A. I am no engineer, your Honor.

The Court: Well, I didn't start out as one, but I think I will end up as one here.

A. Machine No. 1, if I can explain it that way—that was the machine that we used from January of 1948 until May of 1949—produced a block that had a weight, when the block

was removed from the kiln, of from 31 to 33 pounds per 8x8x18, which is the size we manufacture.

The Court: 8x8x18?

A. 8x8x18. The machine——

The Court: (Interposing) Is it that long?

Mr. Babcock: The normal is 16.

The Court: That is what I thought.

Mr. Babcock: The larger sized block.

The Court: I see. All right. Was that three pallets, too?

A. Yes.

Q. So that was a three pallet machine?

A. Yes.

The Court: A three pallet machine, 8x8x18. All right.

A. This machine produced a block with the same aggregate, the same mix, weighing 27 to 28 pounds per 8x8x18.

[fol. 857] The Court: Did you think that that was a drawback, or an inferior block?

A. Definitely. There is definite relationship between the weight of the unit and the ultimate strength of the unit. So the ultimate strength was down. The yield per sack of cement was up, as is evidenced from the lighter weight. That in itself would have been an advantage if it had the strength.

The Court: I can see how the lighter weight of the block may be an advantage rather than a disadvantage. I don't say that it was. But, all right. It was a lighter block. All right. Go ahead. What other objection?

By Mr. Neville:

Q. Did you speak to Mr. Staley——

The Court (Interposing): Was there any other objection he wants to mention?

Mr. Neville: No, that was all.

By Mr. Neville:

Q. Was there anything else wrong with the machine?

A. Well, in our efforts to get more material into the mold box, to compact the concrete in the unit more, we found that we were getting a distorted block. While the mold itself

was theoretically 18 inches—it was actually 17⅝, it is a modular standard size of block, while it was in the mold it was 17⅝. But by reason of the fact that we were trying to force more material under the stripper head when that block is extruded, in a few minutes it expanded and we had a block that was as much as 18 inches long at the top and at the bottom 17⅝.

[fol. 858] Q. So that the machine produced an unsatisfactory block?

A. That is right.

Mr. Babcock: As so used.

The Court: You mean——

Mr. Babcock: (Interposing) After forcing more material in the machine than it was designed to hold.

The Court: All right.

By Mr. Neville:

Q. Why did you——

The Court (Interposing): That is a gratis statement, but let it appear on the record.

By Mr. Neville:

Q. Just why did you do that, Mr. Longenecker?

A. To try and get the material compacted in the mold box.

Q. Did you try other methods of using this machine so that it would produce a satisfactory block?

A. We tried everything that we knew.

The Court: Of course, I don't know that this ultimate block was not a satisfactory block. People are always trying to get things lighter and more durable, and harder and that is one reason for the existence of any plastics at all.

Mr. Neville: The witness has testified, however, your Honor, that this machine did not make a block comparable to the block made by the other machine.

The Court: But all he said is that it did not make the block as heavy as the other machine. That is what he said.

[fol. 859] A. Or strength. It didn't have the strength.

The Court: Did you ever test it for strength?

A. Yes, sir.

The Court: That may be it. This is the first time strength has been mentioned.

By Mr. Neville:

Q. Did you speak to Mr. Staley about this situation?
A. I did.
Q. When?
A. Well, immediately after we put the machine in operation, after we had several days exprience in running it.
Q. Did Mr. Staley look at the machine?
A. Yes.
Q. What did he say when you spoke to him?
A. He said he did not see why it should be any different, because it is the identical machine, except for the front pallet return.

By Mr. Neville:

Q. Did you talk to anybody else from the Besser Company with reference to this machine?
[fol. 860] A. Yes, sir.
Q. To whom?
A. To Mr. Fox.
Q. Who is Mr. Fox, if you know?
A. Mr. Fox is a sales manager of the Besser Manufacturing Company.
Q. When did you talk to Mr. Fox?
A. July of 1949.
Q. And where?
A. At my office at Primos, Pennsylvania.
Q. By the way, did you know Mr. Fox prior to that time, Mr. Longenecker?
A. Yes, sir.
[fol. 861] The Court: Has Mr. Fox been identified?
A. Yes.

Mr. Babcock: He is the sales manager of the Besser Manufacturing Company, your Honor.
The Court: I see. All right.

By Mr. Neville:

Q. So that you knew Mr. Fox quite well, didn't you?
A. Yes, sir.

By Mr. Neville:

Q. What did Mr. Fox say to you when he called on you, Mr. Longenecker?
A. Mr. Fox inquired as to what was the trouble with the machine.
Q. What did you say?
A. We called it to his attention, as to what has been—what unit we have been producing, and he could scarcely believe the resultant product that was coming from the machine with the distortion. He said in his experience he [fol. 862] has never seen anything like it.
Q. Did he try to operate the machine?
A. He had suggestions that our men followed.
Q. And what were the results?
A. No difference.
Q. Did you talk to Mr. Fox on this occasion about purchasing the machine?
A. That was in July of 1950, you mean? Yes, sir.
Q. No, 1949.
A. 1949, yes, sir.
Q. What did you say to Mr. Fox on that subject?
A. I stated that since the policy of the Besser Manufacturing Company had changed and they sold some machines that I now wanted to purchase this machine, the one that we had in our possession.
The Court: You mean that one that wouldn't work right?
A. With the condition that the machine be corrected to make a suitable block.

By Mr. Neville:

Q. I will ask you, Mr. Longenecker, how long after delivery of this machine did this conversation take place?
The Court: Delivery of the second machine?

[fol. 863] By Mr. Neville:

Q. The machine that was unsatisfactory.

A. About 30 days, I would say.

Q. In that period did you still have hopes of being able to remedy the bugs in that machine?

A. I had no question in my mind but what it could be, the condition would be corrected.

Q. And that is when you renewed your efforts to purchase?

A. Yes.

Q. What did Mr. Fox say?

A. Mr. Fox said it was true that the Besser Manufacturing Company has sold some machines but not this particular model. The particular model that we had operated at that time had the front pallet feed; that one they were leasing only.

The Court: Is that the so-called best machine that Besser gets out?

A. It is the Besser Super Vibra-Pack.

The Court: I know. Is it the best machine that they get out?

A. Yes.

The Court: All right.

A. Yes.

The Court: That is what I asked.

By Mr. Neville:

Q. Did Mr. Fox say anything about submitting an offer to the home office?

A. Yes.

[fol. 864] Q. Did you see Mr. Fox following this conference?

A. Yes.

By Mr. Neville:

Q. Then I will say, what did he say?

A. Mr. Fox stated that in view of the understanding we had with the Besser Manufacturing Company at the time of the lease, he would take the matter up with Mr. Besser.

Q. What was that understanding?

A. That understanding was that should the policy of the Besser Manufacturing Company change——

[fol. 865] The Court: Did you mean at the time of the lease, or before the lease?

A. Before.

The Court: All right.

A. Before the execution of the lease.

The Court: All right. Go ahead.

A. What was the question, now?

By Mr. Neville:

Q. What was that understanding, Mr. Longenecker?

A. The understanding was that should the policy of the Besser Manufacturing Company change and they again sell machines, that this machine would be offered to me at the then current market price.

Q. Is that the understanding you had reference to when you mentioned understanding a moment ago, to Mr. Fox?

A. Yes.

Q. Now, what did Mr. Fox say to that?

A. Mr. Fox was unfamiliar with the understanding and he——

The Court (Interposing): Why don't you answer the [fol. 866] question? How do you know whether he was unfamiliar or not?

You cannot look into the man's mind.

A. He stated so.

The Court: That is what he asked you.

A. Yes.

The Court: He asked what he said.

A. He stated that he was unfamiliar with this negotiation, which was conducted by Mr. Park and not himself, and he would take it up with Mr. Besser and Mr. Park and advise me.

Q. I see. Did you see Mr. Fox at a later date?

A. I did.

Q. When discussing that subject?

A. Yes, sir.

Q. When?

A. October of 1949.

Q. Where was this?

A. Primos, Pennsylvania.
Q. All right. Now, what did Mr. Fox say?
A. Mr. Fox said "we will sell you this machine."
Q. Did he discuss terms of sale?
A. I asked him the price. He gave me a price of $60,000.
Q. What did you say to that?
The Court: How much?
A. $60,000. I asked him whether the $60,000 price included as a payment on account of that, rentals paid or accrued up to that time. His answer was "no, that is [fol. 867] use; it is $60,000 from the date of the purchase."
Q. What were the rentals that you had paid up to date for the leasing of the machine?

Mr. Babcock: Up to that date?
Mr. Neville: Yes.
A. Approximately $30,000.

By Mr. Neville:

Q. So that the $60,000 added to the $30,000 would make a total of $90,000?
Mr. Babcock: Ninety, we all agree.
A. Yes, sir.

The Court: How long did this man say he has been in the building block business?
Mr. Neville: Since 1921, your Honor.

A. Since 1921.
The Court: All right.

By Mr. Neville:

Q. Did you agree to purchase under those terms, Mr. Longenecker?
A. No, sir.
Q. Why not?
[fol. 868] A. Because it was entirely too much money.
The Court: You thought it was too much money. All right.

By Mr. Neville:

Q. Did you state that to Mr. Fox?

A. I did.

Q. What did Mr. Fox say to that, or did he say anything?

A. I do not recall that he said anything over it.

Q. By the way, did you keep your payments up under the lease, Mr. Longenecker?

A. The payments were kept under the lease until the second machine was put in operation and it did not produce a satisfactory block and we were unable to get any attention from the Besser organization. Then we did not make the payments and so advised Mr. Fox.

Q. Now, did Mr. Fox call on you again following this meeting of July, 1949?

[fol. 869] A. Yes.

Q. When did he call on you?

A. Well, he was at my office in April of this year.

Q. What did he say to you when he called on you in April of this year?

A. He was asking for the rent payments on the use of the machine.

Q. What did you say to him?

A. I said not until the machine makes a satisfactory block.

Q. On this occasion, did Mr. Fox discuss the possibility of installing a Besser machine in the Geneva plant?

A. Oh yes, that had been discussed previously, and he asked me what decision we had arrived at, whether we were going to install a new machine.

Q. What did you say to that?

A. I told him that we were not going to install a high production machine at Geneva.

Q. Did you say anything about installing another machine, a machine of another make?

A. Yes.

Q. What did you say?

A. I said I was negotiating for the purchase of another machine.

Q. What other machine?

A. The machine that is manufactured by the Lith-I-Bar Company.

Q. Did you know at the time, Mr. Longenecker, that the Lith-I-Bar Corporation was involved in patent litigation with the Besser?

[fol. 870] A. I did, yes.

Q. How long had you known that?

A. At the Chicago convention of the National Concrete Masonry Association.

Q. When was that?

A. At the end of January, or February, 1950.

Q. And you knew that the Lith-I-Bar Corporation was the defendant?

A. Yes.

Q. Did you know that it pertained to possible infringement of patents?

A. Yes.

Q. Did Mr. Fox have anything to say to you about this litigation?

A. That the case was concluded in favor of the Besser Manufacturing Company.

The Court: Wait a minute. What is that?

A. That the case was concluded in favor of the Besser——

The Court: You mean the patent case?

A. Yes.

The Court: Who said that?

A. Mr. Fox.

The Court: When?

A. April of 1950.

The Court: Last April?

A. This past April.

The Court: Fox said that? To whom?

[fol. 871] A. To me.

The Court: Do you know that this court has not decided that case yet?

A. I did not know who was trying the case.

The Court: I was trying it and I have not decided it yet. That is, I have not written any opinion on it. Has Mr. Fox been around here?

Mr. Babcock: Not as yet, your Honor. He will be.

The Court: I would be interested in knowing whether or not he made any such statement.

Mr. Babcock: He will be here.

By Mr. Neville:

Q. Did you have a long distance telephone conversation with Mr. Milewski some two weeks ago, Mr. Longenecker?

A. Yes, sir.

Q. Where were you when that conversation took place?

A. In my office at Primos, Pennsylvania.

Q. Was anybody in the office with you?

A. Yes, sir.

Q. Who?

A. Two representatives of the Besser Manufacturing Company.

Q. Do you know their names?

A. Roy Eddy and Leroy Boboltz.

Q. Do you know what positions these gentlemen occupy in the Besser organization?

A. Mr. Eddy is in the service department, and Mr. Boboltz, I believe, is the head of the service depart- [fol. 872] ment.

The Court: Of what company?

A. Of the Besser Manufacturing Company.

Mr. Neville: I might mention, your Honor, that Plaintiff's Exhibit No. 4, which is a statement of the names and positions of the officers of the Besser Company received from the Besser Company, states that Mr. Leroy C. Boboltz is a vice president.

The Court: All right.

By Mr. Neville:

Q. Now, you recognized Mr. Milewski's voice over the telephone, did you?

A. Yes, sir.

Q. What did Mr. Milewski say?

A. He asked me——

Mr. Babcock: Now, just a moment. I object to this because what Mr. Milewski said could not be within the

hearing of the two representatives of the Besser Manufacturing Company.

The Court: I sustain the objection.

Mr. Neville: But I am leading up to something else, your Honor, where what Mr. Milewski said has a bearing upon what Mr. Longenecker said at the other end of the line.

The Court: What is the purpose of it?

Mr. Neville: I am going to show that there was a repetition of this statement that has just been attributed to Mr. Fox by Mr. Boboltz.

[fol. 873] The Court: You mean about the ending of the other suit?

Mr. Neville: About the ending of that litigation.

The Court: How could anybody possibly have determined anything about this suit that I have?

Mr. Neville: That I do not know, your Honor, but these statements have been made, according to this witness, and I thought your Honor would be interested in knowing that the Besser Company goes around saying these things, just as they go around making statements about the patents being infringed.

The Court: Go ahead, you may answer.

A. May I have the question, please?

By Mr. Neville:

Q. What did Mr. Milewski say?

A. Mr. Milewski asked whether Mr. Fox made that statement to me. I said, "That is my understanding." I said, "Just a minute, there are two representatives of the Besser Manufacturing Company in my office, one of which was present at the time Mr. Fox was there several weeks ago."

Q. Was the line still open while you said this?

A. Yes, sir, and I asked Mr. Eddy whether he recalled Mr. Fox making that statement.

Q. Now, was the line still open when you asked Mr. Eddy that?

A. Yes, sir.

Q. What did Mr. Eddy say?

Mr. Babcock: Now, just a minute. I want to have the [fols. 874-875] witness give the exact words of this. This

is rather important—instead of his conclusion as to that statement.

The Court: All right.

By Mr. Neville:

Q. What did Mr. Eddy say?

Mr. Babcock: No, what did he say to Eddy, first.

A. I asked Mr. Eddy whether my understanding is correct that Mr. Fox stated that the Besser Manufacturing Company had won an infringement suit against the Lith-I-Bar Company. Mr. Eddy's reply was, "I do not recall as I was not present with you and Mr. Fox at all times." Mr. Boboltz said, "Yes, that is true." I then turned to Mr. Milewski and repeated that conversation, which Mr. Milewski already heard my part of it, as the telephone line was open.

Mr. Neville: Your witness, Mr. Babcock.

Mr. Babcock: Well, I can say to your Honor now that as a very necessary part of my cross-examination, if I started now, I am going to run into needing these written documents. I can say that to your Honor because I advise your Honor that the order about which the witness has talked was a submitted order which never was accepted, and it is important in view of the government's examination to bring that out, and I would prefer to reserve my cross-examination until tomorrow morning and get the documents here.

The Court: All right, I think that is no more than fair.

[fol. 876] Roy W. Darden, called as a witness on behalf of the plaintiff, being first duly sworn by the Clerk, testified as follows:

The Clerk: What is your full name?
The Witness: Roy W. Darden.

Direct examination.

By Mr. Speer:

Q. Would you state your name and address, please?
A. Roy W. Darden, Old Peach Tree Road, Atlanta, Georgia.
Q. What is your present occupation or business, Mr. Darden?
A. I cause to be manufactured, sell and service concrete block plant equipment.
Q. For what period of time have you been in the concrete block machine industry?
[fol. 877] A. Since 1944.
Q. In 1944, could you describe for us briefly the kind of a concrete block machine which you caused to be manufactured?
A. It is what we call a low or a medium production machine. It is a cored pallet vibrator type machine with a pressure head. It is semi-automatic.
Q. And approximately what was the eight-hour rate of block production for that machine?
A. We say 1500 to 2000, depending on the operator, and the class of material used.
The Court: You mean a day?
A. Eight-hour day.
The Court: Single pallet?
A. No, cored pallet, single block per cycle, one block per cycle.
The Court: Per minute? How many cycles per minute?
A. Three to four cycles per minute, but you only make one block per cycle. The machine we have been talking about heretofore makes two to three per cycle, but this is a low production machine.
The Court: That is, compared to the others?

A. Compared to them.

The Court: I know that somebody explained to me the difference between the cored pallet and the other pallet, but I do not know as I understand it. What do you mean by cored pallet?

[fol. 878] A. We use a cast iron or pressed steel pallet which is in the exact form and shape of the bottom of the block.

The Court: That is just a flat surface, isn't it?

A. No, we drop it in from the top in the mold over the cores, they are to be rectangular or square or egg-shaped.

The Court: That follows the shape of the block?

A. Yes, of the finished block, instead of putting a flat plain pallet.

The Court: I see, all right.

By Mr. Speer:

Q. In the year 1944, Mr. Darden, approximately how many of these machines did you manufacture?

A. About twelve machines in 1944.

Q. Did you continue to manufacture the same kind of machine in the year 1945?

A. Yes, sir, I did.

Q. And approximately how many machines did you make in 1945?

A. We made around 24 machines in 1945.

Q. Did you continue in the year 1946 to make the same type of machine?

A. Yes, sir, I did.

Q. Now, at any time since 1944, have you ever manufactured a concrete block machine other than the type you have just described?

A. In 1946, we entered into an agreement with Millard Warren to cause to be manufactured, and handle the sales and service of the Warren 800 machine, which is a high [fol. 879] production plain pallet machine.

The Court: 800. 800 what?

A. That means 800 per hour minimum production.

The Court: 6400 a day?

A. Yes, sir.

The Court: What kind of a machine is that?

A. It is a plain pallet machine. At the time, I believe, it was the highest producing machine in the world of this type.

The Court: When was this?

A. 1946, we entered into the contracts. We delivered the first machine, though, in 1947.

The Court: All right. Go ahead.

By Mr. Speer:

Q. Now, you say that machine was called the Warren 800. What did you call this other block machine?

A. Rocker-Crete.

Q. Rocker-Crete?

A. That was the registered trade name.

Q. Now, in what way or in what respects did the Warren machine differ from the Rocker-Crete machine?

A. Well, the Warren 800—of course, it is a fully automatic machine. The small machine is semi-automatic, depends on the human element in there.

The Warren 800 is a plain pallet machine, where the Rocker-Crete is a core pallet machine. Quite a difference [fol. 880] in the mechanism of the two machines. The weights of the machines, the Rocker-Crete weighs approximately 2,260 pounds, and the Warren 800 weighs around 18,000 pounds.

The Court: How much does the Besser weigh, do you know?

A. Oh, it weighs more than—I am quite sure it weighs more than the 800. Probably 24,000 to 30,000, I would guess.

The Court: Go ahead.

By Mr. Speer:

Q. But both of the machines employed the principle of vibrating and compacting the aggregate in the mold, is that true?

A. That is correct, sir.

Q. Now, in the year 1946, Mr. Darden, did you manufacture the machines in your own plant?

A. No. In fact, we never at any time manufactured at our own plant. May I explain this?

Q. Well, I will ask you the next question, then. By whom were the machines actually manufactured?

A. They were manufactured——

Q. (Interposing) Fabricated.

A. (Continuing) —for us from 1944 up through 1946 by the Atlanta Welding and Machine Company.

Q. And then?

A. At Atlanta.

Q. Who did the work after 1946?

[fol. 881] A. After that the Link-Belt Company, the Link-Belt Company took over the manufacture of all of our equipment.

Q. The Link-Belt Company?

A. That is right.

Q. And whereabouts did it have its plant at that time?

A. Well, they have plants all over the country, but all of our material was manufactured and fabricated in the Atlanta plant of the Link-Belt, on Murphy Avenue, in Atlanta, Georgia.

Q. Could you recall approximately what time in 1946 that the Link-Belt Company began the manufacture of your machines?

A. I don't know the exact date, but it was in the spring.

Q. In the spring?

A. In the spring.

Q. Of 1946?

The Court: How does that machine work, that one? It has a plain pallet?

A. Plain pallet. It has a plain pallet. We use an aluminum pallet where most of the other machines use steel. We use that to save weight.

The Court: Save weight?

A. Save weight. We get a 12 to 13 pound pallet against 35 or 40 pound pallet. We don't have as much weight to handle all during the day.

The Court: Have you got a hopper on this?

A. Yes, sir.

[fol. 882] The Court: You have got a feed box?

A. Yes, sir.

The Court: Does the feed box travel on tracks?

A. Yes, sir.

The Court: Does it travel over the top of the mold?

A. It does.

The Court: Is the mold vibrated as it goes over, as the feed box goes over?

A. You can set it so it does or does not, I mean, you can set it with your hand.

The Court. Which way do you recommend?

A. I believe it does a better job if it is vibrating as it goes over.

The Court: As it moves over. And then the feed box is quickly removed?

A. That is right.

The Court: And is there a tamping or a pressure?

A. Pressing.

The Court: Pressing?

A. Yes, sir.

The Court: Have you got a license from the Gelbman people?

A. No, sir.

The Court: Is that covered by a patent in any way?

A. The patents are pending on that.

[fol. 883] The Court: Pending for what?

A. We have made application for patents, and we have so many claims——

The Court (Interposing): Did you ever see the Besser machine?

A. Yes. Yes, sir, many times.

The Court: Isn't that just the way the Besser machine works, with the three pallet machine, isn't that the way it works?

A. No, sir.

The Court: What is the difference?

A. Well, one thing our mold box strips up leaving the block on the pallet, where on the machine, their machine it forces the block down through the mold box. I mean, it is in the reverse, I would say.

The Court: Wait a minute, now.

A. We have a pressure head on the box. The whole mold just strips up, leaving the block on the pallet.

The Court: How does it work on the Besser?

A. On the Besser they force the block through the mold box to a chain.

The Court: You expect to get a patent on that claim?

A. Mr. Warren does.

The Court: Is that the only difference between yours and [fol. 884] the Besser?

A. No, sir. There is a lot of difference.

The Court: Well, is the mold suspended in vibration?

A. We have directional vibration, straight up and down, or synchronized eccentric. That is something I never heard of until Millard Warren came out with this machine.

The Court: Up and down.

A. We have two shafts, and they are synchronized, and they are geared so they are always up together, always down together, out together and neutralized, and in together and neutralized, so you get a straight up and down vibration, where Besser Manufacturing Company claims undirectional, I believe, anyway. We go straight up and down.

The Court: I see. All right.

By Mr. Speer:

Q. Now, then, in addition to the patent applications that you just mentioned to the court, these applications made by Mr. Warren, are either of these machines covered by any patent which has been issued to you?

A. Yes, sir.

Q. And could you tell us the date that that patent was issued to you?

A. It was issued, I believe, June, 1946.

Q. And do you have a copy of that patent?

A. I don't have it with me. It is at the hotel, Mr. Speer.

Q. It is at the hotel.

[fol. 885] By Mr. Speer:

Q. Now, then, Mr. Darden, have you at any time ever asked Mr. Gelbman for a license under his patent?

A. Yes, sir, I have on several occasions.

Q. And could you tell us approximately when you first asked him for the patent license?

A. In late——

A. In late 1946, my Atlanta attorney and I made a trip to New York for the purpose of visiting his office in the Bronx and——

[fol. 886] By Mr. Speer:

Q. Then, Mr. Darden, before this visit to Mr. Gelbman in New York, had you ever had any conversation with him about patents?

A. Yes.

Mr. Gelbman: Fix the time, please.

A. I had.

By Mr. Speer:

Q. Now, Mr. Darden, what was the approximate date of your conversation concerning the patents with Mr. Gelbman?

A. Well, the first time those patents were discussed between us, he approached me in 1946 at the Chicago conven-

[fol. 887] tion and he had a picture of my machine.

The Court: Who had?

A. Mr. Gelbman.

The Court: Mr. Gelbman.

By Mr. Speer:

Q. Now, could you tell us approximately what time in the year 1946?

A. It was in February or March. They are always held in February or March, at the Sherman Hotel in Chicago, or they were then.

Q. Now, at that time, what did Mr. Gelbman say to you about his patents?

A. He stated that he owned a patent for vibration under pressure, and he had numerous patents that covered by machine, and he had a picture of my machine in his hand which he showed me, and he said, "Is this the machine which you manufacture?"

I said, "Yes."

He said, "You are infringing on my patents."

I said, "I don't think so, Mr. Gelbman."

And that ended in just a few minutes.

Q. All right, now, then——

By Mr. Speer:

Q. Is that the only conversation concerning patents that you had with Mr. Gelbman until the time that you and your attorney called upon Mr. Gelbman at his office?

A. I believe so, with Mr. Gelbman, I believe that is right.

[fol. 888] Q. Now, have you ever had any conversation concerning patents with Mr. Besser?

A. Yes, sir, I have.

Q. And approximately what time did you have these conversations?

A. Oh, a few months after the 1946 meeting with Mr. Gelbman in Chicago, Mr. Besser came to Atlanta, and he was stopping at the Robert Fulton Hotel, which is about a block from our office, and he called my office and asked if I would meet him at the Robert Fulton in the lobby, which I did.

The Court: When was this? Who was this?

A. Mr. Besser.

The Court: All right.

A. He had in his possession two patents, the method patent and the patent on vibration under pressure belonging to Gelbman.

The Court: Wait a minute. The method patent is the vibration under pressure. The apparatus patent has no pressure or tamping.

A. I am not too familiar with that.

The Court: All right.

By Mr. Speer:

Q. Excuse me in your story just a minute. Are these the two patents that were shown to you by Mr. Gelbman earlier at the Chicago convention?

A. No. At that time he did not show me any patent, just said, "You are infringing on certain patents which I own."

Q. All right.

[fol. 889] A. Mr. Besser said Mr. Gelbman—and I remember very distinctly he spelled it out, says, "You do know Mr. Gelbman, G-e-l-b-m-a-n?" I said, "Yes, I know him, Mr. Besser."

He spelled it out and he said, "These are his patents

which you are infringing on, and you have to do something to stop business."

A. He said, "You have to do something. You just can't continue to manufacture these machines. They are infringing."

By Mr. Speer:

Q. And what did you have to say to that, to Mr. Gelbman?

A. I suggested to Mr. Besser, why don't you fellows license me. I am making a little machine here. Why don't you license me and let me get in under the tent too? He wouldn't listen to that.

Q. Now, at this conference in the hotel, was anything else discussed at that time?

A. No, sir, I don't remember any other discussion at the time.

Q. Is that the only time that you have ever discussed [fol. 890] patents with Mr. Besser?

A. I do not remember actually talking patents with him again.

Q. All right. Now, what was the general substance of the conversation which you and your attorney had with Mr. Gelbman at Mr. Gelbman's office in the year 1946?

A. We approached Mr. Gelbman on licensing our company to manufacture machines under his basic vibration patents.

Q. And what did Mr. Gelbman have to say?

A. Mr. Gelbman said that it was completely out of his hands, that "it was up to Mr. Olsen and Mr. Besser, who were my licensees;" he said, "you will have to see them."

Q. Was there anything else discussed at that conversation that you can recall?

A. No, sir, except I believe he inroduced me to Mr. Hamlin Andrus at that meeting and he introduced me as the bad boy of the industry.

Q. By the way, Mr. Darden, what is the name of the company under which you have manufactured these machines?

A. Roy Darden Industries, Incorporated.

Q. Roy Darden Industries, Incorporated?

A. Yes.

Q. Has the Roy Darden Industries, Incorporated, ever been named as a defendant in a patent infringement suit?

A. No, sir.

Q. Have any purchasers of a Darden machine ever been [fol. 891] named as a defendant in a patent infringement suit?

A. Yes, sir.

Q. And what was the name of the purchaser?

A. It was the Landis Concrete Products Company, Landisville, New Jersey.

Q. And by whom was the patent infringement suit brought?

A. Brought by Gelbman and Andrus.

Q. Did the Roy Darden Industries take part in that suit?

A. We did. We figured that we should back our customer up to the full extent of our resources and we did take part; we took over right from there.

Q. Now, can you recall approximately at what time that suit was filed?

A. It was filed in January, 1946—January 1947.

Q. At the time of the filing of the suit in January of 1947, what kind of a block machine was your customer employing?

A. One of the smaller machines, the Rocker-Crete.

Q. The Rocker-Crete block machine?

A. Yes, sir.

The Court: Is that one pallet?

A. That is one pallet, yes, sir, that is a cored pallet.

The Court: That is a cored pallet?

A. It is a low production machine.

By Mr. Speer:

Q. Then Mr. Darden, what was the outcome of this patent [fol. 892] suit?

Mr. Babcock: I think if there was action taken by the court that that is the best evidence.

The Court: I would like to know what it is, but I do not know as he is competent to tell. Was there a judgment entered?

Mr. Speer: I do not believe there had been any issue or dispute about this. The case was settled out of court, your

Honor. The patents were not ever contested. It was settled out of court and that is all I asked him for. I did not ask him to say what the court decided because as I said the case was settled out of court.

The Court: Is it admitted that it was settled out of court? Is there any question about that?

Mr. Gelbman: As far as I know there is no question that it was settled. I think——

The Court: Never mind the terms of it, because you are no more competent to tell the terms of it than the witness would be. It was settled and never reached an issue?

Mr. Gelbman: Issue was joined but it never was tried.

The Court: Issue was joined but it never reached trial; is that right?

A. That is correct.

The Court: All right.

[fol. 893] By Mr. Speer:

Q. At or about the time the patent infringement suit was filed against your customer, did you take any action against Mr. Gelbman or the Besser Company?

A. I did. In February, about a month later, in Chicago, I entered suit against Besser, Stearns Manufacturing Company, and Gelbman, and each president as an individual, for unfair competition.

Q. A suit based on unfair competition?

A. Yes, sir.

Q. What was the outcome of that suit?

A. That suit was dismissed simultaneously with the suit in New Jersey against our customer.

The Court: Was that settled out of court?

A. That was settled out of court also.

By Mr. Speer:

Q. At or about the time both of these suits were dismissed, did you ask Mr. Gelbman or Mr. Besser, or the Stearns Company for a patent license under the Gelbman patents?

A. I did, yes, sir.

Q. Can you recall approximately at what time you made such request?

A. On the morning of February 18, 1947.

Q. And to whom did you make this request?

A. I made the request to Mr. Besser, Gene Olsen, Louis Gelbman,—there were several other people present there but I made it principally to those three.

Q. This was on February 18, 1947?

[fol. 894] A. February 18, 1947.

Q. I do not believe you have told us whether this was made over the phone or in person, but how was it made, Mr. Darden?

A. It was made in person.

Q. And whereabouts was this?

A. We were in—Gene Olsen at that time was president of the Stearns Manufacturing Company—in his suite on the second floor of the Sherman Hotel in Chicago.

Q. Now, tell us as best you can what was the general substance of the conversation at that time, February 18.

A. Well, their lawyers—we had them arrange this meeting——

Mr. Babcock: I did not understand that——

A. The lawyers who were handling this case, I believe Larson in Washington, the one that was handling the New Jersey case against our customer, arrange a meeting for us in Chicago——

[fol. 895] By Mr. Speer:

Q. Now, I will ask you to answer this particular question: On February 18, 1947, in the Hotel Sherman, what was the general substance of the conversation between you and Mr. Gelbman and Mr. Olsen, and Mr. Besser, and any others who were there.

A. We asked them to license us so we could continue in business without litigation, and they flatly refused us. They did not enter the meeting with open minds on the subject.

Mr. Babcock: I move to strike that.

The Court: That part may be stricken.

By Mr. Speer:

Q. At the time you asked them if you could be issued a patent license, what were the comments of Mr. Gelbman, if you can recall, or Mr. Besser, or Mr. Olsen?

A. Mr. Gelbman always leaves it up to Mr. Olsen and Mr. Besser.

Q. What did Mr. Olsen say?

A. That "we would not license you;" he said, "Roy, there is only about $700,000 gross business normally in this business," and he said, "we are well able to take care of that, the Besser Manufacturing Company and the Stearns Manu-
[fol. 896] facturing Company," and he said, "there is not any room in this business for your company."

By Mr. Speer:

Q. In addition to what you have just stated, Mr. Darden, did Mr. Olsen have anything else to say?

A. He did. But not in the presence of the others.

Q. All right. Hold off there then. Can you recall if Mr. Gelbman had anything to say when you asked him for a patent license?

A. I believe he said, "All right, fellows, what do you say?" He always leaves it open to them.

Mr. Gelbman: I object to that "always leaves it open to them," as a conclusion.

The Court: I sustain the objection. Tell what he did.

By Mr. Speer:

Q. At this same time did Mr. Besser have anything to say?

A. Nothing other than that he could not go along and let
[fol. 897] us be licensed, that he could not agree to that.

Q. Now then, was that the general substance of the conversations held on February 18?

A. That is correct.

Q. And now on that same day, did you again converse with either or any of those gentlemen, that is Mr. Gelbman, Mr. Olsen, or Mr. Besser,—this is on the 18th?

A. No, sir, I do not believe I did again that day.

Q. At or about that time, Mr. Darden, on February 18, did you have any other discussions about patents with Besser, Gelbman or Olsen?

A. No, sir, I do not believe I had any other.

Q. Did you have any further conversations with this man during your stay at the convention in Chicago?

A. I did.

Q. Now, approximately what date?

A. On the morning of the 20th, I remember this one particularly.

Q. Just a minute. You say that was on the morning of the 20th of February?

A. Yes.

Q. And that is where——

The Court: (Interposing) What year?

A. 1947.

Mr. Speer: 1947, your Honor.

The Court: All right.

[fol. 898] Mr. Speer: The same year.

By Mr. Speer:

Q. And with whom did you have the conversation?

A. Mr. Olsen of the Stearns Manufacturing Company.

Q. This is only with Mr. Olsen?

A. Yes.

Q. And what was the general substance of that conversation?

A. Well——

Mr. Babcock (Interposing): I object to that on the ground it is not binding on this defendant.

The Court: Who is there, now?

Mr. Speer: This is only between Mr. Olsen, who at that time was the president of the Stearns Company, and Mr. Darden.

The Court: He may answer.

Mr. Babcock: May I have the benefit of the objection, in the event the court later rules out the question of conspiracy and combination, and then it would not be binding in any way upon the Besser Manufacturing Company.

The Court: Yes, but at the present time I think it is competent. Go ahead.

Mr. Speer: All right.

A. I approached Mr. Olsen at the convention hall on the morning of February 20, 1947, and told him I was quite ready to quit business, if we could come to some terms where I could get out of the business gracefully, without losing my inventory.

[fol. 899] By Mr. Speer:

Q. Now, sir, could you tell us what had occurred between February 18, and February 20, that caused you to tell Mr. Olsen that you were now prepared to get out of the business?

A. Yes, sir.

Q. All right, tell us what occurred.

A. Gene Olsen and Jesse Besser had made a trip to the Link-Belt Company in Chicago, and had been successful in having my supplies cut off.

Mr. Babcock: I object to that, your Honor please, unless the witness is prepared to say that he was with them or has personal knowledge.

The Court: Or he has knowledge of it. I will sustain it until it is shown that he had knowledge.

By Mr. Speer:

Q. Well, I will just have to ask that again, Mr. Darden. Between February 18 and February 20, what had occurred of which you had—what fact had occurred, if any, of which you had personal information that caused you to tell Olsen you were prepared to go out of business?

Mr. Babcock: I object to the question as asked, it calls for a conclusion of the witness on the basis of entirely incompetent evidence. He said personal knowledge. That personal information might come from Tom Jones. And I don't think the witness ought to be permitted to draw his conclusion of what he had learned from some person, information from an undisclosed source.

[fol. 900] The Court: He can tell what he learned.

Mr. Babcock: Well, not without letting us first have an opportunity to learn how and where, and from whom he learned it.

Mr. Speer: If the court please, I asked only what fact he had—what fact had occurred between the 18th and the 20th.

The Court: He may answer that one.

A. The fact that my supplies had been cut off by the Link-Belt Company, prompted me to approach Mr.——

Mr. Babcock (Interposing): I object to that, your Honor

please, entirely immaterial and irrelevant, incompetent, having no relation to any issue here.

The Court: He said his supplies had been cut off. I will overrule the objection.

By Mr. Speer:

Q. Now, then, Mr. Darden, what information did you have that your supplies had been cut off by the Link-Belt Company?

A. I received a call about seven o'clock on the morning of February 20 from Atlanta. It was from the manager of the Link-Belt Company there. And he informed me that the president of the Link-Belt Company——

Mr. Babcock (Interposing): I object to conversation between him and——

The Court (Interposing): Let's see how far he goes.

[fol. 901] A. He informed me that the president of the Link-Belt Company had instructed him to cut off our supplies until this patent litigation and so on was cleared up.

By Mr. Speer:

Q. Was that your first conversation with the man from Li-k-Belt down in Georgia, or had you talked with him before?

A. He was in Chicago with me on the 17th and 18th. He had just flown back.

Q. He was in Chicago?

A. That is right.

Q. After this phone conversation, it was then that you contacted Mr. Olsen. Is that true?

A. That is correct, sir.

Q. And you told him at that time that you were then prepared to abandon the concrete block machine business; is that correct?

A. That is correct, sir.

Q. And what did Mr. Olsen have to say to that?

A. Mr. Olsen said, "I will get all the fellows together, Mr. Darden," and he said, "I don't want you to feel too bad over this thing. He said, "we are picking on you first because you are the most aggressive in the lot."

He said, "That is a quality in life that is in your favor, boy, but," he said, "we are able," he said, "we are able to take care of all of the volume of business, the Besser Manufacturing Company and Stearns Manufacturing Company, and there just isn't any place for your company in [fol. 902] this field, and I want you to know we intend to go after them, after the others, at the rate of one every four months until we get them all."

The Court: He said that was a quality that was in your favor, but it wasn't in your favor in this case.

A. Chopping my neck off at the same time.

The Court: Reminds me of Bert Williams' famous song, "Somebody else, not me." All right.

By Mr. Speer:

Q. Now, on that same day, did you talk or converse with the other parties, that is, Mr. Besser and Mr. Gelbman?

A. Yes, sir.

Q. Now, then, in addition to Mr. Olsen and Mr. Besser and Mr. Gelbman, were there any other parties there at the conference?

A. Yes, sir.

Q. And who was there?

A. Mr. Gelbman's son was there. John Stark. He is the Besser's lawyer. Delamater, vice president and sales manager of the Stearns Manufacturing Company was present. I believe that is all.

Q. All right. Now, what was discussed at that conference?

A. I explained to them that I had quite a few thousand dollars tied up in inventory, and I would like to have the opportunity to move the machines that I had in inventory, and those that I had bought raw materials for, and that [fol. 903] then I would willingly get out of the industry.

By Mr. Speer:

Q. Just, if you will, Mr. Darden, explain to us what these gentlemen had to say after you told them that you had this inventory you would like to handle.

A. They had me explain. First they wanted to know "how many big machines do you have?"

Q. What kind of machines did they refer to? What kind of machines?

A. They were referring to the little machine, the big machine, the mixers, and the material, because that is what they listed.

Mr. Gelbman: Now, your Honor please, the question as asked was what they said or what he said. Will Mr. Speer have the witness indicate who said what?

The Court: Wait a minute; who was there?

[fol. 904] Mr. Speer: Olsen, Gelbman, Stearns, Besser, and Gelbman's boy, as I understand.

A. Well, I believe that Gene Olsen acted as spokesman there with me. And they would have private conferences around the room, and sometimes we would go into the bedroom there, in the suite. And they agreed that that would be all right. They said, "Roy—" I gave them the number and they were taking notes, I think Delamater was taking notes and probably John Stark. John Stark I believe, is the one that finally handled the preliminary agreement, because we adjourned for thirty minutes, and we came back in an hour, and then the agreements were typed at that time.

Q. I see. Then as the outcome of the conversation, you entered into an agreement with Gelbman?

[fols. 905-906] A. That is correct.

Q. I will show you, Mr. Darden, a photostatic copy of an agreement bearing the signature of Roy W. Darden and Louis Gelbman. Now, I will ask you if that is a photostatic copy of the agreement which the parties came to on February 20th?

A. It is.

Mr. Babcock: What is the exhibit number?

Mr. Speer: I offer the exhibit No. 76 at this time.

Mr. Gelbman: We have no objection.

Mr. Babcock: I would like to make sure that there isn't any question on the record but what the name "John F. Stark" on the exhibit is as a witness and not as a party executing it.

Mr. Speer: That was not brought in.

The Court: What does that purport to be?

Mr. Speer: This is an agreement between Roy Darden and Louis Gelbman, your Honor.

The Court: All right.

Mr. Speer: Now, then——

The Court (Interposing): No objection. It may be admitted.

[fol. 907] By Mr. Speer:

Q. Now, then, Mr. Darden, with respect to that agreement, Government's Exhibit 76, did you receive any correspondence from Mr. Besser and/or Mr. Olsen?

A. I don't remember any. I mean, my lawyers handled it, if there was any, I believe.

Q. At this time I will show you a photostatic copy of correspondence under date of February 20, 1947, addressed to you, and it is signed by Eugene Olsen and J. H. Besser?

A. Yes, sir, I remember that.

Q. Do you recall having had a copy of this?

A. Yes, sir. I have the original.

Mr. Speer: I offer Exhibit No. 77.

Mr. DeGroe: No objection.

The Court: It may be received.

By Mr. Speer:

Q. Now, then, Mr. Darden, after the agreement dated February 20, 1947, Government's Exhibit No. 76, did you enter into any other agreement with Mr. Gelbman or Mr. Andrus?

A. Yes, we had a final agreement there.

Q. I will show you a photostatic copy of an agreement which is signed by Roy W. Darden individually, and Roy [fols. 908-911] W. Darden Industries, Inc., and Louis Gelbman and Hamlin F. Andrus, and I will ask you to take a look at that and see if that is a photostatic copy of the agreement which you referred to?

A. Yes, it is.

Mr. Speer: I offer Exhibit No. 25.

Mr. Gelbman: No objection.

Mr. Speer: Have you any objection, Mr. Babcock?
Mr. Babcock: Besser is not a party to it. I do not object.
Mr. DeGree: We have no objection.

[fol. 912] By Mr. Speer:

Q. Now, then, Mr. Darden, according to this agreement, Government's Exhibit 25, dated April 7, you were granted permission to manufacture and sell 35 machines, is that correct?

A. That is correct, sir.

Q. Now, up to the present date, how many block machines have you manufactured and sold?

Mr. DeGree: Do you mean pursuant to the agreement?

A. Do you mean since the agreement?

By Mr. Speer:

Q. Pursuant to the agreement, oh, yes.

A. I have a balance of 23 to go, so it would be 23 from 35—12 machines.

Q. Now, out of the 12 machines which you have manufactured and sold, what is the number of Warren 800 machines?

The Court: How many did he say he had made?

Mr. DeGree: Twelve.

[fol. 913] A. Twelve.

By Mr. Speer:

Q. Out of those twelve, what percentage or what number of Warren 800 machines have you made?

A. I have four Warren 800 out in the field.

Q. So that by the terms of that agreement, you are still permitted to make one more Warren 800 machine, is that right?

A. That is correct, sir.

Q. Now then, Mr. Darden, after the execution of the agreement, April 7, 1947, did you at any time have any conversations with Mr. Besser or any of his employees with respect to patents?

A. Yes, sir.

Q. And what was the date of the conversation, and with whom was it held?

A. It was with John Stark and Mr. Thompson, who was their southern representative, in November of 1947.

Q. And did this conversation take place at your plant, or whereabouts?

A. No, it took place in the outer room of the Ainsley Hotel, where we were having lunch there.

Q. The Ainsley Hotel in Atlanta?

A. Yes, sir.

Q. What was the general substance of the conversation that you had with Mr. Stark and Mr. Thompson?

A. Mr. Stark informed me that Mr. Besser wanted me to see a certain new patent he had acquired,—the Scott patent—and during lunch he pushed it out on the table, [fol. 914] and I glanced at it and told him that I was not interested in patents.

Q. Was that all that was discussed at that time about patents?

A. That is about all except at that time I think they verbally agreed not to spread the word around the industry that they had closed me out, in order to help me dispose of the machines I had; they were practicing this and I called that to Mr. Thompson's attention, and in the presence of Mr. Stark he admitted that that was going on, and that he was going over to his office and fire a man right away, which I do not think he ever did.

Mr. Babcock: I object to the latter part of it.

The Court: It may be stricken.

Mr. Gelbman: May we have a clarification of the word "they," your Honor?

The Witness: I suppose it refers to "he and Mr. Stark" or "he and the Besser Manufacturing Company."

The Court: Who was saying this?

The Witness: Mr. Thompson, he was their southern representative.

By Mr. Speer:

Q. Mr. Darden, at any time since the execution of the agreement, April 7, 1947, have you had any conversations, oral conversations, or written correspondence, with any of your customers with respect to the fact that they had been approached by the Besser people?

[fol. 915] A. Yes, sir, I have.

Q. Have you had oral conversations?

A. I have had both.

Q. Suppose you tell us then with what person you had a conversation of this type?

A. Well, on one occasion with Mr. George Clark, Junior.

Q. What is his business and occupation?

A. He is in the cement products business in Savannah, Georgia.

The Court: Is that the same as the concrete?

A. Yes, sir, we use that sometimes; you can say the concrete industry, concrete block manufacturing.

The Court: All right.

By Mr. Speer:

Q. And did this conversation take place at his office or over the phone?

A. Both in his office and over the phone. I talked to him on several occasions about it.

Q. This was after April 7, 1947?

A. That is correct.

[fol. 916] By Mr. Speer:

Q. All right. Now, what was the general substance of the conversations?

Mr. Babcock: I object to that, if the court please.

The Court: Just a minute.

Mr. Babcock: Not only for the reasons previously given when similar conversations were offered, but in this particular instance, since the parties by agreement already in evidence have fixed the limitations for the witness's concern to manufacture these machines, and he by his own actions is discontinuing after the completion of the manufacture of those machines, it certainly would not be ma-

terial and relevant to the issue involved in this case for him to relate those conversations.

The Court: The same ruling of the court. He may answer.

A. Previous to that date, I had an order, or I had a deposit from Clark on the Warren 800 Machine. I was to give approximately ninety-day delivery on it. About three weeks before delivery date, I received a letter from Mr. Clark saying that he——

[fol. 917] By Mr. Speer:

Q. Mr. Darden, just what was the general substance of the oral conversation with Mr. Clark?

A. Well, Clark merely told me that the Besser Manufacturing Company had approached him a few weeks before I was to deliver the Warren 800 and although they were only leasing machines at that time they had agreed to sell them a Besser machine outright if they would cancel with me.

Q. Did Mr. Clark say what person from the Besser Company made such statements?

A. No, I don't believe he did. Maybe he did say Mr. Thompson.

Q. Now, just——

Mr. Babcock (Interposing): I will ask that the "maybe" be stricken.

The Court: I will sustain the objection.

By Mr. Speer:

Q. Have you had any other oral conversations with any [fol. 918] of your other customers?

A. Yes, sir.

Q. With whom?

A. Mr. Lloyd of Birmingham is one of them.

Q. Well, he will be here, so we won't ask that.

A. Mr. Swabey.

Q. Who is he, Mr. Darden?

A. He is in the Concrete Block business in Milwaukee, or in a suburb of Milwaukee, rather. And he had been down to see our machine.

Mr. Babcock: Same objection, please, your Honor.

The Court: About the suburb of Milwaukee, or what?

Mr. Babcock: His conversation with this man Swabey on the same subject matter.

The Court: Same ruling.

[fol. 919] By Mr. Speer:

Q. Did he tell you, Mr. Darden, that he had been approached by anyone from the Besser Manufacturing Company?

A. No, sir; he didn't specifically say that.

Q. Have you received any correspondence from customers to the effect that they had been approached by Besser Company?

A. Yes, sir; I think I have.

Q. Have you got such correspondence with you?

A. Here is a letter from Mr. Hart of the Hart Concrete Products Company, Tampa, Florida. A letter from Mr. H. E. Shaw; and at the time this letter was written he was President of the Atlanta Aggregate Company. They are a big block producer in Atlanta, and have Besser equipment. And also from the Alta Vista Concrete Products, Alta Vista, Virginia.

Q. All right.

A. That is all.

Mr. Speer: These have not been identified.

(Whereupon the letters referred to were marked Plaintiff's Exhibits 142, 143 and 144, respectively, for identification.)

Mr. Speer: I offer Government's Exhibit 142, 143 and 144 which is, your Honor, correspondence addressed to the Darden Company.

Mr. Babcock: I object, if your Honor please, to the receipt of Exhibit 142, the purported letter from the Alta Vista Concrete Products Company, for the reason it makes [fol. 920] no identification of any defendant, in addition to the previous objections made as to this type of evidence being hearsay and inadmissible, but this particular exhibit makes no identification of any of the defendants or repre-

sentatives of any kind. It is simply a report of a lot of language used by some unidentified individual.

The Court: I will have to sustain the objection on the motion as made.

Mr. Babcock: I object to Exhibit 143 for the reason that the Exhibit does not purport to recite any conversation between the writer and any representative of the Besser Manufacturing Company, but at best is merely an expression of an opinion of the writer as to business practices and policies.

[fol. 921] The Court: What if he did? I sustain the objection on that letter, entirely.

Mr. Babcock: I object to the Exhibit 144 for the reason that with the exception of about three sentences in the body of the letter there also is not reported a conversation with a representative or any agent or officer of the Besser Manufacturing Company, but is merely expressed the writer's opinion, and with reference to the three sentences the writer identifies the party as Mr. Thompson, and I advise the court that Mr. Thompson has died, so that conversations with him are matters equally within the knowledge of the deceased and, under our Michigan laws and rules of evidence, are inadmissible.

[fol. 922] Mr. Gelbman: May I, on behalf of the defendants Gelbman and Andrus, object to it for the reasons set forth by Mr. Babcock?

The Court: Yes, you may. All right. It is in.

Mr. Speer: If the court please, then, I would like to quote from Exhibit No. 144, correspondence on the stationery of [fol. 923] H. E. Shaw, 936 Moreland Avenue, Southeast, Atlanta, Georgia. Dated March 25, 1948, addressed to Mr. Roy Darden, Roy Darden Industries, Bona Allen Building, Atlanta, Georgia.

> "I have a lot of respect for the Besser machine itself and I am sorry that I differ from the policies and management of the Besser Manufacturing Company. To cite a few instances I wish to quote Mr. Thompson, who is Besser's representative in this district, as saying that the court decision was handed down to you to cease production in the Warren 800

after making only six Warren 800 machines, as well as the maintenance parts for these six machines. Thompson asked me what the buyer of these particular machines would do for repair parts as if to say a buyer would be the goat."

The Court: May I see that letter? Is that all you are reading?

Mr. Speer: That is all I——

(Letter handed to the court.)

The Court: All right. You may proceed.

By Mr. Speer:

Q. Mr. Darden, have you had any oral conversations with a Mr. Mont Hubbard of the Alta Vista Concrete Products?

A. Yes, sir, I have.

Q. And what was the approximate date of the conversation?

A. It was after that letter. If I can get the date of that letter I can give it to you. The letter is December 17, [fol. 924] 1947, so late in December, 1947.

Q. And what was the general topic of that conversation?

A. Naturally I was interested in knowing who made these remarks so I asked him if he would not tell me what company made these remarks and in this case it happened to be the Stearns Manufacturing Company, or a representative of the Stearns Manufacturing Company.

Q. Now, in this conversation are you referring to some correspondence which you had earlier gotten from Alta Vista?

A. That is right, this letter; in other words, my telephone call to him was in answer to this letter.

Mr. Speer: If your Honor please, at this time I again attempt to offer Exhibit No. 142.

Mr. DeGree: Has the witness testified to the identity of the company as yet?

The Court: He did.

Mr Speer: Yes.

Mr. Babcock: He says it was a representative of Stearns.

Mr. DeGree: The same objection, that we previously had.

The Court: Inasmuch as he has now identified it, I think it is competent under my other ruling.

[fol. 925] Mr. DeGree: Yes, subject to the same objection that we cannot cross-examine, and so on.

Mr. Speer: I would like to quote from Exhibit No. 142, correspondence on the stationery of Alta Vista Concrete Products, Alta Vista, Virginia.

Mr. Babcock: Excuse me a minute for the interruption, please. I think I should record the further objection at this time, in order to protect the record, that if as I expect, later on, the court will rule out the question of combination as conspiracy, then that could have no bearing upon the defendant Besser Manufacturing Company.

The Court: All right.

Mr. Speer: Under date of December 17, 1947, addressed to Mr. Roy Darden, Roy Darden Industries, Inc., Bona Allen Building, Atlanta 3, Georgia.

> "For your information, we are quoting a paragraph from a letter we received today. This was the result of another company knowing we had bought one of your machines:
>
> "'It is our understanding that this company will have to discontinue the manufacture of the Rocker-Crete concrete machine in a very short time. They have been infringing on a patent but have had an agreement with the patentee to dispose of the machines they have on hand then discontinue the manufacture of this machine. What will you do about repairs for this machine in the future?' What is the story on [fol. 926] this?
>
> "With best wishes for the holidays,
>
> "Sincerely yours,
>
> "Alta Vista Concrete Products."

Signed by Mont Hubbard.

By Mr. Speer:

Q. Is that all of the correspondence, Mr. Darden, you received?

A. Yes, that is all.

Cross-examination.

By Mr. Gelbman:

Q. Now, Mr. Darden, you testified that you had a conversation with Louis Gelbman in 1946 in New York?

A. 1946 in Chicago.

Q. When was it you had a conversation with Mr. Gelbman in New York?

A. That would be early in 1947 in New York.

Q. Then it was after the Chicago conversation?

A. It was just prior to that, in January, and the convention was in February.

Q. In January of what year, sir, was the convention, or February?

[fol. 927] A. February of 1947.

Q. And then in January of 1947, you had a conversation?

A. I was in New York.

Q. In New York?

A. That is correct, sir.

Q. Now, at that conversation I believe you said that you asked Mr. Gelbman if he would license your firm?

A. Yes, sir, I did.

Q. And did Mr. Gelbman say to you, in words or substance, that he would license your firm?

Mr. Speer: Mr. Gelbman, excuse me a minute. If the court please, I believe Mr. Darden is somewhat confused on these dates, and before we go on with this cross-examination I think that ought to be straightened out. If I may ask him a question: Didn't you state, Mr. Darden, that your first conversation with Mr. Gelbman took place at a convention in 1946?

A. At Chicago, yes, sir, I did.

Mr. Speer: 1946, then, it was.

A. That is correct.

By Mr. Gelbman:

Q. And then later in 1946, you asked Mr. Gelbman for a license, is that right,—at his New York office?

A. No, that was in early 1947.

Q. Do you wish to change your testimony? I believe that during direct examination you testified that it was also. [fol. 928] in 1946 that you visited New York?

A. It could be now; December 1946 instead of January 1947; it was just prior to the convention.

Q. But you recall visiting New York?

A. I recall visiting New York and my lawyer with me.

Q. And irrespective of the time or date, you spoke to Mr. Gelbman?

A. Yes, sir.

Q. Do you recall what Mr. Gelbman's words to you were when you asked him for the license?

A. Yes, sir, I do.

Q. What did he say exactly?

A. He said, "Roy, I would like to license you but it is just out of my hands."

Q. Did he tell you that he had an exclusive license agreement with Stearns and Besser?

A. He did.

Q. And did he tell you that subject to their consent, he would be glad to license you?

A. He did, he said he would be glad to with their consent.

Q. Now, did you meet him after that time?

A. Yes, sir.

Q. And where was it the next time?

A. The next time was in his office in the Bronx, and it was just prior to the convention; I would say a couple of weeks ahead of it.

[fol. 929] Q. And that was after this——

A. That was after this meeting.

Q. This meeting where you went to his office?

A. That is right, sir.

Q. Then I presume you came to his office again; is that right?

A. That is right, sir.

Q. And again you repeated the same request?

A. Yes, sir.

Q. And did you get the same answer?

A. Got the same answer.

Q. Was it the second meeting in New York that you met Mr. Andrus?

A. I believe it was the first meeting.

Q. It was the first meeting?

A. Yes, sir.

Q. And Mr. Andrus was also present while you were asking about this license?

A. He called Mr. Andrus in just as we were leaving and said, "I want you to meet somebody;" he said, "This is Roy Darden, the bad boy in the industry," just as we were leaving.

Q. And I presume that your relationship was fairly cordial; you were not angry at each other?

A. They were very nice to me.

[fol. 930] Q. And when he said you were the bad boy in the industry, was he not joking?

A. It was said in a joking way, but that is the way he introduced me to the man.

The Court: Joking on the square, though, wasn't he?

A. Yes, sir.

By Mr. Gelbman:

Q. Mr. Andrus did not refuse to grant you any license; is that right?

A. Sir?

Q. Mr. Andrus did not refuse to grant you any license?

A. No, no. I didn't ask Mr. Andrus.

Q. You didn't ask Mr. Andrus at all. Now, when was this suit started against this firm in New Jersey, for the patent infringement?

A. I want to get my dates straight, now. I know that. It was started in '46.

Q. Well, you previously testified it was started about January 1947?

A. That is true. It was January, 1947, because it was just prior to the Convention, I remember that very distinctly.

Q. And while counsel asked you whether or not you were

named as a party defendant, you were not so named, I believe?

A. No, sir; I was not named.

Q. But you did appear actively and engage in the defense; [fol. 931] is that right?

A. Yes, sir; that is correct.

Q. You retained counsel who represented your customers?

A. Yes, sir.

Q. Had you seen Mr. Gelbman's patents prior to the time that you manufactured or started to manufacture this machine?

A. I believe the first time I saw his patents was when Mr. Besser gave them to me in Atlanta, that time.

Q. When was that?

A. Which was—that would be after the 1946 Convention, in the summer of 1946, in Atlanta.

Q. In the summer of 1946?

A. Yes, sir.

Q. So that at the 1946 Convention was the first time you were told about infringement on the Gelbman patents?

A. That is right; yes, sir.

Q. Prior to that time, you never knew anything about them?

A. I hadn't any trouble. No word got to me about any infringement.

Q. Now, I believe you testified that you were engaged in business from 1944?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. Prior to 1944, you were a foreman in a block plant, [fol. 932] weren't you?

A. Well, I was the Superintendent.

By Mr. Gelbman:

Q. You were not manufacturing machines, Mr. Darden, were you?

A. In the year 1941 or '42 I made one machine there.

Q. So that when you say you made that one machine, did you make that for commercial purposes?

A. No, sir. We used it to produce block.

Q. For your own plant?

A. Not for resale.

Q. Used it in your own plant, in the plant in which you were employed?

A. In the plant in which I was employed.

Q. And what other types of machines did they use in that plant, other than the one you have just described?

A. They had a Stearns tamp machine, and they had a No. 9 Stearns Jolt-Crete machine.

Q. The Stearns?

[fol. 933] Q. At that time, I believe we had a tamping machine, in 1944.

Q. The Stearns Jolt-Crete, did you say?

A. Yes, sir. No. 9 Jolt-Crete.

Q. The Stearns Jolt-Crete machine was one that embodied the Gelbman patents at that time?

A. Yes, sir.

Q. So that you were aware that there were patents on that particular machine?

A. That is correct. And that is the reason I wanted to make it different from that.

Q. I see. Now, since you—when you made the only machine that you made, or when you made the machine that you spoke about that was used in this plant, was that machine similar to the Rocker-Crete?

A. Yes, sir.

Q. In other words, that was probably the first Rocker-Crete you made; is that right?

A. That is correct.

Q. And did you embody any of the ideas that were used in the Stearns machine that you had been using in this block plant?

A. Yes, vibrating, and we worked in a slight arc instead of up and down, you see. And I don't think anyone can devise a machine to make concrete block where they don't have a drawer go out with the mix there. I think it is an impossibility. I don't think he has that covered in his patent.

Q. Well, you were familiar with the Stearns-Jolt-Crete machine?

[fol. 934] A. Yes, sir, I was; very, very familiar with it.

Q. I presume it was part of your duty to take care of the maintenance of that machine; is that right?

A. That one and most of the others in the South.

Q. And then when you made your machine, did you copy any of the Stearns jolt-crete machine into your new machine, the Rocker-Crete?

A. I don't think so.

Q. You didn't use it at all?

A. No.

Q. Now, when you started to have this patent litigation or became concerned with the patent litigation, you requested a license on numerous occasions; right?

A. That is correct.

Q. And when you went to Chicago, did your attorney go with you?

A. Yes, sir.

Q. What was his name?

A. Vernon Doan.

Q. And where is his office located?

A. He is in the Muncie Building, in Washington, D. C.

Q. And he came to Chicago with you?

A. Yes, sir; he did.

Q. To the Convention?

A. He didn't come with me. He came at my request. I called Washington on the 18th and told him.

[fol. 935] Q. Did you approach Mr. Besser or Mr. Gelbman or Mr. Olsen and request that they get together and see whether they couldn't do something about a license for you?

A. I surely did; yes, sir. We had the meetings.

Q. You were the active person that actually did the approaching; is that right?

A. That is right.

Q. They didn't approach you?

A. No, sir; I approached them.

Q. And at your request, these meetings were held?

A. That is right, sir.

Q. And the ultimate result was that you were granted a limited license; is that right?

A. Yes, sir.

Q. And, as a matter of fact, you haven't even exhausted that license today, have you?

A. No, sir.

Q. By the way, Mr. Darden, were you to pay any royalty for use of these patents?

A. No, sir.

Q. Did Mr. Gelbman attempt to exert any influence over you in any way?

A. I can't say that he has.

Q. Has he ever?

A. Ever?

[fol. 936] Q. Yes?

A. Well, at this meeting in Chicago, I mean, he told me I was infringing his patents.

Q. Outside of that, he has never exerted any influence over you?

A. I talked to him on the phone several times on other business and he would maybe mentioned patents.

Q. Outside of the patents, he didn't tell you you had to get out of business?

A. He never has really been too much—put too much pressure on me personally.

Mr. Gelbman: You may inquire.

Cross-examination.

By Mr. Babcock:

Q. During the course of your testimony on direct examination, Mr. Darden, you used the term at one time "semi-automatic" and at another time "fully automatic". Would you explain to me your distinction between the two, please?

A. Yes, sir. A semi-automatic machine, such as our small Rocker-Crete block machine, the cycles are governed by a human element. A man has to drop a metal form in and pull a valve and push another valve, move that drawer back, and another valve to eject the block. That is semi-automatic. He can make one a minute or he may make his high as four a minute. It is up to the operator and the material.

On a fully automatic machine, the cycle is set. You turn [fol. 937] on the main switch and the machine runs at a set speed. That is what I call fully automatic. That may be a poor description.

Q. As I understand it, at the time you were giving your testimony on direct examination, you were referring to the type of machine that you made which involved the vibration principle?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. And the same distinction between semi-automatic and automatic would be true even though the machine involved the tamping principle?

A. I don't understand your question.

The Court: Read that again.

(Question read by the Reporter.)

A. I believe it is possible to have an automatic and semi-automatic tamping machine. I don't know too much about the tamp method, frankly.

The Court: You don't know too much about what?

A. About the tamp method. That is the old style, that has gone out almost before I entered the industry. There is still a few of them around.

The Court: Don't you know that the Lith-I-Bar machine is manufactured so that it can tamp?

A. I have seen it, yes. I saw that in Birmingham the other day.

[fol. 938] Mr. Neville: But your Honor, the Lith-I-Bar machine is basically a vibrator machine. It does have the tamping, but I don't think it purports to be a tamper.

The Court: I don't think you can make a good block by vibrating. That is, it has never been contended here, has it? A really good block, in any of these lawsuits?

Mr. Neville: I don't know.

The Court: What do you say? You are under oath, Mr. Milewski. What do you say about vibration alone?

Mr. Milewski: Vibration alone, without some method of applying pressure or tamping, you are not going to get a uniformly dense block, top and bottom.

The Court: The Scott machine was just vibrating concrete?

Mr. Milewski: That is right.

The Court: What happened to it, evidently, whether it was tamped or pressed, doesn't appear in the Scott machine. The Gelbman apparatus patent didn't—it merely featured the separation of the feed box from the vibrafor, and the vibrator didn't have to be suspended as in the Scott machine; isn't that true?

Mr. Milewski: Right.

The Court: And there was no tamping or pressure provided for in that machine itself, in the claims of the patent. [fol. 939] Mr. Milewski: There wasn't in the Gelbman machine. There was no provision for pressure.

The Court: Now—no, that is in the Gelbman method. Is it in the Gelbman apparatus?

Mr. Stark: Claim 7 of the Gelbman method is a division of the apparatus patent. It was originally a part of the apparatus application.

The Court: In the apparatus patent—I haven't got it before me—in the apparatus patent as contested, 1, 2, 3 and 4, as I remember, does it appear that there is pressure or tamping?

Mr. Stark: Not in those claims, no.

The Court: No. Those are the only claims——

Mr. Stark (Interposing): In Claim 7 there is.

The Court: In the apparatus patent. What does it say? Pressure?

Mr. Stark: Pressure.

The Court: That is supposed to be a feature of the combination in the method patent.

Mr. Stark: There is no conflict there.

The Court: What is that?

Mr. Stark: There isn't any conflict.

The Court: There isn't any conflict, no; but there isn't anything new either, is there?

Mr. Stark: It was one and the same application originally. [fol. 940] The method patent was divided out of the application.

The Court: I know it was. I know it was. But I have to decide and separate, and if they left part of the method in the apparatus patent that may become important, may it not?

Mr. Stark: They didn't claim the combination in that

Claim 7. It is a combination claim and not just a feature of both 1 and 2 of the Gelbman patent.

Mr. Milewski: The present question, your Honor, there is no block machine unless there is some pressure or some tamping that the top edge of the block is not going to be smooth, nor is it going to be uniform.

The Court: I guess that is pretty well admitted. I didn't know. And I have got some questions to ask the attorneys in the other case about that. I didn't know you could get a really good block just by the vibration method.

Mr. Milewski: Well, there are many old machines that are hand-operated machines that have a method where a man hangs onto something, holds something down by hand, a piece of wood or something, and makes a block by vibration and gets a fairly good block in that way.

The Court: But there has to be some kind of pressure somewhere, whether it is big or little.

Mr. Milewski: To get good results, you need some-
[fol. 941] thing.

The Court: Yes. So when you say it is primarily a vibration machine that means nothing except the advent of vibration, and according to the defendant in the other case the advent of vibration goes way back to the shaking wall of Taylor—and there are some of the others I could name.

Mr. Milewski: Jackson.

The Court: Yes.

Mr. Neville: I made my objection because I thought your Honor was implying that the Lith-I-Bar machine was tamping basically as distinguished from a vibrating machine.

The Court: Oh, no; I didn't. I don't see how you got that. The Lith-I-Bar machine is a vibrating machine and it uses what it calls tamping, but it is so constructed so that it could use pressure.

The Besser machine is a vibrator. They are all vibrating machines now. But even in the old days when it was made by hand, there is a certain amount of vibration that they had by tipping it over, or up and around. However, there may be a great deal of difference between just tipping something up and vibrating it, and having it automatic at an increased rate of speed. That is the thing I am thinking about.

All right. Because you can get one block, but when it [fol. 942] comes to a thousand blocks a day, but when it comes to six thousand blocks a day that is something entirely different, perhaps.

But don't do like perhaps some of the attorneys did, and arrive at some conclusion as to the court's decision in the other case.

All right.

By Mr. Babcock:

Q. Mr. Darden, are you familiar with the machine made by the Stearns Manufacturing Company called the clipper stripper block machine?

A. I am not too familiar with that, sir. I have seen a few of them in operation.

Q. Are you sufficiently familiar with it to recognize that it is a machine that employs the tamping process on finishing a block?

A. Yes, sir, I know that.

Q. Did you know that in 1947 and in 1948 that machine was the type of machine of which the Stearns Manufacturing Company produced the largest number?

A. I did not know that, sir.

Q. With reference to the years 1946 and 1947, and 1948, would you still say that the tamping process was about completely discontinued?

A. Well, as far as I was concerned it was.

Q. As far as you, down in Atlanta?

[fol. 943] A. Yes, sir, that is right, we felt there was a new era, the vibration era, and we were changing over.

Q. But you do not purport to express any competent knowledge of the entire industry?

A. Oh, no, sir, absolutely not.

Q. You also, in the course of your direct examination, used the term at one time "medium production", and at another time, "high production." Would you define for me your intended meaning of those respective terms?

A. Yes, sir. A machine that will produce five to eight thousand block- a shift I call that a high production machine; it makes a lot of block in eight hours; one that makes a thousand or one thousand five hundred up to two thou-

sand, I call that low production—a thousand to one thousand five hundred I call low production; from one thousand five hundred up to five thousand I call medium production.

Q. So that in 1944 when you describe the machine you were manufacturing as being a medium production semi-automatic cored pallet machine, you would fix that as being one which had a capacity of producing between 1500 and 5000?

A. No, between 1500 and 2000.

Q. Between 1500 and 2000 per eight-hour day?

A. That is right.

Q. Now upon what do you base your expression of opinion which you gave on direct examination that the Warren [fol. 944] 800 is the highest producing machine in the world?

A. Well, I——

The Court: Are you going to get into a discussion about which machine is the best?

A. I have been in the industry since about the middle 30's, and to my knowledge it was the highest producing machine in the world at that date,—800 an hour.

The Court: Mr. Besser, I want you to hear what they are saying. He says that machine is the highest producing machine in the world.

By Mr. Babcock:

Q. In making that statement, you would make the comparison between the Warren 800 and what other machines?

A. Well, all of them.

Q. What others do you have in mind?

A. Your Lith-I-Bar, your Besser, your Stearns—all of them manufacture—I will say it would produce more block at that time, now, per day, when they came out with it, than any other machine.

Q. Do you have in mind any other manufacturers than Lith-I-Bar, Stearns and Besser?

A. George, Graveley, Apley—you could name them all—Kent; to my knowledge it was higher producing than any other machine.

Q. Well, do you have in mind that there were any other manufacturers than those you have mentioned now?

A. Oh, yes, there is quite a few of them.

[fol. 945] Q. Quite a few others besides those that you have already mentioned?

A. Oh, yes, sir.

Q. And they were in 1946, 1947 and 1948 manufacturing machines that you would call high production machines?

A. No, many of them were manufacturing what we call a very, very low production machine.

Q. And were they located in different parts of the United States, these various or many manufacturers?

A. Yes, sir. Most of them were centered in Ohio and Michigan; not thousands of them; I don't know how many; perhaps a half a dozen of the leaders.

Q. Those that you have in mind were continuously in that business during 1946, 1947 and 1948, manufacturing concrete block machines?

A. Not all of those that I had in mind; some of them are out of business; some of them were little blacksmith shops and so forth, but those few that I mentioned I think are all still in business.

Q. Well, during those years then, there were, immediately following the war particularly, a number of little places that you have just referred to as blacksmith shops?

A. There were quite a few small—there was some made in blacksmith shops actually.

Q. They conceived the idea that they could get into the [fol. 946] business of making concrete block machinery?

A. Some of them did it.

Q. And then went out of business?

A. They are out of business now, most of them I think.

Q. And that is because of the economic situation, isn't it?

A. Not every time.

Mr. Speer: I object to that.

The Court: He is your witness.

Mr. Speer: I will object to his saying that they went out of business because of economic conditions.

The Court: That is all right. He is your witness. Has he answered?

Mr. Babcock: Yes, your Honor.

A. I answered no not——

By Mr. Babcock:

Q. Not in every instance, you said.

A. Not in every instance; that was a cause in some cases but there were a lot of reasons.

Q. That was true in some cases, wasn't it?

A. In some cases, yes, sir, I am sure that is true.

Q. Are you still in the business of manufacturing concrete block machinery today?

A. Yes, sir, that is the only business I know.

Q. And you do know that there are other concerns and individuals other than Stearns and Besser and yourself in the business of manufacturing concrete block machinery, don't you?

[fol. 947] A. Yes, sir.

Q. You know that there are several?

A. Yes, sir, several.

Q. And at least apparently they appear to be in business today?

A. Yes, sir, to the best of my knowledge.

Q. Now, let us come down, if we may——

By Mr. Babcock:

Q. Now, I want to go over to the Chicago meeting in February of 1947, Mr. Darden. Did I understand you correctly——

Mr. Speer: Excuse me, Mr. Babcock. There were in the Chicago convention, one on the 18th of February and one on the 20th. I wish we would get the date properly set first, your Honor.

The Court: Which meeting have you reference to, Mr. Babcock?

Mr. Babcock: I will have to find out from the witness first which meeting he was talking about in making the statement I am about to ask further about.

The Court: All right.

Mr. Babcock: I think it was the 18th but I may be subject [fol. 948] to correction by the witness on that.

By Mr. Babcock:

Q. During the course of your direct examination, as I understood your testimony, you said, "We had the lawyers arrange a certain meeting." Did I understand that correctly?

A. Yes, sir, our firm—I said "we," I believe—our legal firm in Washington got in touch with Larson, who was handling the case in New Jersey, and asked that he get Golbman, Besser and Eugene Olsen, and call a meeting February 17, and they all agreed to be there.

Q. Was that prior to your arrival in Chicago?

A. Oh, yes, sir, that was a week or so prior to that.

Q. So some time prior to going to Chicago, at your direction your attorney contacted Mr. Larson in Washington?

A. Yes, sir.

Q. And the other parties?

A. Yes, sir.

Q. And asked if when you got to Chicago you could not have a conference, and that was primarily to discuss the then pending suit in New Jersey?

A. Yes, sir, wanted to do something about that, or to stay in business or make some arrangement.

Mr. Babcock: Would you please read that answer?

(Whereupon the last answer was read by the reporter.)

A. Wanted to do something about it in order to stay in business or make some arrangements there on the suit.

[fol. 949] By Mr. Babcock:

Q. And that was the suit in New Jersey?

A. Yes, sir.

Q. Alleging a patent infringement against one of your customers?

A. Yes, sir.

Q. Then you all got to Chicago and convened for the first time on the 18th of February?

A. That is right; they did not show up on the 17th; after they agreed to they did not show up, so we finally got together on the 18th.

Q. And in your first meeeting on the 18th your attorney, Mr. Doan, was present with you. Is that correct?

A. Yes, sir, that is correct.

Q. And Mr. Olsen of the Stearns, Mr. Gelbman and his son?

A. Yes, sir.

Q. Mr. Besser and Mr. John Stark?

A. Yes, sir, and I believe Delamater was in that too, the sales manager, but I am not sure about that.

Q. You are not sure about that?

A. No, sir.

Q. At the time you convened in the meeting on the 18th, after usual personal greetings, the first thing was that you proposed that you be given a license and that the New Jersey suit be discontinued; isn't that correct?

A. That is what I wanted, yes, sir.

Q. That was the first thing that occurred in the conference, wasn't it?

[fols 950-951] A. That is right. I wanted to be licensed to pay a royalty fee the same as Besser and Stearns, and wanted to see if they could not make some arrangement whereby I could become a licensee.

[fol. 952] Roy W. Darden recalled as a witness and having been previously duly sworn, testified further as follows:

Cross-examination (Continued).

By Mr. Babcock:

Q. Mr. Darden, was the machine that your organization had sold to Landis in New Jersey, was that one of the Warren 800's, or one of your own?

A. It was one of our small machines, the Rocker-Crete, sir.

Q. And was it prior to the institution of the suit in New Jersey for patent infringement that you had been up to New York and talked with Mr. Gelbman?

A. No, sir. That was after.

Q. After the suit?

A. Yes.

Q. Was it prior to the Chicago conferences that you had been to New York and talked with Mr. Gelbman?

A. Yes, sir.

Q. So then after the suit for patent infringement was instituted, you went up to New York and talked with Mr. [fol. 953] Gelbman and he told you that he alone could not grant you a license?

A. That is correct, sir.

Q. And then you asked for the conference in Chicago?

A. Yes, sir.

Q. Scheduled for the 17th of February, but the parties got together on the 18th?

A. Yes, sir.

Q. Now, after you had asked or expressed a desire to have a license, during the conference in Chicago on the 18th, did not Mr. Olsen advise you in that conference that, because of the post-war conditions in February of 1947, the demand for concrete block machines was just temporary, a temporary condition that was unusual?

A. He did tell me that the normal volume of business was around $700,000 a year. I think that is the figure.

Q. Well, he told you, in fact, that at that time there was an unusual demand because it was right after the war period, didn't he?

A. I don't remember that, Mr. Babcock.

Q. Well, did he then also advise you that when business settled down to normal that the demands in the country would not support a number of large concerns in the business of manufacturing block machines?

A. He only told me that his company and the other company was well able to take care of the normal [fol. 954] business.

Q. Of the normal business?

A. Which was around $700,000 volume.

Q. And that for that reason—now, I am speaking about the 18th of February, now—and for that reason they felt that, at least speaking for Stearns, that he felt that they could not accede to your desire for a license?

Mr. Neville: Objection to that.

By Mr. Babcock:

Q. Isn't that correct?

The Court: Give me that again.

(Question read by the reporter.)

The Court: What is the objection?

Mr. Neville: He is not competent to say how Mr. Olsen or anyone felt about something.

The Court: Well?

Mr. Babcock: If my question isn't clear, I will restate it, but I thought I was presenting to the witness what Mr. Olsen had said.

The Court: All right.

By Mr. Babcock:

Q. Did you so understand my question, Mr. Darden?

A. I wish you would repeat it, please.

Q. Very well; in the conference on the 18th of February, didn't Mr. Olsen tell you that it was because of that condition in the industry that we have just been talking about he felt, speaking for Stearns Manufacturing Company, [fol. 955] that he could not consent to your having a license?

A. I do not remember his saying it in those exact words.

Q. Well, do you remember that that was the substance of his statement?

A. He said that normal business, around $700,000 a year, he thought his company, the Stearns Manufacturing Company and the Besser Manufacturing Company, could well take care of that. That is all I remember him saying on the subject.

Q. At that time also, namely, at the conference on the 18th of February, was it not Mr. Besser who suggested that they might consider giving you a license for an agreed number of units so as to protect any investment you had made up to that date?

A. I went over that particular subject with Mr. Olsen before the meeting so it was left up to Mr. Besser and he told me how I might go about it to get Mr. Besser to O. K. it and how to act in the meeting of the 18th in order to get Mr. Besser to O. K. it.

Q. At the time Mr. Besser made that suggestion, or discussed it with you, had you advised Mr. Besser and Mr. Olsen that the Link-Belt people had indicated to you that they did not want to become involved in patent infringement matters?

A. Mr. Gelbman was aware of that because the Link-Belt lawyer was with me on the last trip to New York. That was his purpose of going, to see if we could not get it straightened out, and we assumed that all of them were posted on [fol. 956] that by Mr. Gelbman.

Q. It would be your judgment that everybody present knew of that situation?

A. Yes, sir, I would think so.

Q. And yet despite knowledge of that situation, Mr. Besser indicated to you that they might be willing to license you for a certain number of machines so as to permit you to recover your investment?

A. That was what I asked Mr. Olsen to help me do, to get out gracefully.

Q. Wasn't it discussed on the 18th?

A. But it was discussed with Mr. Olsen before the meeting.

Q. Yes, but was it not also discussed in the meeting of the 18th?

A. Oh yes, sir, yes, sir.

Q. Then after that meeting concluded unsuccessfully on the 18th, on the next day, the 19th, you started a lawsuit in the Illinois courts against Mr. Besser and Mr. Olsen, or their company?

The Court: It was after——

Mr. Babcock: After the 18th conference and on the next day, the 19th.

The Court: I thought you said after the settlement.

Mr. Babcock: No, your Honor, after the conference on the 18th, and the next day, which would be the 19th.

By Mr. Babcock:

Q. Is that correct?

[fol. 957] A. I believe it was the 19th.

Q. And service of process was made on Mr. Olsen and Mr. Besser on the 19th of February, wasn't it?

A. Yes, sir.

Q. Then on the third day of that whole transaction, namely, the 20th of February, you first talked with Mr. Olsen alone?

A. That is right, sir.

Q. And you approached him?

A. I did.

Q. You advised Mr. Olsen that on thinking it over you had decided to quit business if you could come to some terms by which you could quit business gracefully?

A. That is right, sir.

Q. At that time also did you not ask Mr. Olsen to arrange a meeting between you, Mr. Besser and himself, without there being present the attorneys or any other persons connected with the respective concerns,—possibly Mr. Gelbman?

A. May I explain the——

Q. First, would you mind answering my question if you can, as to whether or not you made such request of Mr. Olsen?

A. I did ask Mr. Olsen to get the men together immediately.

Q. And without their attorneys or any other representatives of their concerns?

A. I said I would like to have just the principals present if possible.

[fol. 958] Q. That is what I mean.

A. Yes, sir.

Q. And as a result of that conference, and when you men had reached what you considered to be an agreement between yourselves, Mr. Stark was called in, called in to the meeting, and given instructions, as a result of which he prepared this Exhibit 76, the preliminary agreement, isn't that true?

A. This is a preliminary agreement, but I believe Mr. Stark was present all the time. I am not absolutely positive of that. But I think he was there. They may have called him in during the meeting.

Q. All right. If your memory isn't clear on that, at any rate that was when the Exhibit 76 was prepared?

A. Yes, sir, that is correct.

Q. Now, isn't it also true that at the time Exhibit 76 was prepared, right then and there, you were also given this letter, Exhibit 77?

A. Yes, sir; that is true.

Q. And you then caused your attorneys to discontinue the suit you had started in the Illinois courts?

A. We agreed to drop our suit simultaneously with the suit instituted against our customer in New Jersey, but we started the wheels rolling towards that end.

Q. That was a compromise settlement of both lawsuits?

A. Yes, that is true.

[fol. 959] Q. Among other things?

A. Yes, sir.

Q. And you carried out that compromise and you did cause your attorneys to discontinue the suit in the Illinois courts and Mr. Gelbman caused his attorneys to discontinue the suit in New Jersey?

A. That was the final result, yes, sir.

Q. At some time subsequent to that, the final agreement, Exhibit 25, was prepared by the attorneys for the parties and executed, isn't that correct?

A. Yes, sir, that is correct.

Q. Now, I note that the date of Exhibit 25 is March 21, 1947. That is about the time it was completed and executed, isn't it?

A. I would have to look. I m not up on those dates. March the 17th.

Q. March the 17th.

A. 1947.

Q. All right. I will accept that correction. That is about the time that it was completed and executed, isn't it?

A. There are four different signatures on here. One of them was March 17th, one April 7, and two March 21st, so——

Q. (Interposing) The fact is the document had to be transported by mail to the different parties?

A. That is correct.

Q. Isn't that correct?

[fol. 960] A. Yes. It was on or about.

Q. At any rate, it was about a month after the conclusion of your February conference that you finally got the final agreement drafted and signed by all parties?

A. That is correct.

Q. Are you familiar with the trade magazine called Rock Products?

A. Yes, sir.

(A volume of "Rock Products" for June, 1947, was thereupon marked Defendant's Exhibit 145 for identification.)

By Mr. Babcock:

Q. Do you recognize Exhibit 145 as being an issue of that trade magazine for the month of June, 1947?

A. Yes, sir.

Q. Turning to page 169 of Exhibit 145, does that page show an advertisement of your concern?

A. Yes, sir, it does.

The Court: What year is that?

Mr. Babcock: June, 1947, your Honor.

The Court: All right.

Mr. Neville: May I ask if that magazine or publication is in evidence now?

Mr. Babcock: I haven't offered it yet, no, sir.

Mr. Neville: I was wondering whether or not it was the same one we had before.

Mr. Babcock: No, no.

By Mr. Babcock:

Q. That is your advertisement of your concern on page [fol. 961] 169?

A. Yes, sir, it is.

Mr. Babcock: I desire to offer in evidence just this page 169 of the Exhibit 145.

Mr. Neville: No objection.

The Court: May I see it, please?

Mr. DeGree: The court would like to see the exhibit, Mr. Babcock.

The Court: I would like to see the exhibit. Just one page?

Mr. Babcock: Yes, your Honor, just the page 169.

(Handing document to the court.)

Q. Now, Mr. Darden——

The Court (Interposing): Will you wait just a minute?

Mr. Babcock: I am sorry, your Honor.

The Court: Is this a one pallet machine?

A. Yes, sir. That is a cored pallet machine.

The Court: That is a cored pallet, and that I don't even begin to understand. "Licensed under Gelbman"—wait a minute, now, licensed under Gelbman basic patent. That is what it says here. That must have been put in after the settlement was made?

Mr. Babcock: I was leading up to that, your Honor.

[fol. 962] The Court: I see.

A. Here is another advertisement. (Handing document to the court.)

The Court: All right.

A. The big machine is in the middle.

The Court: This does not say anything about being licensed, does it?

A. No, sir.

The Court: Was this gotten out before or after?

A. Yes, sir, before.

The Court: All right.

By Mr. Babcock:

Q. Now, after the final agreement or at or about the time the final agreement was executed in the latter part of March and the early part of April, 1947, you had another meeting in the Shoreham Hotel in Washington, D. C., did you not?

A. I don't remember the exact date but I ran into Mr. Besser and Mr. Stark in the lobby of the Shoreham Hotel in Washington; I mean it was just accidental, it was just a coincidence. We happened to be there at the same time.

Q. Well, did you not confer with the parties involved about the question of your advertisements generally in the trade and the industry that you were licensed under the Gelbman patents?

A. I certainly did. I figured that we should be able to advertise in order to do business because everybody had knowledge that pressure was being put on us and they would not buy from us.

The Court: Now, please keep your voice up.

[fol. 963] A. I figured if we did not advertise the fact that we were licensed now under the Gelbman basic patents, that we would be unable to sell our machine because people had knowledge that pressure was being put on us by Besser and Stearns and Gelbman.

By Mr. Babcock:

Q. That is that pressure had been put on you?

A. Yes, it had been put on us.

Q. And you were given approval for such advertising at that time, weren't you?

A. Yes, sir, in fact Mr. Gelbman inserted the first ad himself saying that we were licensed but I had to pay for it.

Q. Well, you pay for most of your advertising, don't you?

A. Yes, but that was just telling me we were now licensed and he used the Stearns and Besser names in the same ad, but they did not pay anything.

The Court: You say he used Stearns and Besser's names in the same ad but they did not pay anything?

By Mr. Babcock:

Q. You do not see Stearns and Besser's names in this ad on page 169 of Exhibit 145, do you?

A. No, sir.

Q. And that does say "licensed under the Gelbman basic patents"?

A. That is right, sir.

(Whereupon copy of a magazine "The Concrete Manufacturer" was marked Defendants' Exhibit 146 by the reporter.)

By Mr. Babcock:

Q. Do you recognize Exhibit 146 as also being a document published quite generally in the trade?

[fol. 964] A. Yes, sir.

Q. While the document is entitled "The Concrete Manufacturer", it is a publication of the same concern that publishes the magazine "Pit and Quarry", isn't it?

A. Yes, sir, it is a section of "Pit and Quarry."

Q. And in turning to page 239 of Exhibit 146, that is the advertisement of your company, is it not?

A. Yes, sir.

Mr. Babcock: I offer in evidence page 239 of Exhibit 146.

Mr. Speer: We have no objection, your Honor.

(Exhibit handed to the court.)

The Court: I thought you said it was in "Pit and Quarry"?

Mr. Babcock: It is a special section of "Pit and Quarry" that is published in the trade. The witness has so testified.

The Court: May, 1949. That is a year ago. What is the object of putting this in? There is not any question but what since they made that settlement they have advertised their product, is there?

Mr. Babcock: No, your Honor.

The Court: What is the object of putting this in?

Mr. Babcock: Just to show that they have not only advertised their product but continuously since that time they [fol. 965] have advertised the fact that they are licensed under the Gelbman patents.

The Court: Well, does that mention the Gelbman patents there?

Mr. Babcock: Yes, your Honor.

The Court: All right. If you want it in, it is all right. His answer is, the reason he put that in was to show that they were able to do it because everybody knew what pressure had been brought to bear upon them to stop, that they were not under the Gelbman patent—but if you want it in, it is in.

By Mr. Babcock:

Q. So in May of 1949 you were still advertising that Rocker-Crete machine licensed under the Gelbman basic patent for vibration under pressure?

A. Yes, sir.

Q. Now, these two publications, exhibits 145 and 146, are two or the several trade publications in which you had the same advertisement inserted, are they not?

A. Yes. There is one other.

Q. Now, I think you have told us that subsequent to the agreement in March or April of 1947, you have made and sold four of the Warren 800 machines? Am I correct in that?

A. No, sir. You are wrong there, Mr. Babcock.

Q. All right, how many of them have you made and sold since the agreement in March or April of 1947?

[fol. 966] A. I didn't understand the question, then. To date I have sold—we have sold four.

Q. To date you have sold four.

The Court: I thought he said twelve yesterday.

Mr. Babcock: No, twelve machines.

A. We sold twelve, large and small.

Mr. Babcock: I am talking about the Warren 800, your Honor.

The Court: All right.

By Mr. Babcock:

Q. How many of those four, if any, were sold prior to the agreement of Exhibit 25?

A. I don't believe any of them were delivered before the agreement.

Q. How many of them were manufactured before the agreement?

A. Two.

Q. Two.

A. Yes, sir.

Q. And had you contracted for the sale of those two prior to the agreement?

A. We had contracted for the sale of one of them.

Q. One of them. Now, were those two delivered during the remainder of the calendar year of 1947?

A. They were, yes, sir.

Q. Did you make and deliver any other of the Warren 800's, other than those two, during the balance of 1947?

[fol. 967] A. No, sir, we did not.

The Court: Does that machine of yours use both the Gelbman method and the Gelbman apparatus patents?

A. I don't think it infringes on either, Judge, your Honor, but they are licensed under both patents.

The Court: But you still don't think you infringe?

A. No, sir, we don't. Our lawyers don't think so, but we don't have the money——

The Court (Interposing): Your lawyers have told you they don't think so.

A. Yes, sir; that is right.

The Court: Why don't you think that you do? If the Gelbman patents are good, do you have——

A. (Interposing) I don't think they are any good.

The Court: Would you excuse me a minute, Mr. Babcock?

Mr. Babcock: Certainly, your Honor.

A. I don't think they are any good.

The Court: That is a different point. The question first is whether or not they are valid, and then if they are valid, do you infringe? But suppose they are good, do you admit that you infringe?

A. I haven't studied his patents completely,

The Court: All right. I will not put you in that hole. Never mind.

[fol. 968] A. I won't——

The Court (Interposing). I am trying to save you.

A. All right.

The Court: I am not going to put you in that hole by asking you that question. Do you have a suspended mold, on springs, like the Scott patent?

A. Ours is on rubber cushions, on the small machine.

The Court: I see. Do you have a feed box with the mold vibrating free of the feed box? Did I get that right?

A. We can have it vibrating on the box or off. I mean,

the machine will run just as well one way or the other, with just a slight adjustment.

The Court: All right. All right. I am not going into it any further.

By Mr. Babcock:

Q. How many of the Warren 800 machines did you manufacture and sell during 1948?

A. One.

Q. And how many during 1949?

A. One.

Q. So that accounts for the four?

A. Yes, sir.

Q. Have you any orders on hand for any others?

A. No definite orders, no, sir.

Q. Well, then, you made and sold eight of your own Rocker-Crete machines subsequent to the agreement in the spring of 1947?

[fol. 969] A. Yes, sir, that is correct.

Q. How many of those did you make and sell during the balance of 1947?

A. Mr. Babcock, I don't have that information. I mean, it was so few, we just didn't pay too much attention to it. We have sold two this year.

Q. Two during 1950?

A. Yes, sir, I know that.

Q. And those two are included in the eight that you spoke about?

A. Yes, sir, that is right.

Q. Can you tell me how many you sold during 1949?

A. No, sir, I just don't know. I don't have any idea.

Q. Or 1948?

A. No, sir. It is in the file, but I just don't have it.

Q. Now, at the time that you met Mr. Stark and Mr. Thompson at the Hotel in Atlanta in November of 1947, and you told Mr. Thompson that someone was spreading word around that you were going out of business, do you mean to say that Mr. Thompson told you that he knew that that word was being spread around?

A. He did, in the presence of Mr. Stark, and I think Mr. Stark will substantiate——

The Court (Interposing): Mr. who?

A. Mr. Stark, Mr. Besser's lawyer. He is present in the courtroom and I think he will substantiate that. He said that he knew that was going on.

[fol. 970] The Court: Now, wait a minute. That statement necessitates that the court rule out this letter, because if that is equally within the knowledge of somebody else in the company, he is the man to put on here. Isn't this the same Thompson?

Mr. Babcock: It is the same Thompson, but it is not the same subject matter.

The Court: Oh, it is not the same subject matter?

Mr. Babcock: No, your Honor.

The Court: I am sorry.

Mr. Babcock: I did not raise the question of equal knowledge of the deceased relative to this because Mr. Stark was present, according to the witness' testimony.

The Court: Of course that is when you get——

Mr. Babcock: No, it would not be within the equal knowledge of the deceased if someone else was present.

The Court: Yes, you are right. I was thinking about that decision that was just the opposite. All right, you are perfectly right. It is not the same conversation?

Mr. Babcock: No, your Honor, no, it is not.

By Mr. Babcock:

Q. Now, isn't it a fact that Mr. Thompson admitted to you that if such was going on, it was contrary to the understanding, and told you that if their other representative was doing it, he would fire him?

A. No, he told me that he know that was going on, some of the men, he was going over to the office immediately and [fol. 971] let one man go for those practices. That is the way our meeting broke up, he was headed for the office to dispose of or fire a man that had been practicing that.

Q. Was that the same man that had been reported to you as telling that story?

A. Well, in most cases the people won't tell you the man that actually said it. They just say a representative of a certain company.

Q. So in most cases it is pure rumor then?
A. Well, in some cases they will come out and say it.
Mr. Babcock: I have no further questions.

Cross-examination.

By Mr. DeGree:

Q. The Warren 800 machine which you manufactured produced how many block per cycle?
A. Three, sir.
Q. Was it a plain pallet, or cored pallet machine?
A. Plain pallet machine, sir.
[fol. 972] The Court: Do many machines use the cored pallet? Can you make three blocks with three cored pallets?
A. Yes, sir, you can. You have to drop one at a time and they do have an automatic device that will drop three, I understand, but I have not seen the operation.
The Court: Isn't there a big advantage in the plain pallet over the cored pallet?
A. Yes, I think so.
The Court: Why would any machine now use a cored pallet?
A. Only because they are afraid of infringing by using the other.
The Court: I see.
A. They should be using the plain, I would think.
The Court: All right. You may step down.
Mr. Speer: If your Honor please, I have one or two questions.
The Court: All right.

Redirect examination.

By Mr. Speer:

Q. I believe you told us, Mr. Darden, that you had been issued a patent at one time on your concrete block machine?
A. Yes, sir.
Q. Do you have a copy here this morning of that patent?
A. Yes, sir, I do.
Q. I would like to see it.

[fols. 973-974] (Paper produced and marked by the reporter as Plaintiff's Exhibit 147, being copy of Patent No. 2,400,631.)

Mr. Speer: I offer at this time Government's Exhibit 147, which is a patent issued to the witness, Mr. Darden.

The Court: Any objection?

Mr. Babcock: I have none.

Mr. Gelbman: We have not looked at it yet, your Honor.

(Short delay.)

Mr. Gelbman: I have no objection.

Mr. DeGree: We have none.

The Court: May I see it?

(Exhibit 147 handed to the court.)

The Court: This is *is* a core pallet, isn't it?

A. Yes, sir, that is a core pallet.

The Court: Yes.

A. That is the small machine.

The Court: All right. This is an apparatus patent, you call it.

A. Apparatus.

The Court: Would you call that an apparatus patent?

Mr. Gelbman: Oh, yes.

The Court: All right.

Mr. Speer: That is all I have from Mr. Darden, your Honor.

[fol. 975] MILLARD R. WARREN, called as a witness on behalf of the Government, having been first duly sworn by the Clerk, testified as follows:

Direct examination.

By Mr. Speer:

Q. What is your name and address, please?

A. Millard R. Warren, Knoxville, Tennessee.

The Court: Your name is Warren?

[fol. 976] Mr. Speer: Yes, your Honor.

A. Warren.

The Court: Now, Mr. Warren, this is a large room. You have to speak up and you have to keep your voice up.

A. O. K.

By Mr. Speer:

Q. What is your present occupation, Mr. Warren?

A. Vice president of Southern Cast Stone Company.

Q. And what is the principal business of the Southern Cast Stone Company?

A. It manufactures concrete products.

Q. And for what period of time have you been engaged in that business?

A. Since 1933.

Q. Could you tell us what kind of a block machine you employ at your plant?

A. At the present?

Q. At the present time.

A. A machine known as the Warren 800.

Q. The Warren 800?

A. Yes.

Q. Now, is that the same machine that we were just discussing here with Mr. Darden?

A. Yes.

Q. Is that the same machine?

A. Yes.

[fol. 977] Q. Now, for what period of time have you had this machine in your plant?

A. 1945, I believe.

Q. 1945. Is that a machine which was manufactured by Mr. Darden?

A. No, sir.

Q. By whom was the machine manufactured?

A. It was manufactured at the Southern Cast Stone Company plant in Knoxville.

The Court: You mean yourselves?

A. Yes.

By Mr. Speer:

Q. But it is the same kind of machine, the Warren 800, that was manufactured by Mr. Darden?

A. Yes.

Q. That is, it has all the features?

A. Yes.

Q. Is the Warren 800 machine which you have in your plant, is that machine covered by any patent?

A. No, sir. Just the patents applied for.

Q. Just the patents applied for?

A. Yes.

Q. And by whom were the applications made?

A. They were made in my name. Is that what you mean?

Q. Yes. And could you tell us approximately the date of the application?

A. I believe that was in 1946, but I can't be sure.

[fol. 978] Q. Now, could you also explain to us what particular part of the machine was to be asked for in securing the patent, that is, what part of the machine was to be covered by the patent application?

A. I am not too familiar with the patents. The patent attorney worked the patent application up and he had numerous claims with which I am not too familiar, but I think it would dwell more with apparatus patents, and at that time we also used a vibrating head which we had applied for.

The Court: What do you mean, a vibrating head?

A. The head vibrated down into place, instead of depending on the vibrating of the mold box to bring the head down, to compress the top of the block.

The Court: By pressing it?

A. I say, to compress it.

The Court: By pressure.

A. You would use the vibration of the head with the weight to compress the top of the block.

The Court: Would that be the function of tamping, the ordinary function of tamping?

A. No, sir, it wouldn't. It would accomplish the purpose of the tamping on the top.

The Court: That is what I am talking about. That is

the function of tamping. Of course, your head, it neither tamps nor does it press. It vibrates. Is that it?

[fol. 979] A. Vertical vibration.

The Court: Of the head itself?

A. Yes.

The Court: That is not the mold?

A. That is right. We also vibrate the mold.

The Court: Yes.

A. But that condition existed at that time.

The Court: All right.

By Mr. Speer:

Q. Mr. Warren, did you at any time——

The Court: Excuse me. Have you a feed box running over it?

A. Yes, sir.

The Court: Does the feed box vibrate with the mold?

A. Not intentionally, it does not. If we have severe vibation we get some in the feed box.

The Court: Have you any agitators in the feed box?

A. Yes, sir.

The Court: That makes the feed box vibrate too, doesn't it?

A. It does if it hits a chunk.

The Court: I see. All right.

By Mr. Speer:

Q. Mr. Warren, did you at any time discuss the question of patents with Mr. Besser?

A. Yes.

Q. And what was the date of the discussion?

[fol. 980] A. I believe the first discussion that we had about the patents was in February of 1947.

Q. And could you tell us whereabouts this discussion took place?

A. Andrew Johnson Hotel, Knoxville, Tennessee.

Q. And was there any other person present there at the discussion besides Mr. Besser?

A. Yes, Mr. Stark, my father and Roy Darden.

Q. And what was the general topic of conversation at that time?

A. At the first meeting the general topic was that we were infringing, that we were jeopardizing our companies by using these machines without a license, and Mr. Besser was willing to license us to use these machines. However, for that license we were to agree not to build any more machines.

Q. Was this, what you have just told us, are those statements that were made by Mr. Besser?

A. Mr. Besser and Mr. Stark both were talking. I cannot say just who said what, but that was the general conversation.

Q. Was there anything else discussed at this time?

A. We had about, I believe, three or possibly four meetings at the time they were in there.

Q. No, I am only asking you about what occurred at this one. I will ask you about the other ones. What was the outcome of this first conversation?

Mr. Babcock: Well, I object to that as calling for a conclusion.

[fol. 981] The Court: I sustain the objection.

By Mr. Speer:

Q. Did you at any time after this first discussion have any other conferences with Mr. Besser or Mr. Stark?

A. I did.

Q. And what was the date, if you can recall?

A. I cannot give you the exact date but this took place just following the Chicago convention in 1947, in February. Mr. Besser and Mr. Stark were in town on one day, but I do not know what day it was, and stayed there for two or three days and we had a meeting the following day.

Q. And what was the general substance of the conversation that you had at that time, that is the day after the first conference?

A. The general topic of conversation was still the same. It was that we were infringing and that they were willing to grant us a license to protect us as long as we did not manufacture any more machines.

Q. And is that all of the conversation at that time, then, Mr. Warren?

A. Well, not all, but that was the basic point, just arguing over those points.

Q. And when Mr. Besser or Mr. Stark stated that they felt that your machine was infringing their patents, what statements did you have to make?

A. At that time we did not feel that we were infringing.

Q. Well, did you so inform them at that particular time?

[fol. 982] A. Yes.

Q. Well, at that time were any of the proposed terms discussed under which Besser would grant you a patent license?

A. You are still referring to the same meeting?

Q. Yes, the same meeting.

A. That he would grant us a license provided we would sign an agreement not to build any more machines.

Q. At or about this same time, in February of 1947, did Mr. Stark or Mr. Besser inspect your block machine?

A. Mr. Besser did.

Q. He did?

A. Yes.

Q. Now, after the early part of 1947, the conference we have just been discussing, have you ever had any other discussions with Mr. Besser or Mr. Stark concerning patents?

A. Yes. I do not know just what date, but it was possibly a month later, or at the most two months later.

Q. And was the conversation with Mr. Besser or Mr. Stark?

A. Mr. Stark.

Q. And did this conversation also take place down at the hotel?

A. It did.

Q. At the same hotel?

A. Yes.

Q. And what was the general substance of that conversation?

A. I believe at that time the substance was still the same, we were infringing on their patents; they were still willing [fol. 983] to grant us a license and also at this time—I am not sure of this particular meeting, but along about that time—I was asked if there was a possibility that we might work together with Besser and I would receive a nominal

fee as a salary from the Besser Company, not to go to work for them but to stay where I was, and we were not to build any more machines; any patents that we had applied for that they were willing to pay for the patent application and expenses attached to that, and of course the patents would become their property, and also anything new that might be developed they would have first option on.

Q. And did you then at that time state to Mr. Stark what your attitude was?

The Court: You mean by that what his attitude was toward accepting the offer?

Mr. Speer: Yes, your Honor, if it can be classed as an offer at that time.

A. My attitude at that time was not to accept the offer.

Mr. Babcock: Pardon me. What was the answer?

The Court: He said his attitude at that time was not to accept the offer.

By Mr. Speer:

Q. And you so informed Mr. Stark at that time?

Mr. Babcock: Well, just——

The Court: Just a minute.

Mr. Babcock: That is what I am trying to get clear in my [fol. 984] mind. Is this the witness' thinking or his conversation?

The Court: The questions are unusual. They are developing what is in a man's mind. Did he or did he not? What difference does it make what his attitude was if he acted entirely different from his attitude?

By Mr. Speer:

Q. Well, after this offer was proposed to you, Mr. Warren, what did you state to Mr. Stark?

Mr. Babcock: I object to the question as presented because it assumes there was an offer, and there is no evidence of any offer yet.

The Court: Let's not be technical, gentlemen. What is the difference whether you call it an offer, or a suggestion or an attitude. What was your answer to the possible offer?

A. No.

The Court: That was made, or the suggestion that an offer might be forthcoming? What did you say?

A. I was not interested.

[fol. 985] The Court: You told them you were not interested.

A. Right.

The Court: All right.

A. I might add, it was a suggestion.

By Mr. Speer:

Q. Now, have you at any other time after that had any other conversations with Mr. Besser or Mr. Stark?

A. Yes, later in 1947, the topic was still basically the same.

Q. Yes. Did you have any other conversations at which time other things were discussed with Mr. Besser or Mr. Stark?

A. Yes.

Q. And what was the approximate date of the conversation?

A. In early 1949.

Q. And was the conversation with Mr. Besser or Mr. stark?

A. Mr. Stark.

Q. And where did the conversation take place?

A. Henry Johnson Hotel, Knoxville.

Q. And what did Mr. Stark have to say at that time?

A. The topic still remained the same.

Q. Well, did he have anything else to say at that time in addition to the——

A. (Interposing) at that time he had made several calls on me to discuss this matter. At this particular meeting, at which the basic conversation was still the same, that we were infringing and that he wanted to license us, and I think made a suggestion if there was some way that we could work together, I will be willing to sign up with the [fol. 986] Besser Company. I couldn't class it as an offer, because there was nothing ever put in writing.

Q. Yes.

A. It was a suggestion. And I told him no, that we just could not do it, and there were other officials in the company,

which would not agree to it, and for that reason that I could not do it.

Q. Now, this conversation, you state, took place in the early part of 1949?

A. Yes.

Q. Now, have you had any other conversations with Mr. Stark about the same topic?

A. I beieve that was the last, in the early part of 1949.

Q. So then I believe you have testified that you first had these patent conversations with Mr. Besser and Mr. Stark beginning in February of 1947, and continued through the early part of 1949?

A. Yes.

Q. Is that true?

A. Yes.

Q. In that period of 1947 to '49, have you ever been told by Mr. Besser or Mr. Stark that you or your company would be taken to court on these patents?

A. We were told that we might be sued.

[fol. 987] Q. But up until the present time, or back in early 1949, you haven't been taken into court by Besser?

A. No, sir.

Mr. Speer: That is all the questions I have.

The Court: Any others?

Mr. Gelbman: Yes.

Cross-examination.

By Mr. Gelbman:

Q. Mr. Warren, you have been associated with Roy Darden, haven't you?

A. Yes.

Q. And as a matter of fact, you were vice president of his concern, weren't you?

A. Yes.

Q. And are you still vice president?

A. I suppose so. I can't say for sure on that.

Q. Are you still associated with him?

A. Well, yes. I might add that vice president was not active in the company whatsoever.

Q. And as far back as—as far as 1947, you were associated with Mr. Darden, weren't you?

A. Yes.

Q. And the machine that he manufactured, known as the Miller-Warren 800, is the machine that you are talking about, isn't it?

A. Yes.

[fol. 988] Q. Is there any other concern other than Mr. Darden that manufactures that?

A. No, sir.

Q. So that, when you were talking about your machine, you were also talking about Mr. Darden's machines; is that right?

A. It is the same machine.

Q. It is the same machine?

A. Yes.

Q. You are not talking about another company manufacturing a different machine?

A. No, sir.

Q. You are talking about these four machines which Mr. Darden has already testified had been made and sold; is that right?

A. The machine I was talking about is the machine we used in our plant.

Q. You used some machines in your plant?

A. Yes, sir.

Q. That is a block plant, isn't it? It manufactures block, isn't that right?

A. Block is one of our lines. We have several different lines of materials.

Q. I am sorry. I didn't understand. What did you say?

A. The block is a small line with us. I mean by that, we manufacture numerous commodities besides block.

Q. But these Warren 800's that you used, are used for the [fol. 989] manufacture of block?

A. Yes.

Q. Isn't that right?

A. Yes.

Q. And that is the machine that you have been testifying about in answer to Mr. Speer's questions, isn't that right?

A. Yes.

Q. Now, in this February, 1947, meeting that you had with Mr. Besser, was Mr. Gelbman present?

A. No, sir.

Q. Was he ever present at any meetings that you ever had?

A. No, sir.

Q. Now, do you recall the exact date in February, 1947, that these meetings took place?

A. No, sir, I do not.

Q. Was it at the Chicago convention?

A. No, sir. Immediately following the Chicago convention.

Q. Well, then, it is reasonable to assume it was somewhere after the 18th of February?

A. Yes.

Q. And it was after the agreement made by Mr. Darden, with Mr. Besser and Mr. Gelbman, and Mr. Olsen of Stearns, isn't that right?

A. Yes.

Q. Were you informed of that agreement?

[fols. 990-991] A. Yes.

Q. So that at the time of the meeting that you had with Mr. Besser and Mr. Stark, you already knew that an exclusive—withdrawn. You already knew that a license had been granted to Mr. Darden to manufacture Warren 800's?

A. Yes, sir.

Q. Now, how many Warren 800's are there in existence, as of the present date?

A. Seven.

[fol. 992] The Court: Is this very important, gentlemen?

Mr. Gelbman: Well, there has been testimony here that this man has not been sued, your Honor, and I want to show your Honor that they are talking about the same machines that Mr. Darden has been granted a license on.

The Court: Was he personally sued?

Mr. Gelbman: No, he would not be personally sued.

The Court: Was your company sued?

A. No, sir.

The Court: Well, not the company that he was in; one of

the companies that he is president of is sued; what is the name of your company?

A. Southern Cast Stone Company.

The Court: That was not sued, was it?

A. No, sir.

The Court: I cannot see what difference it makes. If you have a point, do not let me drive you away from it, but I cannot see what difference it makes.

By Mr. Gelbman:

Q. I think we are talking about the same machines, aren't we?

A. Yes, same machines.

Q. And those are all machines that Mr. Darden had been [fol. 993] licensed to operate and manufacture?

A. Right.

Q. You never had communicated with Mr. Gelbman in any way, have you, sir?

A. No, sir.

Q. You have never spoken to him?

A. I believe I have spoken to him, yes.

Q. Outside of saying "hello", or "how do you do", there has been no talk between you?

A. No, sir.

Cross-examination.

By Mr. Babcock:

Q. I understand during Mr. Gelbman's questioning of you, you said that at one time you were connected in some capacity with the Roy Darden Industries?

A. I had a title with the Industries. I was vice-president but was inactive. I devoted no time to the Roy Darden Industries.

The Court: Are they in the same town?

A. No, sir.

By Mr. Babcock:

Q. The Roy Darden Industries are in Atlanta, Georgia, aren't they?

[fol. 994] A. Yes, sir.

Q. And your Cast Stone Company was in Knoxville, Tennessee?

A. Right.

Q. Did you continue active participation in the business at Knoxville, Tennessee?

A. Yes.

Q. Now, the meeting you say, the first meeting in February of 1947, occurred subsequent to the agreement between Mr. Darden and Messrs. Gelbman, Besser, and Olsen?

A. Yes.

Q. Well, except for the machines that you were using in your concrete products business in Knoxville, Tennessee, you had not manufactured any machines, had you?

A. In 1947, you are speaking of?

Q. Yes, that is right.

A. Yes, we had manufactured a machine that we were using in Chattanooga at a plant my brother and myself owned in Chattanooga, Tennessee.

Q. And that was for your own use?

A. Yes.

Q. Or the members of your family?

A. That is right.

Q. You had not manufactured and sold any to the public generally?

A. That is right.

Q. Now in the early '40's you bought a Besser machine, [fol. 995] did you not, that was a tamper?

A. Yes.

Q. And you installed that in your plant?

A. Yes.

Q. And then subsequently you worked out a device by which you changed that machine from a tamper to a vibrator, did you?

A. Yes.

The Court: Wait a minute now. What do you mean by that?

Mr. Babcock: He bought a tamper and then through his own mechanism he changed the tamper over into a vibrator.

The Court: Well, you had a vibrator with your tamper, didn't you? You vibrated it first and then tamped?

A. No, sir, we converted that to a vibrator entirely.

The Court: There was no vibration at all when you had the damper?

A. That is right.

The Court: All right. How long ago was this?

Mr. Babcock: In the early 1940's, some years before this conversation of 1947.

The Court: All right.

By Mr. Babcock:

Q. And then after you had accomplished the changeover of the Besser machine, you then built your first Warren machine?

A. Yes.

[fol. 996] Q. And you have built three all together for your own use?

A. Yes.

Q. During your conversations with Mr. Besser and Mr. Stark, or either of them, was there ever a time when the proposed agreement in writing was prepared and submitted?

A. No, sir.

[fol. 997] By Mr. Babcock:

Q. Did you know at the time you were conversing with Mr. Besser and Mr. Stark that in instances where there is a patent infringement it gives rise to a claim for damages against the infringer; did you know that?

A. Yes.

Q. And did you know that in the license agreement customarily used where a patent holder licenses another party, there is incorporated a release from the claim for such damages?

A. Yes.

Q. You did know that?

A. I think so.

Q. Yes. So that if you were infringing in the manufacture and use of your one or two or three machines in your own business, what Mr. Besser and Mr. Stark were pro-

posing was to release you from the claim for damages, wasn't it?

A. Yes.

Mr. Babcock: I have no further questions.

[fol. 998] Albert E. Lloyd, called as a witness on behalf of the plaintiff, being first duly sworn by the Court, testified as follows:

Direct examination.

By Mr. Speer:

Q. What is your full name and address, please?

A. Albert E. Lloyd, Birmingham, Alabama.

Q. What is your present occupation, Mr. Lloyd?

A. President of the Alabama Cement Tile Company, of Birmingham.

Q. And for what period of time have you been in this business?

A. Oh, some 12 or 14 years.

Q. Your business then is the manufacture of concrete products?

A. That is correct.

Q. And included in that is the manufacture of concrete blocks?

A. That is right.

Q. At the present time what kind of a machine do you employ in your plant?

A. We are at present using one Besser machine and one Warren block machine.

A. And approximately what time was the Warren machine installed?

[fol. 999] A. Oh, in the fall, September or October of 1947.

Q. And when did you have the Besser machine installed?

A. The one we are currently operating was installed in February or March of 1946.

Q. Do you own both——

The Court: Wait a minute. February or March of 1946, and when did he say the other one was installed?

Mr. Speer: In September or October of 1947, the other one.

The Court: He had the Besser machine before he had the— Did he own it outright?

Mr. Speer: That was what I was going to ask him.

The Court: All right.

By Mr. Speer:

Q. Do you own both of those machines, Mr. Lloyd?

The Court: No, did you at that time? I just want to follow that.

By Mr. Speer:

Q. At the time that you installed the Besser machine, did you become the owner of it?

A. That is right.

Q. Pardon me.

A. Yes.

Q. And you are also the owner of the Warren machine?

A. Yes.

The Court: This is a Besser one pallet or two pallet or three pallet, or what is it?

[fol. 1000] A. Three blocks on one pallet.

The Court: Yes, that is right, blocks. They are all on one pallet, aren't they? How many cycles per minute? Four cycles per minute?

A. Between three and four, we will say.

The Court: You can make almost six thousand blocks a day on that, that is, if you were to work eight hours. That is true, isn't it?

A. If you have a good day.

The Court: Yes. All right. And what about the other one? I want to get an idea of the other one. What is the other one? Is that a cored pallet machine?

A. No. It produces blocks on a plain pallet also.

The Court: Three at a time.

A. Three at a time. And the speed is relatively the same, the speed of production.

The Court: And the Besser, do you remember how much the Besser cost you?

A. Oh, $16,000, $18,000.

The Court: What did the other one cost you?

A. It was bought at a little later date and cost a little more money, probably a couple of thousand dollars more.

The Court: I see. All right. You may proceed.

By Mr. Speer:

Q. After you installed the Warren 800 machine,—will you strike that, please. At or about the time the Warren [fol. 1001] 800 machine was installed in your plant, did you have any conversation with any employee of the Besser Company?

A. Yes.

Q. And could you tell us approximately what was the date of the conversation?

A. It was some two to four weeks after the installation of the Warren machine, shortly thereafter.

Q. So can we say approximately in October?

A. I should say so.

Q. 1947. And did the Besser employee tell you who he was, or had you been earlier acquainted with him?

A. I had had previous acquaintance with the gentleman in question.

Q. And who is this gentleman?

A. Well, there were two of them.

Q. All right. And who were they?

A. Mr.——

Q. (Interposing) Who are they?

A. Mr. John Thompson and Mr. Archie McIntyre.

Q. And do you know what particular offices they held with the Besser Company?

A. My recollection is that Mr. Thompson was the manager of sales or the manager of the southeastern office, and that Mr. McIntyre was in charge of the service end of their business down there, in the same city.

Q. I see. Now, you say you had a conversation with these gentlemen in or about October of 1947. Could you tell us [fol. 1002] at what place this conversation occurred?

A. It took place at our place of business in Birmingham. As a matter of fact, at the site of our plant.

Q. I see. And can you recall for us what the general topic of conversation was at that time, Mr. Lloyd?

A. The principal topic of conversation was the——

By Mr. Speer:

Q. In this conversation in October of 1947 at your plant, were both Mr. Thompson and Mr. McIntyre there?

A. That is right.

Q. And you had a conversation with both of them?

A. That is right, principally with Mr. Thompson. Mr. McIntyre was also present.

Q. He was present, but the conversation was primarily with Mr. Thompson?

A. That is right.

The Court: All right.

[fol. 1003] By Mr. Speer:

Q. All right. Now, what was the general topic of that conversation?

A. The principal topic was the new Warren machine which we had just recently installed.

Q. And what was it, what did they have to say, or what did he have to say about the Warren machine?

A. Well, they apparently had just learned of its installation and were considerably interested in that we had purchased one of those machines and had come over to our place to see it. And they had several remarks to make concerning the unit and our prospects for suitable operation of it, and service from it, mostly detrimental, I should say.

Mr. Babcock: I ask that that be stricken.

The Court: Sustain the objection. Tell what was said, and then the court will determine whether it was detrimental. Of course, I never saw the man sell anything yet by knocking his competitor, but let's see what was said.

A. Well, I wouldn't be able to repeat the exact words.

The Court: I don't ask you to, but they must have said something about it.

A. Certainly. Remarks were made to the effect that they

thought I had made a mistake, or that our company had made a mistake by buying that machine, that the manufacturers of that equipment were only going to make three of those machines, and that they had an agreement with those people to the effect that the manufacture would be [fol. 1004] limited to that number.

The Court: To three?

A. That is what was told to me.

The Court: This is in April?

Mr. Speer: No, this is in October.

The Court: October, 1947.

Mr. Speer: 1947. After the patent agreement of April, 1947.

The Court: Well, didn't that provide for 25?

Mr. Speer: Five.

Mr. Babcock: No, five. Five.

The Court: Five. All right.

Mr. Babcock: Your Honor remembers Mr. Darden testified that two had already been on order.

The Court: Well, did it mean——

Mr. Babock (Interposing): Mr. Darden testified that at the time of the patent litigation and the making of this agreement, two had already been on order.

The Court: Were they included among the five?

Mr. Babcock: Yes, your Honor. I asked him that specifically.

The Court: All right. All right. Where did I get the idea of 25?

Mr. Babcock: There were 35 in total. 35 in total, including the large and small that Mr. Darden made.

[fol. 1005] The Court: 35.

Mr. Babcock: Only five big ones.

The Court: That is what he is talking about?

Mr. Babcock: That is what he is talking about.

The Court: You said they told you that you made a mistake because they were only going to make three of them, there were only going to be three of them made?

A. That is right. And the agreement was in effect toward that end, and another remark made in a joking, or what I considered a facetious manner was that, "Red, that

will leave you right in the middle. The first maching, or one of these machines is owned by George Clark at Savannah, and there is only going to be three, and you have got the second one, so that leaves you in the middle, ha, ha." You know what I mean. They had some such remarks.

The Court: I know two is in the middle between one and three, but I don't see how that places you in the middle.

A. Well, I am only attempting to tell what was told to me.

The Court: They didn't have any reference to the fact you were No. 2, that didn't put you in the middle? They didn't mean that, did they?

A. Well, I assume what they meant was that I was in the middle generally by having bought a machine that they considered was not so good as their own, and then they illustrated it by saying, "You have the No. 2, so that leaves [fol. 1006] you right in the middle, because one has been sold, you bought No. 2, and one more can be sold, and that is the end, so you are in the middle of the three."

The Court: Perhaps their sense of humor is better than I thought. Maybe you are right.

A. And certain other—some other remarks were made to the effect that the equipment which I had purchased would thereby soon become an orphan piece of equipment, by reason of the fact that the manufacturers would not be producing any more such units, and then raised the question as to where in the world would I expect to get parts and service, and the same question was raised some two or possibly three times, "where in the world do you expect to get service for that machine?"

The Court: Had you paid for it at that time?

A. I had either paid for it in full or made all necessary arrangements.

By Mr. Speer:

Q. Now, at this time, was anything said concerning the performance of the Warren machine that had been purchased by Mr. Clark?

A. Yes.

Q. What did Mr. Thompson have to say about that?

A. In referring to Mr. Clark's machine, which had been delivered some three or four months ahead of the one we

got, he stated that the machine was not performing satisfactorily, and that it appeared to be lightly and not suit-
[fols. 1007-1008] ably constructed, and that the goods which had been produced on the machine were of a poor and unsatisfactory quality, and that this was causing some worry and concern among the owners of the equipment. And, further, that the manufacturers from the equipment were benefiting him to the extent that he had contracted for the sale of some of his own equipment in that city directly as a result of the competing equipment that Mr. Clark had bought and installed.

Q. Did you at any time after that contact Mr. Clark and ask him about his Warren machine?

A. Yes. I called him up right after hearing those remarks, because they caused me some little apprehension at the moment.

* * * * * * * *

[fol. 1009] By Mr. Speer:

Q. Now, was anything else discussed at this time, Mr. Lloyd, that is, in your conversation with Mr. Thompson and Mr. McIntyre?

A. That about covered that particular conversation.

Q. Did either of these gentlemen at that time discuss anything concerning patents?

A. Yes, to the extent that they made the claim or allegation that the Warren equipment which we had just put in did in its prineiple of operation infringe on certain patents which they represented that their company held, but made the further remarks that since the machine which I had bought was one of the number which they claimed had been agreed to in the limited production, that they were not making such remarks with the view of threatening our company or myself; they just made the claim or the allegation.

Q. Now, after that conference with these gentlemen, did you ever have any other conversations?

A. Yes, I had some subsequent conversations with them, yes.

Q. This first conference that you have just testified to

was in October of 1947. Approximately what time did you have any other conversations with Mr. Thompson?

A. Oh, I had conversations with Mr. Thompson for some years prior to that time and some few conversations with him after that time.

[fol. 1010] Q. All right. Then after the conference of October 1947, did Mr. Thompson ever say anything to you about other manufacturers of concrete block machines?

Mr. Babcock: Now, if your Honor please, I object. If counsel wishes to lay the foundation for establishing subsequent conversations between the witness and Mr. Thompson, then we are entitled to have the foundation laid so that the court and ourselves can be advised whether these were conversations at which there were present only the witness and Mr. Thompson, because I do want to preserve my right to make the objection if there are conversations in which only Mr. Thompson and the witness alone were present; and when he incorporates the substance of the conversation in his question I am prevented from having that background and being able to make that objection if I wish to do so.

Mr. Speer: I only asked the witness, I said, "Did you ever have any other conversations with Mr. Thompson about other manufacturers of concrete block machines?"

The Court: He may answer that question.

A. I wish you would state that again, please.

Mr. Speer: Will you please read the question?

(Whereupon the reporter read the previous question.)

Mr. Speer: I would like to have that entire thing off the record. I will ask the question over, if I may.

By Mr. Speer:

Q. Did you at any time, Mr. Lloyd, have any conversa-[fol. 1011] tion with Mr. Thompson or any other employee of the Besser Company about other manufacturers of concrete block machines?

A. Yes.

Q. And could you tell us about when or approximately what time the conversation took place, and who was there?

A. I recall one particular conversation that I had with Thompson which was in about May, 1946, which was some fifteen months prior to our purchase and installation of the competitive equipment.

Q. This conversation in May of 1946, was that between you and Mr. Thompson?

A. That is correct.

Q. All right, and what did Mr. Thompson state at that time?

Mr. Babcock: I object.

The Court: I sustain the objection. This is the man who is dead?

Mr. Babcock: Yes, your Honor.

The Court: All right.

Mr. Speer: If the court please, I understood that rule about dead men, the ordinary dead man statute that we referred to, to only apply to a business deal between the dead man and the other person. Now, that is not the kind of evidence that we intend to offer.

The Court: You may be right on that.

[fol. 1012] Mr. Speer: That is only where they have entered into some kind of a contract.

The Court: You may be right on that. I marked one of those cases yesterday.

(The court referring to the record of yesterday.)

The Court: What was the question here? What did it have to do with?

Mr. Speer: I was asking this gentleman if he had any conversation.

The Court: Yes, that part is all right. What was it about?

Mr. Speer: About other manufacturers of concrete block machines.

The Court: What was the question, the exact question?

(Whereupon the reporter read the last two questions and the intervening answer of the witness.)

The Court: I am inclined to think that that may be an exception to the rule.

Mr. Babcock: Your Honor, if Mr. Thompson was negotiating a sale of a machine to the witness at that time, then he was acting as the agent for the Besser Manufacturing Company.

Mr. Speer: If he was.

Mr. Babcock: And the conversations would be definitely [fol. 1013] within the rule. If he was not, then he is not acting as an agent for the Besser Manufacturing Company, and anything he might have said would not be competent anyway. Unless this was part of the negotiation, he is beyond the scope of his agency.

The Court: It might be evidence of the general instructions to everybody. I am going to take it.

By Mr. Speer:

Q. All right, Mr. Lloyd, will you answer the question then?

A. The question being to the effect what were Mr. Thompson's remarks?

Q. Yes.

A. At the time of our conversation concerning other machinery manufacturers?

Q. Yes, sir.

The Court: Was he there for the purpose of selling you a machine?

A. Yes, sir.

The Court: He was asking then——

A. As a matter of fact he secured our order for a machine at that time.

The Court: And that is the time this conversation took place, this conversation you are going to relate now? Is that right?

A. That was some two or three months after the instal- [fol. 1014] lation of the Besser machine which we put in at Birmingham when he was negotiating with us for the purchase of an additional piece of equipment.

The Court: I doubt very much the effect of the testimony as to being binding upon the defendant at all, but I am going to take it just the same. I quite agree with you that it is very questionable. But I do not think it can do any harm. All right.

By Mr. Speer:

Q. All right, Mr. Lloyd.

A. After discussing what we thought was the principal business at the time of this meeting, which was the sale of additional equipment by Mr. Thompson, he drew from his pocket a memorandum or a small note book and stated that he was interested in contacting some of the smaller manufacturers of concrete products machinery, of which there were several through our part of the country, and said that the reason therefor was that in the opinion of himself and his company these manufacturers were infringing patents which were held by his company, and that he wanted to contact such of these people who were operating in his section of the country to give them warning of such claimed infringement and ask that they cease and desist from further manufacture. So he showed me a list there which contained some three or four names; I should say three for certain, and possibly four; and asked me if I knew any of these people, and I looked at the names he had written [fol. 1015] there, and since I did not know any of them I told him that I did not, and stated further that if that was what he wanted to do, that is, contact people of this type, that all the names that he showed me were across on the other side of town, we being on the east side of the city, and that I could get him in touch or in contact with a couple of them a whole lot closer than those he had on his list, and he seemed a little surprised and said, "Is that so?" And I said, "That is right," and I gave him information on two of them of whom I had knowledge and said, to see one of them he would not have to go as far as two blocks and that the second such firm or individual was not more than a few blocks beyond the first.

[fol. 1016] So he, being eager to see these people, why I rode up to these two business places with him.

Q. Did this all take place on the same day?

A. Yes.

Q. And could you tell to which particular place you and Mr. Thompson went?

A. We went up to a place on the corner of Fifth Avenue and Forty-First Street in the City of Birmingham first.

Q. And what was that particular man's name, or the name of his business?

A. I think the name of his business was the Southern States Materials Company.

Q. I see. Can you recall the gentleman's name who was there, who operated the business?

A. Yes; I recall his name.

Q. What is his name?

A. The man's name was Rivers.

Q. Rivers. Did you and Mr. Thompson then go into the office and have a conversation with Mr. Rivers?

A. We went in on the premises. Not in the office, but in on the lot.

Q. I see. And what was the general topic of conversation there?

A. The topic of the conversation was the—was some one or two machines in process of manufacture in that place of business.

Q. And what in particular was stated about the machines?

[fol. 1017] Mr. Thompson and I first looked at the machines, examined them—he considerably more closely than I—and then after a short interval Mr. Rivers came out of his office close by and Mr. Thompson introduced himself and stated that his business was in the interests of the Concrete block machinery manufacturers which he said he noticed Mr. Rivers was doing, and Mr. Rivers said, "Yes."

And then Mr. Thompson then discoursed to some extent concerning his own position with a company in a similar or in the same line of business, that is, concrete machinery manufacturers, and outlined to Mr. Rivers there his company's position relative to certain patent which he stated that they possessed, and which covered the manufacture of the equipment of the type that Mr. Rivers was producing there. In other words, he said that the equipment that Mr. Rivers was manufacturing did infringe upon certain patents which his company were in possession of, and he asked the gentleman if he realized that he was infringing these patents which Mr. Thompson claimed for his company.

And Mr. Rivers stated that no, he did not realize he was violating any patents held by anyone; that he simply was making machines. And then followed several minutes of discussion between Mr. Rivers and Mr. Thompson, with Mr. Thompson taking the position that he did not want to offer or care to offer any threats to Mr. Rivers for his [fol. 1018] company's part, but it was just making what he termed a friendly call to advise Mr. Rivers of the way his company, that is, Mr. Thompson's company, would think of Mr. Rivers' operations in concrete machinery manufacture.

Mr. Rivers then stated that, why, the business was not proving too attractive, that is, the machinery business, and that he had other interests, which he did not elaborate on, and that, well, I should say my interpretation was that he agreed to cease manufacture without any further notice. That is about what it amounted to. That he would, upon completion of the work he already had in make—he did not contemplate or he would not contemplate further manufacture. He didn't think he would.

Q. And on that same day, did you call on any other block machine manufacturers with Mr. Thompson?

A. Yes. That was another close by. We made a second call.

Q. And who was that, Mr. Lloyd, that you called upon?

A. I think the business was styled the Fifth Avenue Fabricating Company.

Q. And do you know the name of the gentleman that operated that company?

A. Yes, his name was—he was a Mr. Sisk.

Q. Mr. Sisk. Did Mr. Thompson have any conversation there with Mr. Sisk?

A. Yes. When we arrived at Mr. Sisk's place of business, [fol. 1019] we saw about the same thing that we had seen at Mr. Rivers' place of business, except that there was more of it going on. He had, I guess, three or four, at least three or four machines in process of manufacture, at various stages of manufacture. And the conversation covered about the same identical lines, that the preceding conversation with Mr. Rivers had covered, concerning Mr.

Thompson's position and what he represented to be his company's business concerning—his company's position concerning Mr. Sisk's manufacturing activities.

And he got essentially the same reply, possibly not quite as definite as had been the case at the preceding visit, but about the same promise, I would say.

Q. In both of these conversations with Mr. Rivers and Mr. Sisk, did Mr. Thompson state what particular patents he was discussing?

A. Yes. He referred to certain patents, which, as I recall—I not being too interested in the details of what he was claiming—had to do with a mold in which the block was made by the process of vibration, and I think he also made certain references to a patent which had to do with the feeding action of the feed drawer action or some such feature of the machinery.

Q. Now, after you and Mr. Thompson called on these two gentlemen, that is, Mr. Rivers and Mr. Sisk, did you call on anybody else in the block machine industry?

[fol. 1020] A. I didn't call on anyone else with him or—no, I called on some others with some other business in view, but not concrete block machinery.

Q. I see.

A. One in particular that I recall.

Q. Now, I am referring to that same day in May of 1946, but I am going back to the conversation that you had with Mr. Thompson at your office before you called on these other people. Did Mr. Thompson say anything at that time with respect to the fact that he had received orders from the Besser Company to contact these other block machine manufacturers?

Mr. Babcock: No objection to this being answered yes or no.

A. What do you want, yes or no?

The Court: I don't care.

A. Do you want a statement, or do you want a yes or no? The attorney has raised a question.

The Court: Just answer it first, if you can, answer it yes or no. Answer it that way.

A. I would like the question repeated.

(Question read by the Reporter.)

A. Yes. He stated that——

Mr. Babcock: (Interposing) Oh——

The Court: (Interposing) Just a minute. All right. [fol. 1021] There is no question and no objection.

A. Well——

Mr. Neville: (Interposing) The witness was interrupted.

The Court: No. He answered the question.

Mr. Neville: He started to answer.

The Court: He answered the question. There is no other question before him.

Mr. Neville: All right.

By Mr. Speer:

Q. What did Mr. Thompson have to say about this, about having received orders from the Besser Company?

Mr. Babcock: I object, your Honor please, for the reasons previously stated. This is going back to the same circumstances, when the witness and Mr. Thompson were alone, and he is being asked to testify to matters equally within the knowledge of the deceased agent of the Besser Manufacturing Company.

The Court: But it does not appear that they are not equally within the knowledge of other members of the corporation who are alive. He may answer.

A. Mr. Thompson stated that not only he but other representatives of the company would perform that chore of calling on manufacturers of block machinery.

Mr. Speer: Those are all the questions I have, your Honor.

The Court: Now may I ask what is the purpose of this [fol. 1022] line of questioning of this witness? And what is the purpose of the testimony he gave?

Mr. Speer: Well, if your Honor please, in the first instance he testified that Mr. Thompson made disparaging statements about the Warren 800 machine.

The Court: He did not testify to anything of that kind

at all. What he said was a thing that would happen every day: "Why were you foolish enough to buy this machine because they will not be able to service you?" And I have heard that said about automobiles time and time again. Is there anything wrong with that?

Mr. Speer: He did say that. He also said that the Warren machine that was sold to a Mr. Clark was not performing.

The Court: Well, what if he did?

Mr. Speer: Well, your Honor, perhaps the statement by itself and standing alone is not anything. But we attempt to show in this antitrust case that the entire trend and conduct of the defendant has been in just that form, and by the terms of the April agreement with Roy Darden, Darden was to be free to furnish all repair parts for every machine that he disposed of.

The Court: Now, wait a minute. That part is all right. Is that in the Darden agreement?

Mr. Speer: It is in the agreement, yes.

The Court: That he was to furnish——

[fol. 1023] Mr. Speer: All repair parts.

The Court: All right. Now, let us get to the other. I can see where there might be some merit to that. But haven't they a right to go out here and tell somebody, "You are infringing and we are going to stop you"?

Mr. Speer: They have that right, but your Honor, I believe the authorities state that in addition to that right, they have got an obligation to take these alleged infringers in to court.

The Court: Well now, see how foolish that would be.

Mr. Speer: No, I do not think it is at all.

The Court: Suppose there were 100 infringers at one time all over the United States; or let us say there are 48 of them, one in each state. And the main one is right here at home. And they start suit against that man. They do not start suit against the other 47. And you say they cannot say to them, "You better stop because we are going to start action against you"? I think it is their duty, and you have not shown me anything to the contrary.

Mr. Speer: That is possibly true, your Honor. I do not take issue with that. But the fact is that ever since the

Besser and Stearns entered into the agreement under the Gelbman patents in 1942 and up until this case was filed before you, the patents have not been adjudicated at any time. That is 1942 to 1949.

[fol. 1024] The Court: All right. That might be. No concern wants to run into a patent suit. If it can get the results without getting into a patent suit, it does it. If it can go and show this man, "Here you are violating our patents," and he can either say, "I am not," or else he can say, "Well, perhaps I am." And if he is, they can say to him, "We will let you out as gracefully as we can." They do not have to do that. The first thing you will make me believe, after hearing all these stories, is that everybody that caught anyone else violating their patents tried to let them out easy, if of course they have any rights in the patent.

Mr. Speer: That is it.

The Court: Well, suppose they haven't any rights in the patent. Suppose I should hold that the Gelbman patents are no good. That does not make it a crime, because they think they are good, for them to go out and tell people not to use them, does it?

Mr. Speer: No, but if the court please, it just is not the question of the patent.

The Court: You said it was a minute ago. You can not blow hot and cold. You say that is it, and when I take hold of the horn of the dilemma, then you say it is not it. Does it make any difference whether these patents are good or bad, in your opinion?

Mr. Speer: No.

[fol. 1025] The Court: We are agreed on that, then. It does not make any difference whether they are good or bad.

Mr. Speer: That is true.

The Court: If they think they are good, they have the right to tell people not to use them.

Mr. Speer: But still the fact is in the case, the evidence has shown that people who have intended to enter the field of concrete block machine manufacture, have all been approached by these defendants, and we must keep in mind that Besser and Stearns are the two most important people in this industry.

The Court: Well, wait a minute. You have got so many in here that I am beginning to wonder about that. You have got so many people who are manufacturing these block machines.

Mr. Speer: That is true, that is true.

The Court: If you can show that they have done acts to control the market, fine. But I do not think it is worth the time of this court to have you proving here by witnesses brought all the way from Alabama and Georgia and Florida, and it seems to me from all quarters of the United States away from here, brought in here to say that all that these people did was go to them and say, "Wait a minute, you are using our patents and you have got to stop." It is their duty under the law to do that, if they know a man is violating their patents.

Mr. Speer: That is true, your Honor. I have no issue [fol. 1026] that that is true. But with that duty again, there is the obligation—this is not my own opinion; I am certainly basing it on authorities; and that is why we called these men from Alabama and Florida. In other antitrust cases this same conduct has been found by the courts to be a way used by persons attempting to control the industry.

The Court: That may be.

Mr. Speer: Perhaps the act by itself is all right, but that, with all the other conduct of the defendants, we attempt to show has been used by the defendants in an attempt to actually control the industry.

The Court: That may possibly be a link in the chain; I doubt it very much, because I think if a man has a patent and he hears of somebody in Timbuctoo who is using that patent, he has a right to say to that man, "Do not use that patent." He not only has the right to do it, but it is his duty to do it.

Mr. Speer: Yes, they have done that, and in the same breath they have offered the alleged infringers a job with the Besser Company they have offered to buy them out.

The Court: I know that.

Mr. Speer: Well, I am of the opinion——

The Court: What of it? If they have bent over a little bit backwards rather than have a lawsuit?

Mr. Speer: Well——

The Court: Of course, you come to unfair competition. [fols. 1027-1029] If they went over there and told this man, "Why did you buy this machine? You won't be able to get parts for it," that gets into unfair competition, which I think you said is part of this lawsuit. Is that true, or isn't it?

Mr. Neville: That is right, your Honor. That is an element, unfair competition.

The Court: But as I told you the other day, gentlemen, I cannot see anything wrong at all in a holder of a patent saying to somebody whom he thinks is infringing, "You are infringing on our patent and we are going to start suit." And then when the man practically admits it, say, "Here is what we are going to do; we don't want to put the lash to you too much; we will let you get out as easily as we can;" I do not think there is anything wrong with that.

Mr. Neville: Your Honor, the government has no quarrel with the proposition that a patentee has the right and perhaps the obligation to protect his patent. But if he does so as a means of restraining trade and achieving a monopoly, he has no right to do that, and that is when he is violating the law.

Mr. Speer: He has the right to the patent up until it runs afoul of the antitrust law, your Honor.

. . . . . .

[fol. 1030] Mr. Babcock: I have no questions of Mr. Lloyd on cross-examination.

The Court: Any questions?

Mr. De Gree: I have none.

(Witness excused.)

The Court: All right. Call the next witness.

Mr. Speer: That is all we have, your Honor. Now, this other gentleman was on the stand the other day from the East, Mr. Longenecker. He has to be cross-examined yet.

. . . . . .

[fol. 1031] HARRY H. LONGENECKER, recalled for further examination, resumed the stand and testified further as follows:

A. Mr. Neville has some of the papers now.

The Court: Mr. Neville has some of the papers. We will wait for him. Tell Mr. Neville to come in, will you?

(Short intermission.)

Mr. Neville: Your Honor please, the mail has come through. We now have the documents in question. Now, may I have the liberty of carrying on and introducing these documents, shall I say by way of anticipated redirect examination, before Mr. Babcock's cross-examination?

The Court: Certainly. Certainly.

Mr. Neville: Thank you.

Redirect examination

By Mr. Neville:

Q. Mr. Longenecker, I believe you testified yesterday that in the fall of 1946 you signed a purchase order for the purchase of a Besser machine?

A. Yes, sir.

[fol. 1032] Q. I am not sure I asked you the question yesterday, but did you also place an order for special attachments which would go with this machine?

A. The various mold box pallets were included, yes, in the order with the machine, for the machine itself. Then, in addition to that, there were a separate order for a pallet feed, an automatic pallet feed.

Q. I see. So that there were two separate purchase orders?

A. Yes, sir.

Q. (Handing document to the witness) I will ask you to look at this paper and tell the court what it is.

A. This is the purchase order for the machine, together with the various attachments to make this size block, vibrating shafts, and electric panel.

(The document referred to was thereupon marked Government's Exhibit 148 for identification.)

Mr. Neville: The paper so identified by the witness has been marked as Exhibit 148.

By Mr. Neville:

Q. Now, I will show you another paper and ask you what that is.

A. This is a purchase order for a pallet return for the Super Vibra-Pack, and changeover to operate the machine at a speed for 41/5 cycles per minute.

Q. Is this what you had reference to in speaking of the special feed?

[fol. 1033] A. Front pallet feed, yes.

(The document referred to was thereupon marked Government's Exhibit 149 for identification.)

Mr. Neville: I offer in evidence Exhibits 148 and 149.

The Court: Any objections?

Mr. Babcock: None, your Honor.

The Court: May be received.

By Mr. Neville:

Q. Showing you Exhibits 148 and 149, Mr. Longenecker, I will ask you if this is your signature at the bottom?

A. It is.

Q. I will ask you to note also that following, on both of these exhibits, following your signature, there is a notation, "Accepted October 29, 1946. Besser Manufacturing Company, by F. C. Burnette, assistant secretary."

A. Yes, sir.

Q. Now, when you signed the purchase order, was Mr. Burnette's signature on it?

A. No, sir.

Q. What happened after you signed the purchase order?

A. I signed the purchase order and it was witnessed in my office and taken by Mr. Fox, who received the order, to Alpena, and it was later returned to me in that form.

Q. Now, when you gave the purchase order to—is it Mr. Fox?

A. Mr. Fox.

[fol. 1034] Q. (Continuing) — did you pay him any money?

A. Yes, sir.

Q. I believe you testified yesterday that you paid him $3500?

A. That is right.

Q. I notice that on the purchase order which applies to the machine proper, that you agreed to pay $3000 cash at the date of this order. I show you this canceled check dated October 7, 1946, signed by you, on the Clifton Heights National Bank of Clifton Heights, Pennsylvania, and ask you if that check represents the sum you paid upon signing the purchase order?

A. It does.

Q. I show you a canceled check also dated October 7, 1946, signed by you, made payable to the Besser Manufacturing Company, as was the other check, and drawn on the same bank, in the sum of $500. Does that represent the cash payment made on the purchase order identified as Exhibit 149?

A. It does.

(Whereupon the two canceled checks just referred to were marked by the reporter as Exhibits 150 and 151.)

Mr. Neville: I offer in evidence canceled checks identified as Exhibits 150 and 151.

Mr. Babcock: I have no objection.

Mr. Gelbman: We have no objection.

Mr. De Gree: None.

The Court: All right, they may be received.

[fol. 1035] By Mr. Neville:

Q. On the purchase order which has reference to the machine proper, I read the notation, "Shipment April 1947." Did you receive delivery on that date, or during that month?

A. No, sir.

Q. Did you ever receive shipment of the machine or the special equipment under these purchase orders?

A. No, sir.

Q. And is that what led to the execution of the lease about which you testified yesterday, Mr. Longenecker?

A. Yes, sir.

Mr. Babcock: I object to that, if your Honor please, as it asks the witness to draw a conclusion.

Mr. Neville: It is a transition question. I was trying to get to the lease and that is the only reason I asked it.

The Court: All right.

A. Yes, sir.

By Mr. Neville:

Q. I show you this document and ask you what it is.

A. That is an agreement to lease a Super Vibra-Pack plain pallet stripper fully automatic, including all motors, and front pallet feed to run at a speed of 41/5 cycles per second.

Q. Does this lease describe the same type of machine as the one that was described in the purchase order?

A. It describes a Super Vibra-Pack the same as men-
[fol. 1036] tioned in the purchase order. When you take the two purchase orders together, it combines into one document, one machine in the lease.

(Whereupon the lease dated October 21, 1947, was marked by the reporter as Exhibit No. 152.)

Mr. Neville: I offer in evidence Exhibit 152.

Mr. De Gree: I have no objection.

Mr. Gelbman: No objection.

By Mr. Neville:

Q. Showing you Exhibit 152, I will ask you is that your signature at the bottom, Mr. Longenecker?

A. Yes, sir.

Q. When did you sign this lease?

A. October 21, 1947.

Q. I also note the following notation, "Approved at Alpena, Michigan, date October 23, 1947, Besser Manufacturing Company, by J. H. Besser, President." Would that indicate, Mr. Longenecker, that when you signed the lease that you delivered it to somebody?

A. I signed it and Mr. Park took the lease with him.

Q. Presumably——

A. Interposing. And it was later returned.

Q. (Continuing)—to get Mr. Besser's, or that is, the signature of one of the representatives of the Besser Company?

A. That is right.

Q. You testified yesterday that incident to agreeing on [fol. 1037-1039] terms of a lease, there was an understanding to the effect that if the policy of the Besser Manufacturing Company changed, you would be allowed to purchase the machine instead of leasing it?

A. Yes, sir.

Q. I will show you a letter dated October 21st, 1947, addressed to the Building Units Incorporated of Primos, Pennsylvania, signed by Mr. Park, Besser Manufacturing Company, and ask you what that is?

A. This is the understanding that I referred to, reduced to writing, that if the policy of the Besser Manufacturing Company should change, they will offer this machine for sale to us.

(The document referred to was thereupon marked Government's Exhibit 153 for identification.)

Mr. Neville: I offer in evidence Exhibit 153.

Mr. Babcock: I have no objection.

The Court: All right.

* * * * * * * *

[fol. 1040] By Mr. Neville:

Q. Now, I will show you a letter dated October 29th, 1947, addressed to Mr. H. H. Longenecker, Building Units Incorporated, with the same salutation:

"Dear Harry," signed Besser Manufacturing Company, by J. H. Besser, President, and ask you what that represents?

A. This is an acknowledgment, expressing thanks and congratulations on the lease agreement that I executed.

Q. Is it a letter of transmittal sending you the executed lease?

A. Yes, sir.

(The document referred to was thereupon marked Government's Exhibit 154 for identification.)

Mr. Neville: I offer in evidence Exhibit 154.

[fol. 1041] Mr. Babcock: I have no objection.

Mr. De Gree: No objection.

The Court: It may be received.

By Mr. Neville:

Q. I believe you testified yesterday that following the delivery of the latest machine received from the Besser Company, you found that the machine did not operate properly?

A. That is right.

Q. And I believe you also testified that shortly thereafter, I believe you said about a month, Mr. Fox called on you?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. For the purpose of discussing the defective machine?

A. Yes, sir.

Q. And I believe you also testified that on that occasion you renewed your efforts to purchase the machine rather than lease it?

A. Yes, sir.

Q. And also that you were not able to come to terms with Mr. Fox which would lead to a purchase?

A. That's right.

Q. Mr. Fox, however, said that he would take the matter up with his home office?

A. Yes, sir.

Q. Did you shortly thereafter receive a letter from Mr.

[fol. 1042] Fox wherein the matter of purchase was discussed?

A. Yes, sir.

Q. I show you a letter dated June 4, 1945, on the Besser Manufacturing Company stationery, — 1949 rather — addressed to Mr. Harry Longenecker, Building Units, Inc., Oak Avenue and Pennsylvania Railroad, Primos, Delaware Co., Pennsylvania, with the same salutation, "Dear Harry", and signed D. R. Fox, General Sales Manager. I will ask you what that letter represents?

A. That letter represents a promise that automatic

height and density control and pallet brush and oiler would be supplied and also a statement that the machine, referring to the purchase——

Mr. Babcock: I think the letter will speak for itself if it is proper evidence.

The Court: I think he can explain——

Mr. Babcock: But he is not; he is simply reciting what the letter states.

Mr Neville: Well that is his way of doing it.

The Court: Well just because that is his way, let us not do it if it is unnecessary.

A. And it also states that the matter of purchasing the machine was discussed with Mr. Besser and that the answer was "no."

(Whereupon the letter dated June 4, 1949, was marked by the reporter as Plaintiff's Exhibit No. 155.)

Mr. Neville: I offer in evidence Exhibit 155.

[fol. 1043-1044] Mr. De Gree: I have no objection.

Mr. Gelbman: No objection.

* * * * * * * *

[fol. 1045] By Mr. Neville:

Q. Following the receipt of that letter, Mr. Fox called on you, didn't he, Mr. Longenecker?

A. Yes, sir.

Q. Was this the call on the part of Mr. Fox to which you had reference yesterday when testifying with regard to the offer of sale at a purchase price or at a sales price of $60,000.00?

A. That was.

Q. So that that offer of $60,000.00 followed the receipt of this letter?

A. Yes, sir.

* * * * * * * *

[fol. 1046] Cross-examination

By Mr. Babcock:

Q. As I understand it, Mr. Longenecker, you are connected with a concern in Primos, Pennsylvania?

A. Yes, sir.

Q. And what is the name of that concern?

A. Building Units, Inc.

Q. Building Units; and the business of that concern is the manufacture of concrete products?

A. Yes, sir.

Q. Now you are also connected with a concern in Arlington, Virginia, the Washington Concrete Products Company?

A. Yes, sir.

Q. And what is the business of that concern?

A. Similar business.

Q. Do you participate actively in the supervision of the business at Arlington, Virginia?

A. Mr. Davis is the general manager of the Washington Company.

Q. I am sure you didn't understand my question; do you participate actively in the supervision of the business at Arlington, Virginia?

A. Locally no; only in a supervisory capacity from the Philadelphia office; general policy only.

[fol. 1047] Q. And you are also connected with a concern at Geneva, New York?

A. Yes, sir.

Q. The Geneva Brick Products Company?

A. Yes, sir.

Q. And is that concern involved in the business of producing concrete blocks?

A. Yes, sir.

Q. Do you participate actively in the management of the affairs of that concern?

A. In the same capacity as Arlington.

Q. And in what you have termed a supervisory capacity and determining policy?

A. Yes, sir.

Q. How many machines for the manufacture of concrete blocks do you have in the Building Units, Incorporated?

A. One.

Q. How many machines for the manufacture of concrete blocks do you have at the Arlington Plant?

A. Two.

Q. What are the two machines at Arlington?

A. Besser Super Vibra-Pack.

Q. And when were they purchased?

A. I am not sure. I have no records with me. But I be-
[fol. 1048] lieve late in 1947 or '48.

Q. Were they purchased or leased?

A. They were leased.

Q. And were those leases made after or before the lease Exhibit 152?

A. I couldn't say definitely, but my recollection is after.

Q. How many machines do you have operating at the Geneva Brick Products Company?

A. One.

Q. And when was that acquired?

A. Probably in '41.

Q. That was some time before the lease, Exhibit 152, then?

A. Oh, yes, yes.

Q. Now, these were all machines that you classify as automatic, were they not?

A. The machines on the lease?

Q. All the machines that you used for the manufacture of concrete blocks, the machine at Geneva——

A. (Interposing) The machine at Geneva, New York, is not a Vibra-Pack. That is a K-3 Tamper, a Victory Model K-3 Tamper.

Q. Do you classify that as an automatic machine or not?

A. I would classify it as semi-automatic.

Q. Now, as I understand it, in October of 1947 Mr. Park and Mr. Staley came to call on you?

[fol. 1049] A. Yes, sir.

Q. And discussed with you the question of your signing a lease for a Besser Vibra-Pack?

A. Yes, sir.

Q. And that at the time of their call you had them go with you to your attorney's office, Mr. Boyd?

A. Yes, sir.

Q. And then you discussed the matter with Mr. Boyd there in the presence of Mr. Park and Mr. Staley, and Mr. Boyd advised you that you had three possible choices?

A. Yes, sir.

Q. One, you could insist on performance of your order?

A. Yes, sir.

Q. Two, you could buy another machine?

A. Yes, sir.

Q. And three, you could get the best lease possible?

A. Yes, sir.

Q. So that after that conversation and receiving that advice, you executed the document Exhibit 152?

A. Yes, sir.

Q. I note, Mr. Longnecker, that under your signature on Exhibit 152 there appears "Witness Roy Martin Boyd"?

A. Yes, sir.

Q. Is that your attorney?

A. Yes, sir.

[fol. 1050] Q. So he witnessed your signature?

A. Yes, sir.

Q. And the lease, Exhibit 152, was then substituted as the contract with the Besser Manufacturing Company, for the two documents, purchase orders Exhibits 148 and 149?

A. Yes, sir.

Q. Is the front pallet feed and the front pallet return one and the same thing?

A. Yes; it is.

Q. And when the machine arrived in December of 1947, that part of the machine was not attached?

A. It wasn't.

Q. And when you spoke to Mr. Staley, he said that it had not been perfected? As yet?

A. Yes, sir.

Q. Did you receive later the front pallet feed or the front pallet return for that machine?

A. No, sir.

Q. As a matter of fact, the entire machine was replaced in May of 1949, wasn't it?

A. Yes.

Q. And, when replaced, that machine had a front pallet feed or the front pallet return on it?

A. Yes, sir.

Q. Now, was it after you received or at the same time [fol. 1051] that you received the new machine in May of 1949 that you got the racks?

A. At the same time.

Q. At the same time?

A. Yes, sir.

Q. Are those the racks to which Mr. Park is referring in his letter of October 21st?

A. No, sir.

Q. What is the difference?

A. The rack that he is referring to in the letter of October 21st is the automatic stacker.

Q. Did you ever order those?

A. No. I was never advised that it had been perfected to this date.

Q. Well, now, let's see. You had the first machine in from December of 1947—no, you said you operated it from January of 1948 until May of 1947?

A. That is right, sir.

Q. Now, under the terms of the lease, Exhibit 152, the amount of rental which you paid is at the rate of one cent per block, isn't it?

A. Yes, sir.

Q. How did you advise the Besser Manufacturing Company of the number of blocks you manufactured?

A. We reported the number of blocks made on an eight-[fol. 1052] inch basis, eight inch equivalent basis. If I remember, the reports were itemized as to the various sizes and then converted to eight-inch equivalent.

Q. Do you have with you, Mr. Longnecker, anything which would tell us the number of blocks per month from January of 1948 until May of 1949?

A. I don't know whether I have or not. I will have to see.

* * * * * * * *

A. I do not have that record with me.

* * * * * * * *

By Mr. Babcock:

Q. Do you recall, Mr. Longnecker, that from the time the new machine was installed in May of 1949 that there were about the same number of blocks per month reported to the [fol. 1053] Besser Manufacturing Company as in the months previous?

A. I do not recall.

Q. Would you say that that is not true?

A. Well, I wouldn't say it wasn't true or it was true. I don't recall.

Q. Well, you can recall, can't you, whether or not there was a falling off of production in your plant at Primos?

A. Well, there was a difference in the number of hours worked, too. I would have to have that information.

Q. Can you recall whether or not there was a falling off of production in your plant?

A. No, sir; I cannot.

Q. If there were a marked falling off in production in your plant beginning in May of 1949, don't you think you would have remembered it?

A. My recollection is that there was no material falling off in production until November.

Q. Until November of 1949?

A. Yes, sir. That is per hour of production.

Q. Now, let's pass over to your visit, the visit to your office by Mr. Fox in July of 1949. As I understand your testimony, you said to Mr. Fox since the policy has changed and they were now selling some machines, that you wanted to purchase a machine?

A. Yes, sir.

[fol. 1054] Q. Do you know of any sale in your area of the same machine that you had?

A. A Besser Super Vibrapac was sold to Mr. Pitha in North Jersey for three of his plants there.

Q. Is that the same machine that you had in your plant?

A. The Besser Super Vibrapac, yes, sir.

Q. That is the same machine?

A. The Besser Super Vibrapac, same machine, yes sir.

Q. And when were those three machines sold?

A. I have no knowledge as to the exact date that they were sold; but Mr. Pitha personally told me that he pur-

chased three of the machines at the time of the convention in February of that year.

Q. February of what year?

A. 1948 I guess; the letters will give the year; I have forgotten off hand; I think it is 1948.

Q. Well let me give you the letters now. We have here now three letters. Exhibit 153 was dated October 21, 1947.

A. That is not it.

Q. Exhibit No. 154 is a letter dated October 29, 1947.

A. That is not it.

Q. To what letters were you referring when you said the letters would give you the date?

A. Referring to the letter in which Mr. Fox stated that [fol. 1055] Mr. Besser's advice was that he would not sell the machine.

Q. Exhibit 155, a letter from Fox dated June, 1949?

A. That is the year.

Q. Would you give me again the name of the man who you say bought the machine, the three machines?

A. Mr. Pitha; P-i-t-h-a I believe he spells his name; Joseph Pitha.

Q. Where is his place of business?

A. He operates as I understand three companies; one Multiplex Concrete Products Corporation; one the Bergen Building Block Company; and I have forgotten the name of the other one.

Q. Are all three of them in the same city?

A. No; there are in Northern New Jersey.

Q. Different towns?

A. Different towns.

Q. And you cannot give us the location?

A. No; I think the Bergen Building Block company is in Ridgefield Park; I believe the Multiplex is at East Orange or one of the Oranges; I cannot tell you the exact town in which they are located.

Q. Do you know whether Mr. Staley is the representative in New Jersey?

A. I do not.

Q. For all that you know, New Jersey might be a different area?

[fol. 1056] A. It is not a different trading area.

Q. But in the allocation of districts and areas of the Besser Manufacturing Company, that would be a different area?

A. We are referring to trading areas, not sales areas of the Besser Manufacturing Company, I believe.

Q. So you say.

A. That was definitely our understanding; not sales territory.

Q. And for all you know, since you have not seen it, any one of the three sold to Mr. Pitha, they might be a different machine?

A. I have not seen the machines, no.

Q. I say, for all you know, since you have not seen them, they might be different machines from your own?

A. They may be anything as far as that part goes; I have not seen them; I have Mr. Pitha's word for it.

Q. Did Mr. Pitha tell you that he bought the same machine that you have?

A. Besser Super Vibrapac, the same machine we have.

Q. He told you that he bought the same machine that you have?

A. He did.

Q. He didn't tell you that what he bought was a V-3?

A. He did not.

Q. And that what he bought did not have the front pallet feed?

A. It had no pallet feed, no attachments; it was the bare machine, the Besser Super Vibrapac.

[fol. 1057] Q. Well then, he didn't buy the same machine that you bought, did he?

A. The same Besser machine, yes.

Q. Have you any other knowledge or information of any other sales in the same area?

A. Yes, sir.

Q. What other places?

A. Cottman Manufacturing Company, in Philadelphia, Pennsylvania. Cottman-Builders Supply Company, Philadelphia, Pennsylvania.

Q. And what machine did they buy?

A. Besser ~~Super~~ Vibrapac.

Q. The same machine that you have?

A. Yes, sir, with one exception. Instead of a front pallet return it is a side-pallet return.

Q. That is a different model then?

A. It is a pallet return; models—I have no knowledge of models.

Q. And when was the sale made to the Cottman Builders Supply according to your information?

A. 1950.

Q. And what is the source of your information there?

A. The statement from Mr. Fox and Mr. Staley and also the manager of Cottman Builders Supply Company.

Q. Now have you any knowledge or information of any other sales in this area?

[fol. 1058] A. Allentown, Pennsylvania; York, Pennsylvania.

Q. And to whom was a sale made in Allentown, Pennsylvania?

A. Lehigh Building Block Company.

Q. And when was that?

A. 1949 I believe.

Q. Was that the same model machine that you have?

A. Again I may say I am not familiar with model numbers; it is a Besser Super Vibrapac with side-pallet return.

Q. And what is the source of your information on the Lehigh Building Block Company machine?

A. Mr. Staley and the owner of Lehigh Building Block Company. Mr. Harley; William J. Harley.

Q. And what is the other machine that you mentioned?

A. York, Pennsylvania.

Q. And what is the concern there?

A. York Building Products Company.

Q. And when was that machine sold?

A. That was probably in 1948.

Q. You cannot be sure of that?

A. I think it was 1948. I am not sure, no.

Q. And do you know whether that is the same model machine that you have?

A. It is a Besser Super Vibrapac.

Q. What is the source of your information?

[fol. 1059] A. Mr. Staley, the representative of the Besser Manufacturing Company.

Q. Have you any knowledge or information of any other sales in this area?

A. No, I have not.

Q. In the conversations which you had with Mr. Staley about these sales, did Mr. Staley say anything to you about a change of policy?

A. No.

Q. You were not informed then that the sales you have mentioned here were the result of a change of policy by Besser?

A. No.

Q. Were you informed of the terms of the sales which had been made to these other parties?

A. No, sir.

Q. For all you know, then, these other parties might have accepted the price of $60,000.00 that was mentioned to you?

A. I heard no price; I had no idea what the purchase price was; it might have been anything. I will take exception—the only one I know was Mr. Pitha, who stated that he paid $28,000.00 a piece.

[fols. 1060-1062] Q. For the machine that he bought?

A. That is right.

Q. Now, it was in October of 1949 that you had a conversation with Fox about buying the machine that you had in your place of business; is that correct?

A. Previous to October of 1949.

Q. Well, I mean it was October, in the October conversation that you claim he mentioned the price of $60,000?

A. Yes. That is about right.

* * * * * * * *

[fol. 1063] HARRY H. LONGENECKER, recalled to the stand, testified further as follows:

Cross-examination (Continued)

By Mr. Babcock:

Q. Mr. Longenecker, I would like to refer now to your testimony of your conversation in June or July of 1949 with

Mr. Fox. In giving your testimony, you said that you had stated to Mr. Fox that since the policy of the Besser Manufacturing Company had changed and they sold some machines, you now wanted to purchase the machine that you had in your possession. What was the basis for your conclusion that the policy of the Besser Manufacturing Company had changed?

A. I assumed that the policy of the Besser Manufacturing Company had changed——

The Court (Interposing): You have to keep your voice up louder than that. Now, gentlemen, let's talk up so that we can all hear.

A. I assumed that the policy of the Besser Manufacturing Company had changed when I had knowledge that they made a sale to a plant in York, Pennsylvania, one in Allen-[fol. 1064] town, Pennsylvania and three in North Jersey.

Q. But in that same conversation, Mr. Fox told you that while they had sold some machines, they had not sold any of the particular model that you had, didn't he?

A. Yes, sir.

Q. And that the particular model you had with the front pallet feed, they were leasing only?

A. Yes, sir.

Q. So right then and there you were advised by Mr. Fox that there had been no change in the policy of the Besser Manufacturing Company, weren't you?

A. Yes, sir.

Q. Now, you also advised us that the payments were kept up under the lease until the second machine was put in operation, and it did not produce a satisfactory block, "we were unable to get any attention from the Besser organization, then we did not make the payments and so advised Mr. Fox." You did not want to leave the impression by that testimony that you had not made any payments at all since the installation of the second machine, did you?

A. No, sir.

Q. As a matter of fact, you made payments as late as May, 1950, on that lease, didn't you?

A. Yes, sir.

[fol. 1065] Q. Has the machine, during the more recent months, been making a satisfactory block?

A. No, sir.

Q. For how long a time has the machine been making unsatisfactory blocks?

A. From the time of the installation.

Q. And do I understand correctly that since that time the plant in Arlington, Virginia, has bought one or two of the Besser machines?

A. No, sir, not since that time.

Q. Not since that time?

A. No, sir.

Q. Have those machines in Arlington been making satisfactory blocks?

A. I am not qualified to answer that.

Q. Now, I would like to pass to your conversation with Mr. Fox in April of 1950. That is just two months ago, or less, isn't it?

A. Yes, sir.

Q. I would like to have you give me Mr. Fox's exact words, if you can, about the patent litigation.

A. I do not believe it is possible for me to give the exact words, as I did not attempt to memorize them. Mr. Fox, according to my memory, made the statement that they won a patent litigation against the Lith-I-Bar Company.

[fols. 1066-1067] Q. That the Besser Manufacturing Company had won the patent litigation in favor of the Lith-I-Bar Company?

A. In favor of the Besser Manufacturing Company.

Q. Yes, in favor of the Besser Manufacturing Company.

A. Yes.

The Court: When did he say this was?

Mr. Babcock: April, 1950, not more than two months ago this moment.

The Court: I do not know that you have to spend much time on that. I know how these things happen and I will not hold it either against the company or for the company, the more I think of it.

Mr. Babcock: Well I am frank to tell you, your Honor, that I did not feel it entered materially into the litigation itself, but I did not want your Honor to get any impression

that the company or its representatives were deliberately presuming or taking offensive conduct, as far as this court is concerned.

* * * * * * * *

[fol. 1068] The Court: All right, you may put it on the record. Unless I find that there was some malice, it will not matter a great deal. Sometimes, of course, a ruling is made during the course of the trial so that the attorneys say, "Well, there is not any question about it now; following that ruling the court must decide in our favor."

Mr. Babcock: One of the reasons I was trying to get it as exactly as I could, your Honor, I will advise the court, in the presentation of the defendants' case we expect the witnesses named will make a categorical denial of the conversations.

The Court: All right. All right. I am not criticizing you, Mr. Babcock.

By Mr. Babcock:

Q. Now, you had a later conversation with Mr. Boboltz and Mr. Eddy, is that correct?

A. Yes, sir.

Q. And that later conversation was as recent as about two weeks ago?

A. It was on the 24th of May.

Q. 1950?

A. Yes, sir.

Q. Now, during the course of your conversation with Mr. Eddy and Mr. Boboltz, you had a long distance tele-[fol. 1069] phone conversation with Mr. Milewski. Now, did Mr. Milewski call you or did you call Mr. Milewski?

A. Mr. Milewski called me.

Q. Now, Mr. Milewski asked you what?

A. He asked me whether it was true that Mr. Fox made the statement that the Besser Manufacturing Company had won the patent litigation suit against the Lith-I-Bar Company.

Q. Had made the statement to him?

A. To me.

Q. How did Mr. Milewski know about it?

A. I have no idea.

Q. Had you told him?

A. No, sir. I had not talked with Mr. Milewski at all.

Q. Had you told anyone else after April of your alleged conversation with Mr. Fox?

A. I had no direct knowledge that I had, but perhaps I did that I do not recall of.

Q. Had you reported that conversation to any representative of the United States?

A. No, sir.

Q. Now, at that time or now, do you have any idea how Mr. Milewski got the information?

A. I have no direct knowledge, no, sir.

Q. Have you any idea?

A. Yes.

[fol. 1070] Q. What is your idea?

A. My idea is that at one time when I had a conversation with his representative, I may have asked him whether that was true. But I do not recall.

Q. All right, now, Mr. Milewski asked you whether Mr. Fox had made that statement. You said, "That is my understanding"?

A. Yes, sir.

Q. Wasn't your memory of it as distinct at that time as it is now?

A. Yes, sir.

Q. Then you turned to the two representatives of the Besser Manufacturing Company. Now, at this point in your testimony you were asked, "Was the line still open", and you said, "Yes". Now, what do you mean by the line being open? You didn't mean, did you, that either Mr. Eddy or Mr. Boboltz were participating in the telephone conversation with telephone instruments?

A. No. What I meant by that was that I did not place my hand upon the telephone when I turned to Mr. Eddy and asked him whether my understanding of that was correct.

Q. In other words, I gather that you merely turned your head, but that the telephone transmitter was such that you

felt Mr. Milewski could hear you ask Mr. Eddy that question?

A. Yes, sir.

Q. But neither Mr. Eddy nor Boboltz were participating in the telephone conversation?

A. No, sir.

[fol. 1071] Q. Or heard your voice go over the wires, or Mr. Milewski's over the wires?

A. They heard my voice go over the wire.

Q. They heard it go over the wire, but I mean being transmitted over the wire?

A. Yes.

Q. And then Mr. Eddy said that he wasn't present all the time and he couldn't answer your question?

A. Yes, sir.

Q. Well, you interpreted that as being that Mr. Eddy was saying he did not remember being present and at any time he was present hearing those words, didn't you?

A. Yes, sir.

Q. And then Mr. Boboltz said what? Now, this being just two weeks ago, you ought to give me the exact words.

A. Mr. Boboltz said, "Yes, that is correct."

Q. That is what you want your testimony to be, "Yes, that is correct"?

A. My testimony is exactly what happened.

Q. You are sure that Mr. Boboltz didn't say to you, "Well, if Mr. Fox said so it is correct"?

A. No, sir.

Q. Now, you also told us that during your conversation with Mr. Fox in April, he talked with you about installing a machine in Geneva. You recall that?

[fol. 1072] A. Yes, sir.

Q. And that you told him you were not going to install a high production machine, at Geneva?

A. Yes, sir.

Q. And also that you were negotiating for the purchase of a Lith-I-Bar machine?

A. Yes, sir.

Q. Isn't the Lith-I-Bar machine a high production machine?

A. Not that machine that I was negotiating for.

Q. It is not. I recognize, Mr. Longenecker, that I did not ask you to do this yesterday, so I do not want any such implication to be found in my question, but since the adjournment yesterday have you by chance conferred with your office to get the production figures?

A. No I did not.

Q. So that you are not in any better position today than you were yesterday to answer any questions along that line?

A. No, sir.

* * * * * * * *

[fol. 1073] Redirect examination

By Mr. Neville:

Q. I believe you testified, Mr. Longenecker, that you made payments on the lease that has been discussed as late as May of 1950?

A. Yes, sir.

Q. Would that bring you up-to-date on the lease?

A. No, sir, up to November 1st, 1949.

Q. So that you have been behind on the lease from the time that your negotiations started to have the machine put in shape so it could be operated properly?

A. Well it started prior to that. It started when I wanted to get the machine installed or the attachment installed as covered by the lease.

Q. Yes, so that your testimony is still true that you have been delinquent on the lease since that time?

A. Yes, sir.

Mr. Neville: That is all.

* * * * * * * *

[fol. 1074] PIERCE E. WRIGHT, called as a witness on behalf of the plaintiff, being first duly sworn, by the Court, testified as follows:

Direct examination

By Mr. Neville:

Q. State your full name, please.
A. Pierce E. Wright.
Q. Where do you live, Mr. Wright?
A. 7702 Jefferson Avenue, East.
Q. Were you called here in answer to a subpoena?
A. Yes, sir.
The Court: Is that in Detroit?
A. Yes, sir.

By Mr. Neville:

Q. What is your business or profession?
A. I am a labor and industrial relations advisor, also vice president of the Stearns Manufacturing Company.
Q. Where do you have your principal place of business in Detroit?
A. 3157 Penobscot Building, Detroit.
Q. As labor relations advisor do you represent a number of different concerns, Mr. Wright?
A. About forty clients, perhaps ninety concerns; some of the clients are associations.
Q. Have you at any time represented the Besser Manufacturing Company in the capacity of labor relations counsel?
A. Yes, sir.
[fol. 1075] Q. Do you represent the Besser Manufacturing Company in that capacity now?
A. That is problematical.
Q. Do you know Mr. Jesse H. Besser, the president of the Besser Manufacturing Company?
A. Yes, sir.
Q. How long have you known Mr. Besser?
A. About twenty years, eighteen to twenty years.
Q. How long have you known Mr. Besser in a business way?

A. I was first engaged by Mr. Besser about 1939.

Q. In what capacity at that time?

A. As labor relations advisor.

Q. Were you retained on a permanent basis then?

A. No, not at that time.

Q. Were you later?

A. About a year later.

Q. About a year later?

A. Yes.

Q. And did you sign a contract with him?

A. No, sir.

Q. What sort of an arrangement did you have with Mr. Besser?

A. An annual fee.

Q. And have you represented him as labor relations counsel since that time on that basis?

A. Yes, sir.

[fol. 1076] Q. So that is it fair to say that you know Mr. Besser quite well or fairly well, both as a person and as a business executive?

A. I would say it is a fair question and I could answer yes.

Q. And did you have any conversations with Mr. Besser in the year 1945 looking to the acquisition of stock by Mr. Besser in the Stearns Manufacturing Company?

A. Yes I believe the first conversation was in 1945.

Q. Where did you have that conversation?

A. In Alpena in his office.

The Court: What year is this?

A. 1945.

Mr. Neville: 1945.

By Mr. Neville:

Q. Could you be a little bit more specific about the time? Could you tell us the month in 1945?

A. No I cannot definitely place the month; I would say it was in the late summer or early fall of 1945.

Q. Now, as near as you can remember, will you tell us what you said to Mr. Besser and what Mr. Besser said to you on that occasion?

A. He asked me if I was acquainted with anyone in the Indiana Limestone Corporation and my reply was that I knew some of the directors. It then developed during the course of the conversation that Gene Olsen was employed by the Indiana Limestone Corporation.

Mr. Babcock: Just a minute. I submit that the witness [fol. 1077] is now stating a conclusion. He says it then developed during the conversation that such-and-such was the fact.

The Court: Give us as near as you can the conversation.

A. Mr. Besser stated it was rumored that Mr. Olsen was employed by the Indiana Limestone Corporation, and it was also rumored that the Indiana Limestone Corporation were going to take over as a subsidiary the Stearns Manufacturing Company.

The Court: This is in 1945?

A. 1945, yes, sir.

The Court: This is before the acquisition of the stock, is it?

Mr. Neville: Yes, your Honor.

The Court: In the Stearns M[illegible]ufacturing Company by Besser?

A. Yes.

Mr. Neville: What I am trying to do is develop the history of that situation.

The Court: All right, I want to keep it chronologically in order and as a matter of fact I may ask you to give me these dates chronologically in order later on, either side or both sides.

Mr. Neville: Yes, your Honor.

Q. All right, go ahead, Mr. Wright.

[fol. 1078] A. I asked him the reason, and he told me that Mr. Olsen had been in and told him that he was going to start making a three-at-a-time plain pallet machine at Alpena and rented the Highway Commission building to build it in, and he was desirous of ascertaining whether Olsen was getting any support from Indiana Limestone Corporation.

Q. Did Mr. Besser say anything else about Mr. Olsen contemplating making of a three pallet machine?

A. Well, that was substantially the conversation, as I remember it.

Q. Did he ask you to conduct an investigation at the Indiana Limestone Company?

A. He did.

Q. Did you make such an investigation?

A. I did.

Q. Did you report to Mr. Besser?

A. I did.

Q. When did you report to Mr. Besser?

A. About December of that year.

Q. Where?

A. At Alpena.

Q. In Mr. Besser's office?

A. Yes, sir.

Q. What did you report to Mr. Besser?

A. That I had interviewed one of the directors, Mr. Corpy [fol. 1079] (?) of Indiana Limestone Corporation, and the result of that conversation.

Q. What did Mr. Besser have to say?

* * * * * * * *

A. He stated that he was desirous of buying the stock of the Stearns Manufacturing Company, and would I be interested in acting as agent in his behalf, to which I replied "yes."

By Mr. Neville:

Q. Did Mr. Besser state why he wanted to acquire the Stearns Manufacturing Company stock?

A. Yes, he did.

Q. What was the reason that he gave?

* * * * * * * *

[fol. 1080] The Court: State as nearly as you can the conversation. All right.

A. Repeat the question, please.

(Question read by the reporter.)

A. He briefly outlined the history of the plain pallet, the development of the plain pallet machine, the success that he had with it, and that he wanted to be the only person manufacturing the plain pallet machine. He wanted to have some hand in any other company that made the plain pallet machine.

By Mr. Neville:

Q. I see. Now, did you undertake to follow Mr. Besser's instructions in acquiring the stock?

A. I did.

Q. What did you do?

A. Interviewed several stock brokers, and inquired as to the price on the market. Sort of worked out a plan for the purchase, and acquainted Mr. Besser with the fact that I was ready to proceed.

Q. Did you have any conversation with Mr. Hal Smith, Junior?

A. Yes, sir.

[fol. 1081] Who is Mr. Hal Smith, Junior?

A. He is a partner in Smith Hague Company, investment stock brokers.

Q. Did you consult with Mr. Smith on this plan of acquiring the Besser Manufacturing Company stock for Mr. Besser?

A. You mean the Stearns Manufacturing Company?

Q. Of acquiring the Stearns Manufacturing Company stock for Mr. Besser?

A. Yes, I did consult with Mr. Smith.

Q. When did you consult with Mr. Smith?

A. Oh, we had perhaps ten or twelve meetings during the spring months of 1946.

Q. Where did you have the first one?

A. In Mr. Smith's office.

Q. When was that?

A. February of 1946.

Q. Who was present at that meeting?

A. Mr. Smith and myself.

Q. What was discussed there?

Mr. Babcock: I object.

By Mr. Neville:

Q. What was the conversation?

Mr. Babcock: I object to the conversation with Mr. Smith.

By Mr. Neville:

Q. What did you say and what did Mr. Smith say?

Mr. Babcock: I object.

The Court: Who is Mr. Smith?

[fol. 1082] Mr. Babcock: The stock broker.

Mr. Neville: I am trying to unfold, your Honor, the manner in which this stock transaction took place. Now, we are at the point where Mr. Wright has consulted a broker and is discussing the execution of a plan.

The Court: As a result of a talk with Mr. Besser?

Mr. Neville: As a result of a talk with Mr. Besser.

The Court: He may answer.

Mr. Babcock: Pardon me. May I state a further objection?

The Court: All right.

Mr. Babcock: Not only that the conversation between this witness and Hal Smith is incompetent, immaterial and irrelevant generally, but further because, if your Honor please, in the answer of the Besser Manufacturing Company filed in this case we have admitted that the Besser Manufacturing Company owns the stock alleged in the complaint.

The Court: Well but——

Mr. Babcock (interposing): The mechanics of his purchase cannot possibly have any relation.

The Court: I think the mechanics of the purchase may have a great deal to do with this case, and it may indicate to the court either one way or the other that the claim of the government in this case is well founded. It may. I don't say it does. It may.

* * * * * * * * *

[fol. 1083] (Question read by the reporter as follows:

"Q. What was discussed there?")

A. Methods and procedures of purchasing the stock.

By Mr. Neville:

Q. Could you be a little more specific about that, Mr. Wright?

A. I told Mr. Smith that I represented an unknown client, whose name I did not want to reveal at that time, and we wanted to purchase some stock of the Stearns Manufacturing Company. He inquired how much we wanted to purchase. I told him all that was available. We did not want to increase the market price, but we wanted to buy it cautiously. Whenever any came up on the market for sale, that he was to buy it.

Q. By the way, did Mr. Besser instruct you to keep his name secret in these negotiations?

A. At that time, yes.

Q. What did Mr. Smith have to say?

[fol. 1084] A. He said that he was ready to proceed and would work with me in the matter, and he was ready to go ahead at that time.

Q. Now, if I may, I would like to take you back to the original conversation with Mr. Besser, when the plan of acquiring the stock was discussed.

* * * * * * * *

[fol. 1085] Q. What, if anything, was said, Mr. Wright, about acquiring the stock in the name of nominees?

A. Mr. Besser suggested that inasmuch as he did not want to reveal himself as the purchaser of the stock, could I find other people to buy it in their name.

Q. What was said about the manner in which the stock would be paid for?

A. He agreed to furnish me with the available funds.

Q. Now, was there anything said about the opening of a special banking account to handle these transactions?

A. Not from him. That was of my own volition.

Q. I see. Would you kindly tell us when you opened such a banking account?

Mr. Babcock: Well, as I understand the witness, he is saying that this is something he did privately on his own, and it has no part of any understanding with Mr. Besser. I submit it is immaterial.

The Court: The way the question was answered and asked, it is immaterial.

Mr. Neville: All right, I will rephrase that.

[fol. 1086] By Mr. Neville:

Q. Were you instructed by Mr. Besser to do what was necessary to handle the money?

A. Yes, sir.

Q. What did you do?

A. On receipt of the first check from Mr. Besser I opened up a bank account in a different bank from that in which I usually transacted my business and called it the "Pierce E. Wright Special Account."

The Court: With money furnished to you by either Mr. Besser or the Besser Manufacturing Company?

A. Yes, sir.

By Mr. Neville:

Q. This was an account that was totally separate from your own account?

A. Yes, sir.

Q. Now, following your discussions with Mr. Smith of the brokerage house, were purchases of stock made in accordance with the plan?

A. The first purchases were made in June of that year.

The Court: Of 1945?

A. 1946, your Honor.

Mr. Neville: 1946 now.

By Mr. Neville:

Q. In whose name?

A. Stanley Fildew was the first official purchaser, in his name.

Q. How did Mr. Fildew happen to be the nominee?

A. I asked him could I purchase that stock in his name, [fol. 1087] he being my friend and counsel.

Q. Was stock purchased in the name of any other nominee or nominees?

A. Yes.

Q. Would you kindly name them?
A. Horace A. Matchener, Vera Dixon.
The Court: Can you identify these people? These names are not taken right out of the air, are they?
A. No, sir.
The Court (to Mr. De Gree):
Q. Mr. Fildew, as a matter of fact—is that your partner?
Mr. De Gree: Yes, your Honor.
The Court: All right, now you have given the second one; who is that?
A. Horace A. Matchener.
The Court: How do you spell that?
A. M-a-t-c-h-e--n-e-r.
The Court: Who is he?
A. A retired business man.
The Court: All right, go ahead.
A. Vera Dixon.

By Mr. Neville:

Q. And who is Vera Dixon?
A. Subsequently Mrs. Wright.
Q. Anybody else?
A. Wells K. Stanley.
[fol. 1088] The Court: Who is Mr. Stanley?
A. Attorney and counsellor at law at Cleveland, Ohio.

By Mr. Neville:

Q. Anybody else?
A. Allen H. Pierson.
Q. Who is Mr. Pierson?
A. Industrial engineer, Detroit.
Q. Were these gentlemen all selected by you, Mr. Wright?
A. Yes, sir.
The Court: Who selected these people? You?
A. I did.
The Court: All right.

By Mr. Neville:

Q. Do you recall how much stock was purchased in this manner in 1946, Mr. Wright?

A. Just short of 14,000 shares.

Q. Do you know what happened to these certificates of stock?

A. Yes.

Q. What happened to them?

A. I received an assignment in blank from each of the alleged purchasers which I attached to each certificate when it was delivered to me by the broker, which I in turn carried to Alpena.

Q. Carried to Alpena and delivered them to whom?

A. Delivered them to Mr. Besser or the then treasurer of the company.

Q. How soon after these transactions took place did you [fol. 1089] do that with the certificates?

A. Within a reasonable time after the receipt thereof.

Q. Now, did the purchases continue in 1947?

A. No, they did not.

Q. Do you know of any circumstances or any events which caused a discontinuance of the purchases in 1947?

A. No none other than Mr. Besser told me not to buy any more at that time.

The Court: Have you got the total of how much he bought?

A. Approximately 14,000 shares.

The Court: I mean, has that been in the record yet?

Mr. Neville: It has been asked.

A. Yes, sir.

Mr. Babcock: The exact figure is not. The witness said "just short of 14,000."

The Court: Just short of 14,000?

A. 13,765 shares, I think it was, to be exact.

The Court: That is what you bought for him in 1946?

A. Yes, sir.

The Court: After you had had this conversation?

A. Yes, sir.

The Court: All right.

By Mr. Neville:

Q. Did Mr. Besser say anything to you, Mr. Wright, in 1947, about an investigation being conducted by the Justice [fol. 1090] Department?

A. No sir, he did not, not to my knowledge.

Q. Were any purchases made at all in 1947?

A. I do not think so. At least I did not make any.

Q. Were purchases made or resumed in 1948?

A. Yes, sir.

Q. At Mr. Besser's instructions?

A. Yes, sir.

Q. Where and when did you receive those instructions?

A. The latter part of 1947, he authorized me to proceed and attempt to buy in block all of the stock of the officers of the Stearns Manufacturing Company.

The Court: At that time did he have this 14,000?

A. Yes, sir.

The Court: In his name or the Besser——

A. No, sir, he had it in the names of the individuals in whom it was purchased.

Mr. Neville: Endorsed in blank, your Honor.

A. Still in blank assignment.

The Court: All right.

By Mr. Neville:

Q. Did you state where and when, Mr. Wright?

A. The latter part of 1947.

Q. And where did this meeting take place?

A. In Alpena in his office.

Q. Did Mr. Wright say anything about acquiring a par- [fol. 1091] ticular block of stock on that occasion?

A. You mean Mr. Besser?

Q. Mr. Besser, I beg your pardon.

A. I stated, I believe, that he instructed me to purchase if possible the stock held by the executives and officers of the Stearns Manufacturing Company.

Q. And who would that be particularly?

A. Gene Olsen, Bob Davis, Delamater, Gene Olsen, Junior, Mrs. Olsen, Dan Hall.

Q. And who held the bulk of that stock, if you know?

A. Gene Olsen.

Q. And did Mr. Besser on this occasion state why he wanted to acquire the Olsen block of stock?

A. No, I do not think that there was any particular statement at that time as to why.

Q. Did you proceed to carry out Mr. Besser's instructions?

A. I did.

Q. What did you do?

A. I again consulted with Mr. Hal Smith.

Q. When?

A. December, 1947.

Q. And where?

A. In his office.

Q. What did you say to Mr. Smith and what did Mr. Smith say to you on that occasion?

[fol. 1092] Mr. Babcock: May I have the record show the same objection, if your Honor please?

The Court: As to what?

Mr. Babcock: That I made to the previous conversation with Hal Smith by this witness.

The Court: All right.

By Mr. Neville:

Q. You may answer.

A. Will you repeat the question?

Q. What did you say to Mr. Smith and what did Mr. Smith say to you on this occasion?

A. I told Mr. Smith that I had been instructed by my client to purchase in bulk if possible the stock of the officers and executives, and any others who held large blocks of stock in the Stearns Manufacturing Company. We talked it over for a considerable length of time and he suggested that we employ Henry Selz from Chicago to act as our agent with the Stearns officers. I agreed and phoned Mr. Selz and had Mr. Selz come over the next day. I met Mr. Selz and talked it over with him, talked the entire matter over with him, again in Mr. Smith's office.

Q. Did you discuss with Mr. Selz the means whereby you would acquire this stock?

A. Yes, because Mr. Selz insisted upon knowing where the money was coming from.

Q. Did you tell him?

[fol. 1093] A. Mr. Selz——

The Court: Who is this?

A. Mr. Selz.

The Court: And who is he?

Mr. Neville: He is a broker.

A. He is a stock broker from Chicago.

By Mr. Neville:

Q. Did you tell him who was supplying the money?

A. Yes, I did.

Q. Did Mr. Selz agree to go ahead with the plan?

A. Yes, he did.

Q. Did Mr. Selz agree right then and there to do it, Mr. Wright?

A. Substantially yes he did, but he wanted further instructions and further assurances that the money would be available when the deal was consummated.

Q. Were you able to give him those instructions at a later date?

A. Yes.

Q. When did you give him those instructions, approximately?

A. About the middle of February.

Q. Now, we are in 1947, are we not?

A. Now we are in 1948.

Q. 1948, rather. Did you discuss with Mr. Selz the price which you would pay or that he was to pay in acquiring this stock?

A. I did.

Q. What was said about that?

[fol. 1094] A. Mr. Besser placed a ten dollar limit on it at that time. Mr. Besser had placed a limit on it at the meeting that we held with Mr. Selz in Chicago the latter part of January, and after I had been instructed by Mr. Besser to proceed I instructed Mr. Selz that the $10 limit would be the limit as discussed in the Chicago meeting.

Q. Was Mr. Selz instructed to keep Mr. Besser's name secret, as in the other transaction?

A. Yes, he was.

Q. To your knowledge, did Mr. Selz contact Mr. Olsen in order to purchase the Olsen stock?

A. Yes.

Q. Was the Olsen stock eventually acquired from Mr. Olsen through the offices of Mr. Selz?

A. Yes.

Q. When?

A. March 26, 1948.

* * * * * * * *

By Mr. Neville:

Q. Then I believe you gave the date, Mr. Wright?

A. March 26.

Q. Now when, prior to March 26, 1948, did you have a telephone conversation with Mr. Besser?

[fol. 1095] A. Yes, I had many with him during those days.

Q. Do you recall one in particular, which I believe would be the week before March 26, where the Olsen stock transaction was discussed particularly?

A. Yes, I do.

Q. Did you telephone Mr. Besser, or did he telephone you?

A. I telephoned him.

Q. I see. Will you tell us what he said and what you said during that telephone conversation?

A. Mr. Selz had reported that Olsen was welching on the deal, or, in other words, backing out or reneging on some of the promises he had made.

Q. Did you know what he was talking about when he mentioned those promises?

A. Yes, I did.

Q. What was that?

A. One was that he would go out of business, stay out of business for five years.

* * * * * * * *

[fol. 1096-1097] By Mr. Neville:

Q. Who would stay out of business for five years?

A. Gene Olsen.

Q. Did Mr. Besser say anything further during this telephone conversation on that subject?

A. Well, we discussed—yes, he did.

* * * * * * * *

By Mr. Neville:

[fol. 1098] Q. Now, just for the purpose of clarification, if I can succeed in doing it, was a part of the plan that in order to acquire the Stearns stock for Mr. Olsen that an attempt would be made to have Mr. Olsen agree to stay out of business for five years after the sale?

Mr. Babcock: I object to it, your Honor please. It calls for a conclusion.

The Court: Sustain the objection. "Was it part of the [fol. 1099] plan?"

By Mr. Neville:

Q. Was it part of the plan?

The Court: No. That is why it cannot be anything else but a conclusion. Let him tell what was said, and then the court will arrive at the answer whether it was part of the plan.

Mr. Neville: All right.

* * * * * * * *

By Mr. Neville:

Q. Did Mr. Besser instruct you in any respect with reference to having Mr. Olsen stay out of business for a period of five years following the sale of his stock?

A. Yes.

Q. What did he say?

A. At the Chicago meeting, where Selz and Mr. Besser and myself were present, instructed both Mr. Selz and I that that would be one of the bases of purchase.

Q. Now, to get back to the telephone conversation with [fol. 1100] Mr. Besser, did Mr. Besser say anything about those instructions?

A. At that time, no.

Q. I believe you testified just a moment ago that Mr. Besser had heard rumors that Mr. Olsen was about to welch on his deal. Can you throw a little more light on that?

Mr. Babcock: I don't understand the question.

A. No.

The Court: Just a minute now.

Mr. Babcock: The witness has not so testified. As I understand it, the witness testified that Olsen—that Selz was reporting to him, the witness, that Olsen was welching.

The Court: Just how was that?

Mr. Babcock: Nothing that Besser said.

The Court: Just how was that?

A. Selz reported to me that Mr. Olsen wanted more money for his stock and was not going to stay out of business, he was going right back into business again. I, in turn, reported that to Mr. Besser in a telephone conversation immediately.

The Court: All right.

* * * * * * * *

[fol. 1101] By Mr. Neville:

Q. Did Mr. Besser instruct you to go ahead with the plan?

A. Yes, sir.

Q. Did you contact Mr. Selz following this telephone conversation?

A. Mr. Selz was sitting alongside of me at the time.

Q. Now, where was the transaction, and when I say "transaction" I mean the actual sale and transfer of certificates of the Olsen stock?

A. At the offices of Smith Hague & Company.

Q. And that was on March 26?

A. March 26.

Q. Who was present at the closing?

A. Mr. Smith, Mr. Hague, Mr. Olsen, Mr. Delamater, Mr. DeGree, myself——

Q. (Interposing) Did Mr. Olsen——

A. (Continuing)——and Mr. —— momentarily the name slips my mind. Counsel for Mr. Olsen.

Mr. De Gree: Grant Cook.

A. Grant Cook.

By Mr. Neville:

Q. Now, did Mr. Olsen have his stock certificates with him?

A. He did.

Q. Now, in whose name or names were these certificates taken?

A. None at that time.

[fol. 1102] Q. How was the money paid?

A. The National Bank of Detroit sent over a cashier's check for somewhere in the neighborhood of $850,000, payable to Smith Hague.

Q. Do you know who bought that cashier's check?

A. No, sir.

Q. Are you sure it was a cashier's check, Mr. Wright?

A. It may have been a draft. It was a check of some kind.

Q. I will ask you to look at that (handing document to the witness).

A. That is it. No, wait a minute. No, that is not the one that came over to us. A cashier's check from the bank, or a draft upon the bank, came over, payable to Smith Hague & Company.

Q. I see.

A. For that amount, $800,000 and some odd dollars.

Q. Now, I didn't hear the answer to the question, do you know who paid for the cashier's check?

A. I do not, positively.

Q. You did not pay for it?

A. No, sir.

Q. Now, what happened to the certificates subsequent to the closing of the deal?

A. They were held in trust by the bank officer who was awaiting the certificates in my office until they were later picked up by Mr. Bessey.

Q. How many shares of stock were involved in that trans-
[fol. 1103] action, do you know?

The Court: I didn't hear you. How many shares of stock?

By Mr. Neville:

Q. How many shares of stock were involved in that transaction, if you know?

A. About 63,000 or less.

Q. Did your name eventually appear as a holder of this stock, Mr. Wright?

A. It did.

Q. When?

A. Fourteen days prior to May 4, whatever that date would be.

Q. And how did that come about?

A. Mr. Besser instructed Smith Hague & Company to put 40,000 shares of stock in my name and the balance in the name of Myron Hultmark. He gave them the stock to take to Grand Rapids and have it so registered.

Q. Did you sign an assignment in blank of that stock?

A. I did.

Q. Do you know if Mr. Hultmark did the same thing?

A. He did.

Q. What happened to these certificates and the assignments?

A. They were delivered to Mr. Besser.

Q. Have you seen these certificates since that time?

A. No, sir.

Q. By the way, who is Mr. Hultmark?

[fol. 1104] A. Myron Hultmark is a former salesman for the Besser Manufacturing Company, at present president of the Stearns Manufacturing Company.

* * * * * * * *

By Mr. Neville:

Q. Who selected Mr. Hultmark as a nominee owner of this stock in this transaction?

A. Mr. Besser.

Mr. Babcock: I object, your Honor please. It calls for a conclusion by the witness.

By Mr. Neville:

Q. Did you select him as nominee holder?
A. Pardon me.

The Court: Wait a minute, now. He withdrew the question. I hadn't ruled on it. Evidently that was withdrawn and another question was asked.

[fol. 1105] Mr. Neville: Yes, your Honor.

A. If I know what question I am asked now——

By Mr. Neville:

Q. Did you select——

The Court (Interposing): You are entitled to know that.

By Mr. Neville:

Q. Did you select Mr. Hultmark as a nominee holder of this stock?
A. No, sir.
Q. Who did?

Mr. Babcock: I object. That calls for a conclusion.
Mr. Neville: I have asked him——
The Court (Interposing): Ask him if he knows.

By Mr. Neville:

Q. Who did, if you know?
A. Mr. Besser, in my office.

Mr. Babcock: I move the answer be stricken.

By Mr. Neville:

Q. I don't know if I asked you the question——

The Court: (Interposing) Just a minute.
Mr. Babcock: Just a moment, Mr. Neville. I move that the question and answer be stricken as calling for the conclusion on the part of the witness. He hasn't been asked to

state the conversation. He has just been asked for his conclusions.

The Court: I think it may stand. He said he selected him in his office.

Mr. Neville: Mr. Besser's instructions. Mr. Besser, him-
[fol. 1106] self, evidently, as I understood him, your Honor.

The Court: That is exactly the point. Now you are getting to it properly, and, technically, Mr. Babcock was correct. But you may have cleared the air. The court let it in, anyway.

Mr. Neville: Thank you.

The Court: Because he would merely ask another question and get it in properly.

By Mr. Neville:

Q. Now, was there a meeting of the stockholders of the Stearns Manufacturing Company—I don't have the date—yes, I do—on the 4th of May, 1948?

A. Yes, sir.

Q. Were you present at that meeting, Mr. Wright?

A. Yes, sir.

Q. Was this a special meeting?

A. Yes, sir.

Q. Who called this meeting, if you know?

A. Mr. Gene Olsen, as president of the corporation.

Q. Now at that meeting was there an election of a new board of directors?

A. Yes, sir.

Q. Can you tell us who composed the board prior to this election, if you know?

Mr. Babcock: I submit the corporate records are the best evidence.

[fol. 1107] The Court: He may know, if he knows.

A. Mr. Olsen, Junior, Senior, Mr. Delamater, a Mr. Smith, and one other person whose name I cannot recall.

The Court: How many members were there? Five members?

A. Five members of the board.

The Court: The two Olsens; Delamater; Smith; let us have his first name. Do you know his first name?

A. I do not know it. It is in the record right here, however.

The Court: All right, and someone else whom you cannot remember?

A. I cannot remember at all.

The Court: All right.

By Mr. Neville:

Q. What was the composition of the board after the election?

The Court: If you know.

Mr. Babcock: Same objection, if your Honor please.

By Mr. Neville:

Q. If you know, of course.

A. After the election?

Q. Yes.

A. Mr. Lee Joslyn.

Mr. Babcock: Did the court overrule my objection?

The Court: Yes. You mean Mr. Lee Joslyn, the attorney?

A. Yes, sir.

[fol. 1108] The Court: All right.

A. Mr. Delamater, Mr. Hultmark, Mr. Fildew and myself.

By Mr. Neville:

Q. Was there a meeting of this board on the same day?

A. Yes.

Q. Were you present at this meeting?

A. Yes.

Q. Who else was present?

A. The rest of the directors.

Q. What happened at the meeting?

A. We elected officers.

Mr. Babcock: I submit the minutes of the meeting are the best evidence of what happened unless there is something outside of the minutes that he is asking for.

Mr. Neville: We have them, your Honor, and if your Honor insists, we will get the minutes, but I think it would be of interest to know right now who the officers were.

The Court: Well you did not ask him that. You said, "What happened at the meeting?"

Mr. Neville: Well I am leading to that.

The Court: And the minutes are the best evidence. I sustain the objection.

By Mr. Neville:

Q. Was there an election of officers at this meeting?

A. Yes.

[fol. 1109] Q. Who was elected president?

A. Myron Hultmark.

. . . . . .

[fol. 1110] Q. What other officers?

A. I was elected vice president, Mr. Delamater was elected secretary.

Q. And did you become active in the management of the Stearns Manufacturing Company from that time on?

A. Partially, a day or two a week.

. . . . . .

[fol. 1111] By Mr. Neville:

Q. Did Mr. Hultmark become active in the management of the company following his election as president?

A. Yes, because he was elected president and general manager.

Q. Did he go out to the plant?

A. Yes, sir.

Q. And he ran the business from out there?

A. Yes, sir.

The Court: How many days a week would he spend?

A. All of his time.

. . . . . .

[fol. 1112] By Mr. Neville:

Q. Now beginning on May 4, 1948, can you state whether or not Mr. Besser participated in the management of the Stearns Manufacturng Company in any way?

A. He did not.

Q. So that beginning on that day to your knowledge, Mr. Hultmark and the other officers of the company are the ones who ran the Stearns Manufac uring Company?

A. Yes, sir.

Q. Did you give any reports to Mr. Besser concerning the management of the Stearns Manufacturing Company?

A. Yes I did.

Q. What sort of reports?

A. Monthly financial statements, progress reports.

* * * * * * * *

By Mr. Neville:

Q. Did Mr. Besser make any comments to you about your management of the company?

[fol. 1113] A. None whatever.

Q. Did he express satisfaction?

A. Well he did not——

* * * * * * * *

[fol. 1114] By Mr. Neville:

Q. Did Mr. Besser ever make any comments to you on [fol. 1115] the management of the Stearns Manufacturing Company following your election as vice president?

A. No, none specifically.

Q. Does January 22, 1950, register in your mind as a significant date, Mr. Wright?

A. It does.

Mr. De Gree: What was that date?

Mr. Neville: January 22.

The Court: 1950, last January.

* * * * * * * *

[fol. 1116] By Mr. Neville:

Q. Did you see Mr. Besser on January 22, 1950? Do you remember having dinner with Mr. Besser at the D.A.C. on that date, Mr. Wright?

A. Yes.

Q. Will you tell the court what you said and what Mr. Besser said on this occasion?

Mr. Babcock: I object.

The Court: Just a minute.

By Mr. Neville:

Q. As closely as you can remember.

Mr. Babcock: I am sorry; I thought the question was finished. I object for the reason it being on January 22, 1950, some nine months or so subsequent to the filing of the complaint and too remote from any of the transactions involved in the pleadings in this case.

The Court: Objection overruled. I think if Mr. Besser said something to him out here in the hall this morning he could tell that.

By Mr. Neville:

Q. You may answer the question.

A. He told me that an individual by the name of Ben Stone was desirous of purchasing his holdings in the Stearns Manufacturing Company.

Q. Did he discuss or did he speak to you or tell you the terms under which this Ben Stone was negotiating with Mr. Besser?

A. Yes he did.

Q. Would you kindly state what he said to you, what Mr. [fol. 1117] Besser said to you with respect to these terms?

A. Stearns Manufacturing Company were to take over the Sinterlite process.

The Court: What process was that?

A. Sinterlite—Agilite.

The Court: Is that some other process?

A. Yes, the Agilite process; Stearns Manufacturing Company were to purchase the holdings of the Gocorp

Company, the Gene Olsen Corporation; to recognize the validity of the Besser patent, and Stearns stop making a three-at-a-time plain pallet machine.

Q. Now, I wonder if this wouldn't be a good time for you to tell us, Mr. Wright, if you know of any patents which apply to plain pallet machines as such?

The Court: Plain pallet what?

Mr. Neville: Plain pallet machines.

The Court: oh.

Mr. Neville: As such.

A. I don't know of any.

By Mr. Neville:

Q. Do you know of any which apply to cored pallet machines as such?

A. I am of the opinion that one of the Gelbman patents still does.

Mr. Babcock: I object to the opinion.

Mr. Neville: This gentleman is in the business and qualifies, I believe, at least.

The Court: Is in what business?

[fol. 1118] Mr. Neville: In some respects, as an expert.

The Court: In what business?

Mr. Neville: The concrete block machine business.

Mr. Babcock: Since 1948, as vice president, spending one or two days a week at the Stearns plant in Adrian.

Mr. Neville: I think an intelligent person, during the course of one year, perhaps two years, spending one or two days a week, would learn something about the business.

The Court: Now, he said in answer to your first question, as I remember, he said he did not know of any patents applying to the plain pallet. He wouldn't have to be in the business five minutes before he would know of the patents on the plain pallet, and what they cover, and now you are asking him to tell about the cored pallet.

Mr. Neville: That is right. I didn't refer to vibration or tamping, or anything of the sort. I just asked the question——.

The Court: (Interposing): That is why.

Mr. Neville: I asked the question with reference to the plain pallet and the cored pallet only.

The Court: All right. You never heard about any plain pallet, or any patent on a plain pallet?

A. I know about the Besser patent on the plain pallet, which, to my knowledge, has expired, yes. But I am assuming I am asked the question at the present time as to [fol. 1119] the present status of the plain pallet patent. Maybe I am wrong in the assumption.

The Court: I don't think you can tell the present status of the plain pallet. The only one that has it is in no position to state it right now, I will tell you. That is the cored pallet patent, that is the only one that knows their position, and I don't. Well, he says he does not, but he knows about the cored pallet. Now, he may answer that.

A. One of the Gelbman patents may still be in full force and existence and has to do with the cored pallet machine. I am not positive of that, however.

By Mr. Neville:

Q. But no patents that you know of applying to the plain pallet machine?

A. None that I know of. I don't think that the Scott patent applies to the plain pallet machine. That is the only one I know. That applies to the machine at the present time.

Q. Now, I believe you said that one of the conditions mentioned by Mr. Besser was that the Stearns Manufacturing Company take over the Agilite enterprise.

Mr. Babcock: Now, if your Honor please, all that the witness has said was that Mr. Besser said he was negotiating with a man by the name of Stone, but that as a part of the negotiations then in progress the subject was being discussed. Now, there was no condition imposed, as a matter of fact, as the court knows from what has transpired previously in this case. The negotiations which were in progress in January were finally consummated by the [fol. 1120] Besser and Stone in March entering into a written document, and I submit that these conversations about preliminary negotiations leading up to a contract are

entirely immaterial, incompetent, irrelevant, and certainly should not be classified as conditions in the presentation of the question.

The Court: Overruled.

Mr. Neville: Well——

The Court (Interposing): Overruled.

By Mr. Neville:

Q. Now, then, please answer the question.

A. What was the question, please.

(Question read by the reporter.)

A. No, sir.

By Mr. Neville:

Q. Now, do you know what that involved?

A. The Marietta Concrete Slab——

Mr. Babcock: (Interposing) Pardon me.

The Court (Interposing): He asked if you know what it involved.

A. Yes.

By Mr. Neville:

Q. What did it involve?

Mr. Babcock: I object, if your Honor please. The question is entirely too general and indistinct for me to be able to anticipate a possible answer and state an objection, to determine its materiality and relevancy, and I am sure the court can't either.

[fols. 1121-1123] The Court: Well, I might know the answer. I don't know. Let him answer. What did it involve?

A. The Marietta Concrete Plant, Concrete Agilite, Concrete Company Agilite Plant——

The Court: (Interposing) What is Agilite? What is that?

A. Agilite, your Honor, is an aggregate that comes from sintering and in that particular plant, a shale——

The Court (Interposing): Sintering is heating, is that what you mean?

A. They take shale and coal and run it through a ma-

chine, and when they get through they have a clinker which in turn is an aggregate for concrete block.

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[fols. 1124-1125] By Mr. Neville:

Q. Would you please identify the concern in Ohio which is involved in this Agilite enterprise?

A. Marietta Concrete Slab Company, I think is the proper name of the corporation.

• • • • • • • •

[fol. 1126] By Mr. Neville:

Q. Would you kindly tell us what the Ohio concern—I believe it was the Marietta——

A. (Interposing) Concrete Slab Company.

Q. Yes. —what that company had to do with the agilite process.

A. They have the agilite plant.

Q. Which was being discussed?

A. They have the agilite plant.

Q. They have the agilite plant?

A. Yes.

Q. Now, had they had any business—or, strike that. Did they transact any business with the Besser Manufacturing Company with reference to this agilite process?

A. Well, they purchased the plant from Besser Company.

Q. When?

A. About a year and a half ago.

Q. I see. Now, do you know what the Marietta Company's obligations were to the Besser Company as a result of taking over that plant?

A. Exactly, no.

Q. Do you know what the Besser Company's obligations were to the Ohio Company as a result of this transaction?

A. Hearsay only.

Q. I see.

[fol. 1127] The Court: Was anything said to you by Mr. Besser about what it was?

A. Yes, there was.

The Court: That wouldn't be hearsay, would it?

A. Well, he explained to me that the plant——

The Court (Interposing): All right. That is what the attorney is trying to get out of you and the court is entitled to know.

By Mr. Neville:

Q. What did Mr. Besser have to say in that proposition?

A. He explained that the plant was not operating successfully, and that they had a lot of problems to overcome, and he wanted to get rid of it.

The Court: I thought he had gotten rid of it a year and a half ago.

A. I don't think they bought it outright. He just got rid of it, that is all.

Mr. Babcock: I didn't hear the witness.

The Court: He said—I thought he said he had gotten rid of it a year ago. Now he says Mr. Besser said he was—they were having some trouble out there, and he wanted to get rid of it, had got rid of it a year and a half ago. Why would they be trying to get rid of something they didn't own in January, 1950?

Mr. Neville: Because they had some obligations which [fol. 1128] still followed these sales.

The Court: Well, did he— he can relate the conversation, just as he remembers it.

Mr. Babcock: The only reason I mentioned that is to try to expedite it, your Honor, but as a matter of fact, to show how far afield we have gone, and how much confusion there is in this, I think if either the court or I may be permitted to ask the witness a question, we will discover when he refers to the plant, as Besser having sold the plant, he intended to refer only to some machinery.

Besser never owned and operate the plant and buildings, the buildings and plant, as a matter of fact, as might be understood from the previous answer. They just sold this outfit some machinery for use in this agilite process.

The Court: Evidently it isn't completely paid for, is that it?

Mr. Babcock: That is right.

The Court: Then why doesn't the—the questions can be

asked, as I say, to bring out what the situation is. Now, gentlemen, you may go ahead.

By Mr. Neville:

Q. Is Mr. Babcock's statement a correct statement, Mr. Wright?

The Court: So far as you know.

A. Yes, sir. Besser Company furnished the machinery.

By Mr. Neville:

Q. I see.

[fols. 1129-1130] A. A portion of it, anyhow.

The Court: You may proceed.

By Mr. Neville:

Q. Did Mr. Besser—and I am referring to this conversation at the D.A.C.—Did Mr. Besser say anything about the Stearns Manufacturing Company relinquishing its rights under the exclusive patent license agreement which it had jointly with Besser from the Gelbman people?

A. Yes.

Q. What did he say in that respect?

A. We discussed relicensing other companies, Stearns to surrender that particular section of the agreement that provided for an exclusive with Stearns and Besser.

Q. Well, I am not sure that I understood you correctly. Did you say—or, your Honor please, would the reporter please read the answer?

(Answer read by the reporter.)

The Court: "Stearns and Besser." "Stearns and Besser", is that what you said?

Mr. Speer: Yes.

A. Yes.

The Court: Mr. Reporter?

The Reporter: Yes.

* * * * * * * *

[fol. 1131] Mr. Neville: Would you read the question, please, and read "Gocorp" instead of "Olsen"?

(Question repeated by the reporter as follows:

"Q. Now, did Mr. Besser say, when speaking of buying out Gocorp as a part of the transaction, did he say how Gocorp was to be bought out?")

A. Not at that meeting.

By Mr. Neville:

Q. What were your comments during the course of this conversation, Mr. Wright?

Mr. Babcock: Objected to as being entirely immaterial and irrelevant. This man has long ceased to be an agent of Mr. Besser or the Besser Manufacturing Company. His agency was to buy the stock which was an accomplished fact in March of 1948. Now he has related what Mr. Besser had to say. The court has received that, but what he might have to say that late after his agency was stopped, unless he is still talking about the stock purchase transaction, what he might have to say about Stearns, what he might have to say about the management of Stearns, since he has said that Mr. Besser had never had any comments to make about the management of Stearns, certainly could not be material, relevant or competent.

[fol. 1132] The Court: I don't know. I don't know what it is. I think I should have the full conversation that took place at the D.A.C. You may answer. How are you going to get it if you do not get what this man said? I think the phrasing was a little unfortunate. You could have asked him what was said.

By Mr. Neville:

Q. What did you say during this conversation?

A. I objected to those conditions.

The Court: That is a conclusion on your part. Say what you said.

A. I told Mr. Besser that I was opposed to the conditions of sale.

The Court: What was your connection at that time? You were with Stearns?

A. I am vice president of Stearns Manufacturing Company.

The Court: I see.

A. I told Mr. Besser that I was opposed to the conditions enumerated by him because it would cause quite a commotion of the stockholders, the balance of the stockholders of the Stearns Company. I related the difficulties that we had encountered over the years because of the Besser name connected with Stearns, and that I did not want any part of the trouble that would ensue from such a negotiation.

By Mr. Neville:

Q. What did Mr. Besser say in answer to that, if anything?

A. He said that he was going to proceed, however.

Q. Did you see Mr. Besser on February 18, 1950?

[fol. 1133] A. Yes, sir.

Q. Where?

A. Fort Shelby Hotel.

The Court: What is the date?

Mr. Neville: February 18. The other was January 22.

The Court: All right.

By Mr. Neville:

Q. At the Fort Shelby. Who was present at that meeting?

A. Ralph Bailey and Mr. Besser and myself.

Q. Did you discuss the proposed Stone deal then?

A. Yes, we did.

Q. What did Mr. Besser say and what did you say?

A. He said that Mr. Stone was still negotiating with him. I reiterated my objections to the conditions of sale.

Q. Did you see Mr. Besser on February 19, 1950?

A. Yes, I did.

Q. Where?

A. I had dinner with him at the D.A.C.

Q. Who was present on this occasion?

A. Mrs. Wright, Mr. Besser and myself.

The Court: Who was present?

A. Mrs. Wright, Mr. Besser and myself.

The Court: And this is what date?

A. February 19.

The Court: All right.

[fol. 1134] A. Sunday night.

The Court: All right.

By Mr. Neville:

Q. On this occasion, what did Mr. Besser say and what did you say?

A. He told me that in the sale of the stock he was always going to—— he wanted to give me the first opportunity to purchase it, and he wanted to know whether I would take over the stock of the Stearns Company financially and reiterated the four conditions again.

The Court: Just give me those four conditions again as you remember them.

A. Recognize the validity of the Besser patent.

The Court: Besser patent?

A. Yes, sir.

The Court: Do you mean the Besser patent?

A. That is the way it was stated during the discussion. It was known as the Scott-Thomas patent, however; Stearns stop making the three-at-a-time machine; take over the agilite machines and process; buy out Stearns—buy out the Gocorp Corporation.

. . . . . .

[fol. 1135] By Mr. Neville:

Q. Can you tell us if the agilite condition was one of the reasons why the transaction did not appeal to you, Mr. Wright?

A. Yes.

[fol. 1136] Q. What was that?

A. Stearns Manufacturing Company have a sinterlite process.

. . . . . .

[fol. 1137] By Mr. Neville:

Q. Is that the only reason?

A. And Mr. Besser's explanation that it was burdensome did not appeal to me as a representative of Stearns, or to me individually.

. . . . . .

[fol. 1138] By Mr. Neville:

Q. What did he say?

A. He said that he was going through with the Stone commitments and that they had them in contract form.

The Court: What is that?

A. They had it in contract form and would file it with the Antitrust attorneys, and he was reasonably sure that he would be able to teach those government jaspers a lesson and get what he wanted.

By Mr. Neville:

Q. Did Mr. Besser discuss the Lith-I-Bar Company on this occasion?

A. Yes, he did.

Q. What did he have to say about the Lith-I-Bar Company?

[fol. 1139] A. The probability of giving them a license to manufacture a two-at-a-time machine under the Gelbman patents.

Q. Will you repeat that, please?

A. The probability of giving them a license to manufacture the two-at-a-time plain pallet machine under the Gelbman patent.

Q. And what would be the inducement to do that, if he expressed himself on that point?

A. I would not know.

Q. Did he say anything about the litigation up North?

A. Yes, he did.

Q. What did he say?

A. He thought that perhaps that licensing Lith-I-Bar would help the final determination of the so-called Bay City suit.

Q. But the license he was speaking of pertained to a two pallet machine as distinguished from a three pallet machine?

A. That is right.

Q. Did you see Mr. Besser on February 22 of this year?

A. I did.

Q. Where?

A. I had breakfast with him at the Fort Shelby Hotel.

Q. Who was present at this time?
A. Mr. Besser and myself.
The Court: What date was this?
A. February 22.

By Mr. Neville:

Q. What did Mr. Besser say and what did you say on [fol. 1140] this occasion if you recall?
A. He told me that the—— he repeated that the Stone contract had been settled upon, however it had not been signed.
Q. Did you see Mr. Besser on February 26 at the D.A.C.?
A. I did.
Q. Who was present on this occasion?
A. Mr. Ray Bailey, Mrs. Wright, Mr. Besser and myself.
The Court: Who is that first one?
A. Ray Bailey, not Ralph, it is his brother.

By Mr. Neville:

Q. Was the Stone deal discussed on this occasion?
A. It was.
Q. What did Mr. Besser have to say about it?
A. He told me that the Stone contract had been prepared and again reiterated that it had been prepared and apparently Mr. Stone was going to sign it, and Mr. Stone had told him the night before that he would sign it and would go through with the deal; that he was with Mr. Stone and Mr. Adams and Mrs. Stone and Mrs. Adams the night before at the Statler, I think.
The Court: Did you ever know this man Stone before?
A. Never saw him until April 3, your Honor.

By Mr. Neville:

Q. And did you have a telephone conversation with Mr. Besser on March 29?
A. March 29, I saw him.
Q. Where?
[fol. 1141] A. In Alpena.
Q. And what did you say on that occasion, and what did Mr. Besser say?

A. Well, I carefully explained to Mr. Besser the rumors that were running around about the Stone contract and the probability of the Stearns Company closing its doors and stopping making the three-at-a-time machine; that the stockholders were all up in arms about it. I asked him not to go through with the Stone contract and to make a deal with Myron Hultmark and myself to save our face with the rest of the stockholders.

Q. What did Mr. Besser say to that?

A. Stone was expected that day, or the next day, and he would see what would happen.

Q. Did anything else happen at this meeting?

A. No. We discussed labor matters and labor problems in his own plant.

Q. Did you see Mr. Besser on April 18, 1950?

A. Yes.

Q. I am referring to the meeting at the Detroit Club.

A. Yes.

Q. Who was present at that meeting?

A. Mr. Myron Hultmark and Mr. Besser and myself.

Q. What was said at this meeting by those present?

A. Well, we again attempted to—— sought to have him not go through with the Stone contract, because of the [fol. 1142] stockholder uprising, the majority stockholder uprising, and we discussed at that time the amount of money that was to be paid to Olsen, where it was coming from, or paid to Gocorp, where it was coming from, and agreed to meet at a later date.

Q. What was said about acquiring Gocorp?

A. The Stearns Company through Stone, were to purchase——

Mr. Babcock: Just a moment. May I have fixed who is saying all this?

By Mr. Neville:

Q. If you can remember.

The Court: I understand that Mr. Besser was doing most of the talking.

Mr. Babcock: I don't know. He hasn't said yet that Mr. Besser is saying it, or he is saying it, or Hultmark is saying it.

The Court: All right.

A. Mr. Besser stated that the Stearns Company were to purchase the Gocorp Corporation in the amount of——

The Court (interposing): Go ahead.

A. (Continuing) ——approximately in the amount of——

The Court (interposing): Is this the 18th?

A. Pardon.

The Court: Is this April 18?

A. This is April 18 at the Detroit Club. (Continuing) ——in the amount of approximately between $250,000 and $300,000, or approximately $270,000.

[fol. 1143] By Mr. Neville:

Q. Did Mr. Besser say or admit in Mr. Hultmark's presence that part of the Stone deal was to acquire the Gocorp Corporation?

Mr. Babcock: Pardon me, if your Honor please, at this point I interpose this objection: It is a fact, and has already appeared that the Stone contract became an executed document in part, I think—— let me check that. Yes, that is correct, March 31.

Now, my objection doesn't go to the witness being asked to state the conversation with Mr. Besser, but my objection does go to the reference in the question to this as a part of the Stone deal, when the Stone deal has already become an executed and consummated transaction, and if its terms are material and relevant here, then the document, stating its terms, is the best evidence.

The Court: Yes, if they are attempting to vary the terms of a written instrument, but I didn't think that the question called for that. May I have the question again here?

(Question read by the reporter.)

Mr. Neville: It so happens, your Honor, that——

The Court (interposing): Just a minute. Does it vary the terms?

Mr. Babcock: I will say to your Honor, if the Stone contract ever becomes material and relevant, there is no refer-

ence in it whatsoever to Gocorp, or to buying Gocorp, or [fol. 1144] anything else.

Mr. Neville: Precisely.

The Court: That doesn't—just a minute. That doesn't require the government or prohibit the government from showing the preliminary steps and conversations up to the final contract.

Mr. Babcock: But this, your Honor, is three weeks after the final contract. This is April 18, and the contract was executed March 31.

Mr. Neville: But it so happens that this is not mentioned at all in the contract.

The Court: Is this part of the conversation afterward?

Mr. Neville: This conversation——

The Court (interposing): Give me the question again. You may be right because of that date.

(Question reread by the reporter.)

Mr. Babcock: This is April 18, your Honor, at the Detroit Club, three weeks after the contract is executed.

The Court: No, he may answer, because it doesn't seek to vary the terms of a written instrument. It is merely what one man said or claims that he said. He may answer.

Mr. Babcock: All right, then, I will add this: That I object to the question as asked unless it is specifically determined that the witness is testifying to a statement by [fol. 1145] Mr. Besser relating to the same contract that was being talked about in February and in January, or whether he is talking about another contract.

The Court: Well, wait a minute. He said the deal. That either is the same contract, or are there several contracts?

Mr. Babcock: But there might be another.

Mr. Neville: We haven't talked about that.

The Court: The question is perfectly proper, if on that date Mr. Besser had made any other statement that might be relevant to this matter and can be introduced. It does not vary the terms of the written instrument. You may answer.

A. He did.

By Mr. Neville:

Q. Did Mr. Besser on this occasion say anything about his competitors participating in the manufacture of three pallet machines?

A. I don't understand the question, as a three pallet machine.

Q. Did Mr. Besser say anything about being the only manufacturer of three pallet concrete block machines?

A. You mean three-at-a-time?

Q. Three-at-a-time.

A. Yes.

Q. I see.

A. Plain pallet machine. The answer is yes.

Q. What did he say?

[fol. 1146] A. Well, he reviewed the history of the plain pallet machine, how he had developed it, put it on the market, and he said that he wanted to be the only one to make a high production three-at-a-time plain pallet machine.

* * * * * * * *

[fol. 1147] By Mr. Neville:

Q. Returning to this conversation you had with Mr. Besser regarding the terms of the proposed Stone deal, did you not testify that Mr. Besser said that one of the conditions would be that Stearns relinquish its rights under the exclusive patent license agreement which came from the Gelbman people.

* * * * * * * *

A. I did not testify that that was one of the conditions.

By Mr. Neville:

Q. You did not testify to that?

A. As one of the conditions. I testified it was discussed.

The Court: Discussed as one of the conditions?

A. No.

[fol. 1148] The Court: Oh.

A. No. There were four conditions. This matter was discussed separately from that.

The Court: Just which condition was this, allegedly?

Mr. Neville: This was one of the conditions.

The Court: Which one?

Mr. Neville: Which I don't know whether it comes 1 or 2 in the list.

The Court: I don't care. I didn't ask you what number it was. I asked you which one. Which condition?

Mr. Neville: My recollection is, your Honor, that the witness testified—and apparently I am being corrected now—that one of the conditions was that the Stearns Manufacturing Company would release its exclusive rights under the original exclusive patent license agreement which went from Gelbman to Besser and Stearns as colicensees.

The Court: That is what I understood the witness to say, too.

Mr. Babcock: Oh, no, your Honor.

A. No.

Mr. Babcock: Your Honor and counsel are confused. The witness never mentioned that as part of his conversations in January and February.

A. I may have, but not as part of the conditions.

Mr. Babcock: Not as part of the Stone transaction?

[fol. 1149] A. No, sir.

Mr. Babcock: Not as part of the Stone transaction?

A. No, sir.

By Mr. Neville:

Q. Do you recall saying that part of the—— don't you recall saying that one of the conditions was that they would recognize, as you said a while ago, the Besser patents?

A. Yes. But that is the Gelbman patent.

Q. But didn't you understand that they——

A. (Interposing) No, I didn't.

Q. (Continuing)——that they would relinquish——

A. If I made that statement——

The Court (interposing): Get it right in a moment.

A. If I may be permitted to clarify what I did say——

The Court (interposing): All right.

A. I said we discussed at the meeting in February, the 19th, at the D.A.C. the licensing of Lith-I-Bar.

The Court: Yes.

A. And that would be surrendering, on the part of Stearns, its exclusive agreement with and in company with Besser, to the Gelbman patents. Now, it was not a condition of the Stone sale. It was something that we discussed separate from the Stone sale. That was my testimony.

The Court: Well, wasn't it part of the conditions of the Stone sale—didn't you say the statement was made to you by Mr. Besser that the three pallet machine would not be [fol. 1150] made any more by the Stearns people?

A. Yes.

Mr. Gelbman: That is not the same thing.

Mr. Babcock: That isn't the same thing.

A. That is not the same thing.

The Court: Of course, the witness refers to the Besser patent. I never heard of the Besser patents until he said that.

Mr. Gelbman: He is talking about the Scott patent, your Honor.

The Court: What is that?

Mr. Gelbman: He is talking about the Scott patent.

The Court: You never heard of the Scott patent until lately.

Mr. Gelbman: I haven't.

The Court: Nor your brother, evidently.

Mr. Gelbman: That is right.

The Court: Is it your brother?

Mr. Gelbman: That is right.

Mr. Neville: Perhaps, your Honor, I can bring this all to a head.

The Court: All right. I think that was a condition.

A. No, sir. It was not.

The Court: Well, you just said—— I thought you just said it was.

[fol. 1151] A. Not as he is framing the question.

The Court: I mean the one I suggested to you.

A. That is giving up the three-at-a-time.

The Court: That was one of the conditions of the sale?

A. That is right.

The Court: Or of the purchase by Stone.

A. That is right.

The Court: Or the sale by Besser of the Stearns stock, was that the Stearns would no longer make the three pallet machine.

A. Three-at-a-time plain pallet.

The Court: Well, yes, the three-at-a-time plain pallet. It is one pallet. I keep thinking of three of them.

A. Yes, sir. That was a condition.

The Court: That was a condition.

A. That is right.

The Court: Of the sale. But the other matter about the Lith-I-Bar having the right to manufacture the two block machine, that was not a condition?

A. No, sir.

The Court: But it was discussed?

A. Yes, sir.

The Court: Now we have it straight.

Mr. Babcock: It was discussed incident to consideration [fol. 1152] of the possible compromise settlement of the pending patent litigation, something entirely separate and distinct.

The Court: All right, you may step down. We will take a recess.

(Whereupon a short recess was had.)

The Court: All right, gentlemen.

By Mr. Neville:

Q. Mr. Wright, did anybody from the Besser Company at any time discuss with you the possibility of the Stearns Manufacturing Company releasing its exclusive rights under the Gelbman license agreement?

A. Yes.

Q. Who?

A. John Stark.

Q. And when?

A. He first called me on the telephone one night, about March 20.

The Court: Who is this?

A. John Stark.

By Mr. Neville:

Q. He telephoned you?

A. At my home one night about 11:30, it was on March 20.

Q. What did he say?

A. He said that Mr. Besser suggested that he get in touch with me and wanted to have Stearns release to Gelbman its exclusive right with Besser for the manufacture of machines under the Gelbman patents.

* * * * * * * * *

[fol. 1153] Q. What did you say to that?

A. I told him to write a letter to the board of directors.

Q. Was that the end of the conversation?

The Court: Give me that again, what he said?

A. He wanted the Stearns Manufacturing Company to release its exclusive right in conjunction with Besser to manufacture vibrating machines under the Gelbman patent.

The Court: You mean throw them open to the entire world?

A. I don't know. That is what he asked. He asked me to release it. I don't know what he wanted to do with it.

The Court: All right.

By Mr. Neville:

Q. Was that the end of the conversation?

A. Yes.

Q. Did you discuss the same matter with Mr. Stark at a later date?

A. Yes.

Q. When?

A. April 6.

Q. Where?

A. In my office.

Q. What did Mr. Stark say on this occasion?

A. He showed me a longhand written letter that was to come from Gelbman to Stearns and asked if it met with my approval.

Q. What did you say?

A. As far as I was concerned it was all right to send it in.

[fol. 1154] The Court: send it in to whom?

A. Stearns.

By Mr. Neville:

Q. Did you say that that was a longhand letter?

A. It was written in longhand.

Q. Did you have that letter typed?

A. Not that letter. This was a letter that was to come from Gelbman to the Stearns Manufacturing Company.

Q. That is right.

A. Which letter subsequently arrived at the Stearns Manufacturing Company and they sent it to me.

Q. Yes. Now, just a minute. Did you retain that longhand copy?

A. No. He just showed it to me and I read it and he took it away with him.

Q. Now I believe you have just said that the Stearns Manufacturing Company later received a letter from Mr. Gelbman?

A. Yes.

Q. I show you a letter addressed to the Stearns Manufacturing Company, dated April 5, 1950, signed "Louis Gelbman," and ask you what that represents?

A. That is a letter received by registered mail at Adrian, and forwarded to me here in Detroit unopened, a letter from Louis Gelbman to the Stearns Manufacturing Company, and my attention.

(The letter referred to was marked by the reporter as Exhibit 156.)

Mr. Neville: I offer in evidence Exhibit 156.

[fol. 1155] Mr. De Gree: No objection.

Mr. Gelbman: No objection.

The Court: It may be received.

[fol. 1156] By Mr. Neville:

Q. Mr. Wright, were the matters discussed in this letter discussed between you and Mr. Stark when he called at your office?

A. Yes.

Q. Will you please tell us what was discussed at your office with reference to this letter?

A. The release by Stearns of the contract provision of the Gelbman contract that granted an exclusive license to Stearns and Besser for the Gelbman patent.

Q. Did Mr. Stark say that he was going to send the draft that he made to New York for Mr. Gelbman's signature?

A. No, he did not.

The Court: Have you introduced that letter yet?

Mr. Neville: Yes, your Honor, this is the letter received from Gelbman by Stearns Manufacturing Company.

. . . . . .

[fol. 1157-1158] A. That letter was in the mail when Stark showed me what I was supposed to get.

The Court: Wait a minute, now. That letter was in the mail?

A. Yes, that letter is dated April 5. Mr. Stark was in my office April 6.

The Court: With a longhand letter?

A. With a longhand letter and said that I would get it from Gelbman.

. . . . . .

[fol. 1159] The Court: That is dated what date?

Mr. Gelbman: April 5.

The Court: Have you any other question you desire to ask now, Mr. Neville?

Mr. Neville: Yes, I am going to proceed to something else, your Honor.

The Court: I mean about this.

Mr. Neville: No, your Honor, I am finished using this exhibit.

The Court: Did you see a copy of some letter before April 5?

[fol. 1160] A. No.

Q. What year is that?

A. This is April 5 this year.

The Court: Before that?

A. No.

The Court: By Mr. Stark?

A. On April 6, I saw Stark.

The Court: On April 6?

A. That is right.

The Court: So that that letter if it is dated correctly was in the mail by the time you saw the other letter?

A. Yes.

The Court: And who showed you the longhand letter?

A. John Stark.

The Court: John Stark?

A. Yes.

The Court: And do you remember receiving this letter?

A. Yes.

The Court: Did John Stark say anything about his longhand letter being in the mail?

A. He said his longhand letter would come to me from Gelbman.

The Court: And as you remember it, not that it is, but as you remember it, to the best of your knowledge, is this what the longhand letter contained?

[fol. 1161-1162] A. It is.

* * * * * * * *

[fol. 1163] Cross-examination

By Mr. Gelbman:

Q. Mr. Wright, the term "agolite" you have used is a connotation given to the particular process that the Besser Manufacturing Company used in making this sinter, is that right?

A. Sinter aggregate.

Q. Sinter aggregate?

[fol. 1164] A. Yes, sir.

Q. When you testified before that agolite and sintering or sinterlite is one and the same, that isn't quite correct?

A. I don't believe I testified that they are one and the same.

The Court: I don't think he did. I thought he said it was another process. That is what he said.

A. That is correct.

By Mr. Gelbman:

Q. It also uses different machinery, doesn't it?

A. Yes.

Q. And the sinterlite process is a Gelbman patent, isn't it?

A. Yes.

Q. And Stearns had been exclusively licensed under the sinterlite process?

A. Yes.

Q. Isn't that right?

The Court: Has Gelbman got that patent, too?

Mr. Gelbman: We have that, your Honor. One or several of them.

By Mr. Gelbman:

Q. Besser is not licensed under those same patents?

A. I don't think so. I know he isn't, but Stearns has an exclusive license under the Gelbman sinterlite patent.

Q. Now, would you say that the giving of a license on the patents covered by the joint license agreement with [fol. 1165] Besser and Stearns to any other person besides Besser and Stearns would result in an advantage to the patentee?

Mr. Speer: I object, your Honor.

The Court: Just a minute, now. I don't know if he is qualified to answer that. Read that question.

(Question read by the Reporter.)

The Court: I don't see how he would have any knowledge of that at all. I sustain the objection.

Mr. Gelbman: This man has been allowed to testify to conclusions all day long about financial benefits to the corporation, financial benefits to himself, and financial benefits to Mr. Besser.

The Court: No, he hasn't. Go ahead. I have permitted him to testify to conversations, what was said and what was not said.

By Mr. Gelbman:

Q. Mr. Wright, in 1945 I believe you purchased the first block of stock; is that right?

A. 1946.

Q. 1946. Then in 1945 you had a conversation with Mr. Besser relative to Gene Olsen, isn't that right?

A. That is right.

Q. And I believe you said that Mr. Besser was interested in finding out something about Mr. Olsen's activities; is that right?

A. Yes.

Q. Was that in connection with the Stearns Corporation?

[fol. 1166] A. Yes.

Q. So that there was no control with—strike that. So that it is fair to assume that at that time Mr. Besser had no knowledge of Mr. Olsen's activities; is that correct?

A. No, it isn't correct.

Q. Well, sir, didn't you testify that he asked you to obtain information concerning his activities?

A. Yes. He told me where he was. He told where he was. I didn't know where he was. Besser told me where he was.

Q. Did he ask you to find out what he was doing?

A. He asked me to find out what his connection with the company was and whether they contemplated taking the Stearns Manufacturing Company in as a subsidiary company. That is the Indiana Limestone Corporation.

Q. But this was another corporation not connected with Stearns at that time?

A. That is right.

Q. Or Besser at that time?

A. That is right.

Q. Now, with respect to this letter, Exhibit 156, wasn't there received by the Stearns Corporation prior to that letter a formal written agreement drawn by my office?

A. Yes.

Q. Do you recall the date, approximately, when that was received?

A. The latter part of March.

[fol. 1167] Q. Yes.

A. March 25.

Q. What happened to the formal written agreement they sent to you?

A. It was carried back to your brother by Mr. Hultmark.

Q. It wasn't signed or executed?

A. No, sir.

Q. And was it presented to your Board of Directors?

A. No, sir.

Q. Do you know whether that was to the same effect as this letter?

A. I understand it was.

Mr. Gelbman: I have no further questions.

* * * * * * * *

[fol. 1168] By Mr. Neville:

Q. Did you, subsequent to receiving the letter of April the 5th, 1950, discuss with Mr. Stark the letter which Mr. Stark had drafted and prepared for Mr. Hultmark's signature, to be sent to the Gelbman people?

A. I did not, but my secretary did.

[fols. 1169-1170] The Court: There you are.

A. I did not discuss it.

* * * * * * * *

[fol. 1171] Mr. Babcock: After having a little help, your Honor, I am willing to concede that the document was taken into Mr. Wright's office by Mr. Stark.

The Court: That is what I thought.

* * * * * * * *

The Court: (Interposing) Then can't you have it—is the girl going to tell the purpose?

Mr. Neville: She is going to say why Mr. Stark came [fol. 1172] there and what he said and what he said was this, that, in substance, I am leaving this here for Mr.

Wright so that you can look at it and have Mr. Hultmark sign it.

The Court: They are willing to admit that part. Aren't you?

Mr. Neville: No, they——

Mr. Babcock: (Interposing) Surely. The letter is prepared on its face for that purpose.

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[fol. 1173] (Draft of letter, undated, from Stearns Manufacturing Company to Gelbman, marked by the reporter as Plaintiff's Exhibit No. 157.)

The Court: Did your girl finally show you that letter?

A. A half hour later.

Mr. Neville: Is the letter in evidence now, your Honor?

The Court: Yes, the letter is in evidence. It is admitted on the record that Mr. Stark went into Mr. Wright's office, that Mr. Wright was not there, and that this was a letter prepared by Mr. Stark that he wanted Mr. Wright to look over and have Mr. Hultmark sign it.

Mr. Babcock: If it had the approval of the Board of Directors.

Mr. Neville: No, that was not mentioned.

Mr. Babcock: Well it is in the body of the letter.

Mr. Neville: Well, it might be in the body of the letter but it is not stated as Mr. Babcock has just stated it now.

* * * * * * * *

[fol. 1174] The Court: That letter never went out, did it?

By Mr. Neville:

Q. Did that letter go out?

A. It was taken to the Board of Directors.

Q. But was the letter ever mailed?

[fol. 1175] The Court: That is simply the copy of the letter made by the girl?

A. That is true.

The Court: And that implies in itself that the Board of Directors would have to pass on it, even if he did not say

so out and out. The letter itself implies that was necessary and of course it would have been necessary as the company could not have given up that right without the action of the Board of Directors.

Mr. Neville: That concludes the direct examination unless your Honor wants the young lady brought in.

The Court: I do not want anybody; I am not conducting the government's case. I try merely to help you out once in a while, as I think I have right here.

Mr. Neville: We certainly appreciate it and I think that saves the necessity of having her come in here.

The Court: All she could testify, if she came in here, is that Mr. Stark came in and showed her that and said, "Show it to Mr. Wright and if he approves have Mr. Hultmark sign it."

Mr. Neville: The government is completely satisfied with the record as it now stands.

The Court: All right. Cross-examine. One question I asked the witness was about this man Stone. He said he never met him until when?

[fol. 1176] A. April 3.

The Court: What was the occasion of your meeting him?

A. He came to my office.

The Court: Had such a contract been entered into between the Stearns——

A. Between Besser and Stone.

The Court: Does Stone own the control now of the Stearns Manufacturing Company?

A. He came in and told me he did, yes.

The Court: Well I guess you were pretty sure that he had control.

A. No, I wasn't sure that he had.

The Court: Did you assure yourself later on?

A. Yes, I did.

The Court: Has he?

A. Yes, the stock is in his name; that is the only way I can interpret that.

Mr. Neville: Well of course there is a fine distinction there; the stock might be in Mr. Stone's name but——

The Court: I know your position on that, but as far as you were concerned Mr. Stone had the stock in his name and controlled the company?

A. Yes, sir.

The Court: All right.

[fol. 1177] Cross-examination

By Mr. DeGree:

Q. Well taking it up at that point, Mr. Wright, when Mr. Stone came into your office on the date you have mentioned, what did he say?

A. He requested me to resign as a director so that he could take my place.

Q. What did you tell him?

A. That I would first discuss it with the Board of Directors and until such time that I could ascertain that he had sufficient stock to control the company I would remain as a director, because I had a duty to perform to the majority stockholders.

Q. What if anything did Mr. Stone tell you at that time with respect to a contract he had made with the Besser Manufacturing Company or Mr. Besser?

A. He said he had made a contract with Besser to buy the stock and he had paid for it cash with his life savings earned after income tax.

The Court: Was he careful to put that in there?

A. Very careful.

* * * * * * * *

[fol. 1178] By Mr. DeGree:

Q. The question was, what if anything did Mr. Stone tell you the contract between himself and Besser or Besser Manufacturing Company contained?

[fol. 1179] A. I asked him whether it contained any restrictive measures and he said it was without strings attached.

Q. I see. What if anything was said by Mr. Stone with respect to calling a meeting of the Board of Directors of Stearns Manufacturing Company?

A. He asked that a meeting be called, a special meeting be called just as soon as possible.

Q. Did he state for what purpose he desired that meeting called?

A. So that he could be elected a director and made president and general manager.

Q. Then I believe you testified that you told him that you would take up his request with the Board of Directors and you would consult with him further?

A. I did.

Q. At some further time did you consult with him?

A. He came in to see me on April 6th.

Q. And will you state what the conversation was?

A. Well at that time he told me that the bank was financing him, The National Bank of Detroit, and that he intended to borrow a large sum over there to enlarge the manufacturing potentialities of the company, and that he was very anxious to take over active management because he didn't have anything else to do, and asked when the Board of Directors were going to hold their meeting.

Q. What did you tell him?

[fol. 1180] A. At the regular stated date the meeting would be held.

Q. Which was when?

A. April——

Q. I don't care for the exact date, but shortly after that, was it?

A. April 17th.

The Court: You mean your annual meeting?

A. Monthly meeting.

The Court: That was the monthly meeting of the Board of Directors of Stearns Manufacturing Company?

A. Yes, sir.

* * * * * * * *

By Mr. DeGree:

Q. Now state whether or not Mr. Stone met with some of the members of the Board pursuant to your last talk with him?

A. He did.

Q. And do you recall when that was?

[fol. 1181] A. April the 17th.

Q. And was the full Board present?

A. No.

Q. Was it a regular meeting of the board?

A. Special meeting.

Q. How many directors were present?

A. Four.

Q. Who were they?

A. Mr. Hultmark, Mr. Joslyn, Mr. Fildew and myself.

Q. And Mr. Stone met with them, did he?

A. Yes.

Q. Will you state what Mr. Stone said to these members of the Board of Directors?

A. Mr. Joslyn asked him what the provisions of the contract was that he had with Besser.

Q. And what did Mr. Stone reply?

A. Well he said, "You have me at a disadvantage and I do not want to discuss it."

Q. Is that all he said?

A. He agreed to take the contract over and show it to Mr. Joslyn the next day.

Q. But at this particular meeting was anything further said by Mr. Stone?

A. No. Substantially that was the conversation.

[fol. 1182] Q. Did he say that he was taken at a disadvantage?

A. That was right.

Q. And that he didn't care to discuss it?

A. He didn't care to expose the contract that he had with Besser.

Q. Did he give any explanation then to the Directors as to why he had wanted to meet with them?

A. None.

Q. Subsequent to that did you see the signed copy of the Stone-Besser contract?

A. Not a signed copy.

Q. I see. Mr. Stone didn't show it to you?

A. No.

Q. But he said he would show it to——

A. Joslyn.

Q. Mr. Joslyn?

A. Yes.

Q. On the next day?

A. Yes.

Q. All right. Now let us go back to the time, Mr. Wright, when in 1946, I believe you stated, the stock of the Stearns Manufacturing Company was first purchased by you for Mr. Besser. What arrangement, if any, was there between you and Mr. Besser concerning compensation to you for your activity?

A. Oh, I was to be paid on a basis of per share and [fol. 1183] expenses in acquiring the stock.

Q. I see. Were you to receive any interest in this stock that was being purchased?

A. Not at that time.

Q. Was there ever any later time—

A. Yes.

Q. At which that subject came up for discussion?

A. Yes.

Q. And how long after 1946 did that occur?

A. 1948, just prior to the Olsen deal, March 26, 1948.

Q. And by the Olsen deal you refer to the fact that you then were to endeavor to purchase the block of Stearns stock held by its executives and directors?

A. Yes.

Q. All right. Then what was said to you by Mr. Besser at that time with respect to any possible interest in the stock of Stearns Manufacturing Company that you were buying which would go to you?

A. Well he said that at some later date that we would arrive at some agreement wherein I would be enabled to purchase the stock.

[fol. 1184] Q. I see. Did the subject come up for discussion at any subsequent times?

A. Yes. In the summer of 1949.

Q. And what was said by Mr. Besser at that time?

A. I had reported to him some conditions that existed and he then asked me if I wanted to take over the stock of the Stearns Company.

Q. What did you tell him?

A. I told him that I would rather wait until after the suit was adjudicated, meaning this suit.

Q. I see. Was any price discussed at that time?

A. No, there wasn't, Mr. DeGree.

Q. After that time, was there any effort—was there any further conversation between you and Mr. Besser whereby you were to purchase this stock from him?

A. The January 22nd meeting at the DAC, this year.

Q. All right. And what was said at that meeting with respect to your acquiring the Stearns stock, held by Besser?

A. Well, he only wanted to know if I wanted to purchase the stock now, take it over, and then set forth the four conditions that he wanted it sold or would sell it under.

Q. Yes. I do not believe on direct examination you stated what your reply to him was.

A. My reply was that I was apprehensive of the furor that may be created by the majority stockholders, should [fol. 1185] such an arrangement become public, and I did not want any part of it.

Q. I see. When was the first time that Mr. Besser stated to you that he had made or had intended to make some contract with Mr. Stone with respect to Stone's acquiring the stock?

A. The meeting of February the 19th.

Q. February 19th?

A. Yes.

Q. It was first proposed to you on January 22nd?

A. Yes; that is right.

Q. And up to that time, had you ever heard of Stone?

A. No.

Q. From Besser?

A. Except that he mentioned Stone's name that night.

Q. On January 22nd?

A. The 22nd.

Q. In what connection did he mention Stone's name?

A. He said that Mr. Stone—there was a Mr. Stone that was desirous of purchasing the stock.

Q. I see.

A. That was all that was said.

Q. And then on February 19th, if that is correct—if the date is correct, and correct me if I am wrong——

A. (Interposing): Right.

Q. (Continuing)—he then did state that he was making some arrangement with Mr. Stone?

[fol. 1186] A. That is right.

Q. And as you testified on direct examination, he discussed with you these four conditions that he was going to impose upon Stone as a requirement for Stone to get this stock?

A. And again tendered me an offer to buy it.

Q. I see. And what was your reply to that?

A. Substantially the same as the first one, because of the apprehension of the trouble that may be caused by the other stockholders.

Q. I see. Mr. Wright, since 1948 have you been actively engaged in the concrete block machinery manufacturing business?

A. Yes.

Q. Have you had opportunity to observe the machines which are being made by the Stearns Manufacturing Company?

A. Yes.

Q. Do you recognize the exhibit that I have in my hand?

A. Yes, I do.

Q. What would you call it?

A. I would call that a twelve-inch cored pallet.

The Court: Cored pallet?

A. Yes, sir.

Mr. DeGree: Will you mark this as an exhibit.

(A cored pallet was thereupon marked Defendant's Exhibit 158 for identification.)

By Mr. DeGree:

Q. I would like to have you explain for the benefit of [fols. 1187-1189] us how a concrete block machine works which uses a cored pallet, as distinguished from a concrete block machine which uses a plain pallet. Could you do that?

A. Yes, I could. But you flatter me, Mr. DeGree, with so many experts present.

[fol. 1190] By Mr. De Gree:

Q. Mr. Wright, will you very briefly show how the cored [fol. 1191] pallet machine works in the production of concrete blocks?

A. Well, with a cored pallet machine, if you will visualize a core box in which the cores are standing perpendicular——

Q. (Interposing): Yes.

A. (Continuing) —this is dropped down over the core to the bottom of the core box or mold box.

Q. Yes.

A. Either—well, of course, with a twelve inch pallet there would only be two of them on a three-at-a-time machine. The aggregate is then pushed in, vibrated, height control, after which the pallet, with the block on it, is ejected from the machine by raising it up through the box.

Q. I see. Now, on a plain pallet, how does that operate?

A. The plain pallet would be, if you visualize a pallet substantially twice the size of this pallet, a little bit larger than twice the size, and then the core box, either the core box will come down on top of the pallet or else the pallet will be raised to the bottom of the core box.

Q. I see.

A. The cores are suspended from the top, that is, the core which makes this hole in the block.

Q. Yes.

A. The aggregate is deposited in the core box, the vibration takes place, the height control is finished, and the [fol. 1192] block and the pallet are stripped down from the core box. And that will be on the plain pallet.

The Court: Stripped down or up?

A. Down.

The Court: Some machines they go up?

A. This machine they go down. Plain pallet they go down.

The Court: Wait a minute, now. Did you ever see the Lith-I-Bar?

A. Yes. I think the core box raises on that one, but the pallet—the block don't go up. The block can't go up. On the plain pallet machine it can't go up through the core box.

The Court: Doesn't the pallet in the Gelbman patent push the block up?

A. Yes. That is the cored pallet machine.

The Court: I am talking about the plain pallet.

A. No, it can't. The pallet can't go through the core box when it is plain.

The Court: Wait a minute.

A. Impossibility.

The Court: Your Gelbman patent is a plain pallet patent?

Mr. Gelbman: I don't know, Mr. Stark may be able to give you an explanation of it. I don't know enough about the mechanics of it.

The Court: Don't you know what the Gelbman patent [fol. 1193] is? Is that a plain pallet?

Mr. Stark: As I understand it, the patent itself has nothing to do with the pallet. They use the plain pallet in the operation of the machine that uses the Gelbman patent process, both the method and apparatus.

The Court: But in the machine used by Lith-I-Bar——

Mr. Stark (Interposing): It could be either.

The Court: What is that?

Mr. Stark: It could be either, as I understand it.

The Court: It can be either the cored or plain. But you use the plain pallet, don't you? And doesn't the plain pallet push the block up as it is released for—isn't that part of the ejection?

Mr. Stark: May I have Mr. Besser explain?

Mr. Gelbman: Maybe Mr. Besser can tell me.

Mr. Besser: When the pallet is shoved out, that would be a cored pallet in all cases.

The Court: That would be a cored pallet in all cases?

Mr. Besser: You couldn't use a cored mold. It would have to be a cored pallet.

The Court: I didn't know you people used any cored pallets any more. I thought you used nothing but the plain pallet?

Mr. Besser: The Besser machine is a plain pallet machine. [fol. 1194] The Court: Plain pallet.

Mr. Besser: In that, the pallet drops down, and the block——

The Court: (Interposing) The same as in the Lith-I-Bar?

Mr. Besser: Yes, sir.

The Court: How about the Bonnet? What happened to the Bonnet patent? Wasn't that pushed up?

Mr. Stark: I believe it was, but I don't think it was a plain pallet.

The Court: Wasn't that one of the distinctions made the other day, or alleged distinctions between the means of ejection in the Lith-I-Bar machine and the so-called Gelbman patent? Wasn't that said to me right here in this very court?

Mr. Gelbman: Isn't your Honor thinking of the Darden claim?

The Court: No. I am talking about—you weren't here, I don't think. You were here, and so were you, Mr. Milewski. Isn't that a distinction that was made to me in the claim of Lith-I-Bar, that we eject the block through the bottom and the Scott machine—the Scott patent with the Gelbman ejected through the top? Wasn't that said to me, Mr. Stark, here?

[fol. 1195] Mr. Stark: I would have to clarify the point. I can tell you about the Scott patent. It could eject either way in that case.

The Court: But in the Scott patent the pallet does go up through and shove it out.

Mr. Stark: In the means they show in the drawings.

[fols. 1196-1200] The Court: Yes; all right. But in the Gelbman patent he mentions the ejectment was not emphasized at all.

Mr. Stark: No.

The Court: I got it mixed up with the Scott Patent. All right. I am oriented now.

By Mr. DeGree:

Q. So Mr. Wright, when a cored pallet is used the block itself has to come up in the box?

A. That's right.

Q. In order to get it out?

A. That's right.

Q. On a plain pallet the box goes up and the block remains on the pallet at the bottom?

A. Either the box may come up or the pallet may go down with the block on it.

Q. So that by using a plain pallet machine you may have a fully automatic high production machine?

A. Yes.

Q. By using a cored pallet it is not a fully automatic machine?

A. No.

Q. It is not as high a production?

A. No.

. . . . . .

[fol. 1201] Cross-examination

By Mr. Babcock:

Q. I want to refer first, Mr. Wright, to your testimony of your conversation in the late summer or early fall of 1945 with Mr. Besser. As I understand it, at that time Mr. Besser told you that it was rumored, or it had come to his ears that the Indiana Limestone Corporation was going to take over the Stearns Manufacturing Company and operate it as a subsidiary of the Indiana Limestone Corporation?

A. Correct.

Q. And, incident to his conversation with you reporting that rumor, he asked you to make an investigation of the rumor?

A. That is correct.

Q. And then asked you to engage in an activity of acquiring some stock in the Stearns Manufacturing Company?

A. Yes, sir.

Q. Which, during 1946, you proceeded to do?

[fol. 1202] A. That is right.

Q. Then for some reason or other undisclosed to you, there was a recess, so to speak, during 1947 in the activity of purchasing stock in Stearns?

A. Yes.

Q. And then in 1948 you resumed the activity?

A. The latter part of '47.

Q. The latter part of '47?

A. Yes. But we purchased the stock in 1948.

Q. Now, in connection with the matter of the purchase of the stock of the officers of the Stearns Manufacturing

Company, have you, in your business experience, bought and sold stocks?

A. Stock broker?

Q. No, on your own account?

A. Yes. Much to my sorrow.

Q. And in connection with the effort to acquire the stock of the officers of the Stearns Manufacturing Company, you had conferences with Mr. Smith?

A. Yes.

Q. The broker?

A. Yes.

Q. On the basis of your own experience, if not also on the basis of your conferences with Mr. Smith, were you not conscious at that time of the fact that if it became known, at least among stockholders of the Stearns Manufacturing Company, that you were engaged in an activity to acquire [fol. 1203] substantial stock, that that would increase the price of the stock?

A. It did.

Q. I mean, before you began your effort, while you were still talking with Mr. Smith, in the early stages of it, you were conscious of the fact that if your activities along that line became known, it would result in an increase in the price?

A. No doubt it would, yes.

Q. And under the instructions of Mr. Besser, you did not want the price to go over $10 per share?

A. Not at that time, there wasn't any limit of $10 per share at that time, when we first started to purchase.

Q. I see.

A. The stock was being sold around $7 at that time.

Q. But without that limit you still wanted to get the stock at as low a price as you could?

A. Most assuredly; that was sound business.

Q. And if it became known that the Besser Manufacturing Company was engaging in an activity of acquiring this stock, it would have resulted in an increase in price, wouldn't it?

A. I would assume that it would.

* * * * * * * *

[fol. 1204] By Mr. Babcock:

Q. Am I correct, Mr. Wright, in assuming that what you and I have just been discussing was the basis for your testimony, "we did not want to increase the market price but we wanted to buy it cautiously"?

A. That was one of the reasons, yes.

Q. Now, you also told us when you came to the actual purchase of the stock in 1946 that the first official purchaser was Mr. Stanley Fildew?

A. Yes.

Q. And you selected him because he was your friend and counsel?

A. Yes.

Q. By counsel, did you mean your attorney?

A. Yes.

Q. Mr. Fildew had acted as your own personal attorney in matters previous to this?

A. Yes.

Q. Was he advising you personally in this particular activity?

A. No, he was not, until after the stock was—we started to purchase the stock.

[fol. 1205] Q. And your consulting him in connection with that stock was a matter of your own judgment?

A. The day before we purchased the stock or the day we purchased the first stock I consulted Mr. Fildew and asked him if I could put it in his name.

Q. And did he continue to act as your personal attorney throughout your effort to acquire the balance of the stock?

Mr. Neville: Objection. I don't see that that is material, your Honor.

The Court: I think he may answer.

A. Well, there wasn't any question that I discussed with him regarding the purchase of the stock thereafter, that I remember.

By Mr. Babcock:

Q. Was he present at the Smith office when the stock was finally transferred?

A. He was not.

Q. Was Mr. DeGree?

A. Mr. DeGree was.

Q. And representing you in the transaction?

A. I took Mr. DeGree along so that I would have someone other than myself present. I did not want to be responsible for the entire transaction myself.

Q. Now, you have just told us that you do not recall consulting Mr. Fildew during the course of the various purchases of the stock. Do you recall consulting Mr. De Gree?

A. The morning the purchase was made.

[fol. 1206] Q. So far as you know, since the transfer of the Stearns stock to Mr. Fildew, no one, including Mr. Besser, has had any influence or control over Mr. Fildew's judgment as a stockholder and director of the Stearns Manufacturing Company?

A. Not that I know of, sir.

Q. And, as I understand it, the collection of Mr. Matchener, Vera Dixon and Wells K. Stanley, and Mr. Pierson was your selection?

A. Yes, sir.

Q. And no one, including Mr. Besser, exercised any influence or control over you in the making of those selections?

A. He suggested that I get someone other than myself.

Q. Yes.

A. I was the one selecting.

Q. But, you selected those persons?

A. Yes, I did it.

Q. No one exercised any control or influence over you?

A. No.

* * * * * * * *

[fol. 1207] By Mr. Babcock:

Q. Now, you were testifying to a telephone conversation you had with Mr. Besser in March of 1948 and that testimony was that Mr. Selz has reported that Olsen was welching on the deal, or in other words backing out or reneging on some of the promises he had made. Did you yourself ever talk with Mr. Olsen?

A. No, sir, not until March 26, the first time I ever met him, 1948.

Q. That is at the time the actual purchase of the stock was consummated?

A. That is right.

Q. Of your personal knowledge then, you do not know [fol 1208] whether Mr. Olsen ever made any promises of that character?

A. Well I heard him at the time that the deal was consummated again reiterate the statement that he had made to Selz.

Q. And what was that?

A. Namely, that he was withdrawing his promise to stay out of business for five years.

Q. In other words, at the time of the consummation of the purchase in the stock broker's office, you heard him admit that he had made the promise to stay out of business for five years?

A. That is right.

Q. And he then stated that he had and was withdrawing that promise?

A. Yes, sir.

Q. Now there was present at that meeting, in addition to yourself and Mr. DeGree and Mr. Olsen, Mr. Grant Cook as Mr. Olsen's attorney?

A. That is right.

Q. And Mr. Hal Smith, Junior?

A. Yes.

Q. Was Mr. Selz there?

A. Yes.

Q. Anyone else?

A. Mr. Hague.

Q. Mr. Hague?

A. Yes.

Q. Anyone else?

[fol. 1209] A. No, I guess that is all. Mr. Delamater—I think I testified that he was present, the other day.

Q. Now, were there any other promises that Mr. Olsen had made that he was withdrawing or did withdraw at the time of the consummation of the purchase of the stock?

A. Well, he made some other promises there that he later withdrew.

Q. Were those promises conditions attached to the purchase of the stock?

A. Yes, they were.

Q. And what were those?

A. That he resign immediately as a director and president of the company, and that he also have all of the other directors resign and there would be a completely new election of directors.

Q. And then later he withdrew those promises?

A. One week later he withdrew those.

Q. Where were you when he withdrew the promises a week later?

A. In his office in Adrian.

Q. Who was present at that time?

A. Mr. Olsen, Mr. Selz and myself.

Q. How long after that was it that he did resign?

A. May 4; I think the meeting with Mr. Olsen in his office was April 7.

Q. Now when you spoke of giving progress reports to Mr. Besser, subsequent to the purchase of the stock, did you mean reports of progress of the business of Stearns Manufacturing Company?

[fol. 1210] A. Yes.

Q. Such as you would give to any stockholder who might be interested?

A. That is right, financial—the machines we were selling.

Q. Now, I just want to be sure before we leave Mr. Olsen, were there any other promises that Mr. Olsen made that he withdrew?

A. No, that was the only two, his withdrawal of his staying out of business and the resignation from the director. I might say there was one other, yes, there was a promise that he would not remove any engineering plans, any blue prints from the office,—a lot of them disappeared and I assume he removed them.

Q. That is purely an assumption on your part, though, isn't it?

A. Yes.

Q. Now, at the time of your conference with Mr. Besser

in January of 1950, when you discussed with him the negotiations then pending with Mr. Stone for the purchase by Stone of the Besser Manufacturing Company stock in the Stearns Manufacturing Company, did you know whether or not the Gocorp Corporation was for sale?

A. There had been many rumors of it.

Q. It had been rumored that it was being offered for sale?

A. Being offered to Jesse Besser for sale, Jesse Besser was attempting to buy it.

Q. Well, if that is the way you interpret my question, I would like to correct it. I am speaking now of a public offering.

[fol. 1211] A. No.

Q. An offering to anyone.

A. I know of no public offering, Mr. Babcock. None.

Q. Except for this one particular rumor you have just mentioned you had no information of the Gocorp Corporation being offered for sale?

A. No.

Q. Now, after January, 1950, and your conference with Mr. Besser, your next conference was in February, as I understand it?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. In the February conference, did you advise Mr. Besser that subsequent to the January conference you had reported the subject matter of the conference to representatives of the Department of Justice?

A. I did not.

Q. Is it a fact that you did?

A. I did not.

Q. Then, after the February conference, as I understand it, your next conference was in March?

A. Yes.

Q. In the March conference, did you advise Mr. Besser that you had reported the subject matter of your February [fol. 1212] conference with him to the representatives of the Department of Justice?

A. I did not.

Q. Is it a fact that you did?

A. Not at that time, no. I hadn't talked to anybody in the Department of Justice.

Q. Then, after the March conference, when was your next conference?

A. In your office, on May 15.

Q. You did not see Mr. Besser between the March conference and May 15?

A. No, I didn't. Wait a minute. I will take that back. I had a meeting with him in April. April 17 and April 18.

Q. Well, in the April conferences, did you advise Mr. Besser that after the March conference you had reported, the subject matter of your conference to representatives of the Department of Justice?

A. I did not.

Q. Is it a fact that you did?

A. I did not.

Q. Well, after the April 18 conference, did you report the subject matter of your conferences to representatives of the Department of Justice?

A. I did not.

Q. When did you?

A. About three weeks ago, when they came to me.

Q. Why at that time?

[fol. 1213] A. At their request, and also the fact that I did not want to see the Stearns Manufacturing Company wrecked. I had a duty to the rest of the stockholders of the Stearns Manufacturing Company.

Q. Wasn't that same responsibility present in January?

A. Yes.

Q. Wasn't that same responsibility present in February?

A. Yes.

Q. Wasn't that same responsibility present in March?

A. Yes.

Q. Then why did you wait until late in May or June?

A. Because at that time the Stone contract had become public property. Everybody knew what was in it.

Q. Well, whether or not it had become public property, wasn't your responsibility to the Stearns Company the same?

A. Yes.

Q. But your official conscience didn't direct you to report it in January, or February, or March?

A. Well, there wasn't anything to report at that time, other than I reported to the board of directors. After the February conference I reported my conferences to the board of directors of Stearns.

Q. But in May or June, your official responsibility directed you to report the matter to the government officials, even [fol. 1214] to the detail of the use of the word "jaspers"?

A. Well, when they came to me and asked me what I knew about it, all I could do was tell them.

Q. What you knew about what?

A. The entire transaction, from start to finish.

Q. What transaction?

A. The purchase of the stock and the conduct of the company.

Q. The purchase of the Stearns stock?

A. Yes.

Q. Well, the fact of the matter is, you had already appeared as a witness before the Grand Jury?

A. That is right.

Q. In the fall of 1948, didn't you?

A. That is right.

Q. And you had conferred with the government representatives at that time?

A. Well, in the Grand Jury, yes.

* * * * * * * *

[fols. 1215-1216] By Mr. Babcock:

Q. The fact of the matter is, Mr. Wright, representatives of the government were informed from your lips in the fall of 1948 of your purchase of the Stearns stock, were they not?

* * * * * * * *

[fols. 1217-1218] A. Other than in the Grand Jury room, no.

* * * * * * * *

[fol. 1219] A. The answer to that question is "no," your Honor.

The Court: Certainly. It could not be anything else. He told you that three times. He said, "No, other than what I told the Grand Jury." What he told the Grand Jury is not before us at all and he is not going to testify as to that. You may proceed with the question, and he said "no."

* * * * * * * * *

[fols. 1220-1222] If he has made a mistake you may cross-examine him further.

By Mr. Babcock:

Q. I am not talking about the Grand Jury, Mr. Wright, and I am not talking about anything except a point of time. Now, is it not a fact that in the fall of 1948 government representatives heard from your lips the story of the purchase of the Stearns stock?

A. They did not.

Q. Not a single government representative?

A. Positive.

Q. They did not know anything about it until just three weeks ago?

* * * * * * * * *

[fol. 1223] By Mr. Babcock:

Q. Can you give me, please, the last question that was objected to and the objection stated?

(Whereupon the last question was read by the reporter as follows:

"I corrected that so as to make it the direct question, [fol. 1224] did the government representatives learn from you the Stearns deal prior to three weeks ago?")

* * * * * * * * *

The Court: I said he may answer the question as long as he knows that when he refers to agents of the govern-[fol. 1225] ment he does not mean the Grand Jury. I do not know how a court could be any more explicit than that. Can you answer the question?

A. The answer is "no."

Q. Can you fix for me the exact day about three weeks ago when you conferred with representatives of the Antitrust Division?

A. No, I cannot, not the exact date. It was Tuesday or Wednesday, three weeks ago.

Q. Was it during the last week of May?

A. Yes, next—the third week of May, Mr. Babcock.

Q. During the third week of May?

A. Yes.

Q. Now, prior to that time, you had not told any representatives of the government of the United States the information about your purchase of the Stearns Manufacturing Company stock?

A. No, sir.

Q. And prior to that time, you had not related to any representative of the government of the United States your conversation with Mr. Besser?

A. No, sir.

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[fol. 1226] By Mr. Babcock:

Q. Prior to the third week in May, had you disclosed [fol. 1227] to an agent of the Federal Bureau of Investigation the fact of and the terms of the purchase of the Stearns stock?

A. Not to my knowledge.

Q. Prior to the third week in May, had you disclosed to an agent of the Federal Bureau of Investigation the subject matter of your conference with Mr. Besser?

A. Not to my knowledge.

Q. Prior to the third week in May, had you disclosed to any representative of the Antitrust Division of the United States the report that Mr. Olsen had welshed on his promises?

A. Not to my knowledge.

Q. At the time you appeared before the Grand Jury, did anyone accompany you up to the Grand Jury room?

A. No. I went by myself.

Q. Up to this present moment, during the calendar year of 1950 or as much of the calendar year of 1950 as has

expired, have you had any discussion at all regarding your representation of the Besser Manufacturing Company in the capacity of labor relations counsel?

A. Yes.

Q. With whom?

A. Jesse Besser.

Q. When?

A. March 29. His personnel man and assistant personnel man, two or three times during the month of April, and [fol. 1228] once or twice in the early part of May.

Q. And what was the subject matter of those discussions?

A. Labor problems of the Besser Manufacturing Company.

Q. During those discussions, or any other discussions during 1950, did Mr. Besser say to you that you were no longer representing the Besser Manufacturing Company?

A. No, he did not.

Q. Why did you testify that the question of your representing the Besser Manufacturing Company is problematical?

A. I haven't made up my mind whether I want to continue or not.

Q. Why?

A. Well, I have been placed in a most embarrassing position, representing him on the Stearns Company. I just don't want to be in that position.

Q. Representing him with the Stearns Company?

A. That is right, at the Stearns Company.

Q. How do you represent him at the Stearns Company?

A. Well, he is the owner of the stock. The stock is in my name. I was elected with that stock. I always was under the impression that I represented Jesse Besser.

The Court: You mean there is still some stock in your name?

A. Yes, some that I own myself, though, your Honor, at the present time.

The Court: Well, do you own any stock that belongs [fol. 1229] to Mr. Besser at the present time?

A. Not since the middle of April.

The Court: All right.

By Mr. Babcock:

Q. The middle of April of this year?

A. No.

Q. What did you do in the middle of April of this year to change that status?

A. Mr. Besser transferred it to Ben Stone's name.

Q. As a matter of fact, it hasn't been transferred at all.

A. Well, I understand it has, Mr. Babcock, from the transfer sheets of the Detroit Trust Company.

Q. And it is only on the basis of that information that you testify that there was a change made in April of 1950?

A. Yes.

The Court: Is there any question but what Mr. Stone bought this stock?

Mr. Babcock: Contracted to buy it, but there hasn't been any transfer of it made.

A. I understand the transfer has been made on the books of the corporation.

The Court: The contract hasn't been introduced yet, has it?

Mr. Babcock: No, your Honor.

Mr. Speer: No, not yet.

By Mr. Babcock:

Q. Well, since April, then, your concept of your represen-
[fol. 1230] tation of Mr. Besser with Stearns terminated?

A. That is right.

Q. So that that embarrassing position was removed, then, wasn't it?

A. I did not say that that was the embarrassing position. I said the embarrassing position was at Stearns, as a director.

Q. Yes, sir. So that since April of 1950, your position as a director is on the basis of your own personal ownership of stock?

A. No. It is on the basis of the representative of all of the stockholders.

Q. That is right.

A. Elected by all the stockholders.

Q. But your position as a director has nothing to do with the Besser Manufacturing Company stock?

A. At the present time, no.

Q. And since April, 1950?

A. Yes. It never has been directly Mr. Besser. It has been Besser and everybody else. All the stockholders. I have been elected by all the stockholders, Mr. Babcock.

Q. But since April, 1950, the position of being in the middle that you speek of has been removed?

A. No. It has increased.

Q. Well, let me see whether I understand your previous testimony.

A. Well, let's see.

[fol. 1231] Q. As I understand your previous testimony, you felt that you were in the middle because you were representing the Besser Manufacturing Company. Is that correct?

A. Substantially, yes.

Q. All right. Since April, 1950, that condition has no longer existed, isn't that true?

A. Because Besser has transferred his stock to Stone.

Q. Since April, 1950, that condition has no longer existed, isn't that correct?

A. Yes and no, Mr. Babcock. I am still a director of all of the stockholders.

Q. All right. Aside from your capacity as a director of all of the stockholders, since April, 1950, that condition has no longer existed?

A. I will agree with you.

Q. All right. Why then today, in June of 1950, is it problematical that you continue representing the Besser Manufacturing Company?

A. Well, you will have to take that up with Mr. Besser. I wouldn't know.

Q. But you have told me that Mr. Besser has said nothing to you about discontinuing your employment, but it is your testimony about its being problematical——

A. (Interposing) And I testified a few moments ago that I didn't want to continue.

[fol. 1232] Q. Would you let me finish my question?

A. Pardon me. I think I testified a moment ago I didn't care to continue.

Q. Yes.

[fol. 1233] BEN STONE, called as a witness for the government, and having been duly sworn by the Clerk, testified as follows:

Direct examination

By Mr. Neville:

Q. Please state your full name.

A. Ben Stone.

Q. Where do you live, Mr. Stone?

A. 20031 Shrewsbury, Detroit.

Q. What is your business or profession?

A. Investing money in businesses to make money.

Q. Can you particularize on that a little bit?

A. Well, would you like a chronological record of the businesses I have been in and what I have done with them?

The Court: No, we don't care what businesses you have been in. What is your business now? And it shouldn't be difficult to answer, if you have got a business.

A. I invest money in businesses with the purpose of [fol. 1234] operating them so that I can make a profit for my investment.

By Mr. Neville:

Q. Where is your place of business now, Mr. Stone?

A. 16281 Hamilton.

Q. And what kind of an establishment is that?

A. It is a heating company.

Q. Is that the business you are in now?

A. One of my businesses.

Q. What are your other businesses, if any?

A. Building a group of houses in Hazel Park, Detroit.

Q. Any other business?

A. I am a stockholder of the Stearns Manufacturing Company.

The Court: Is that a business, or is that a fact, that you own stock? You don't actively work there, do you?

A. I have been prevented from doing so, your Honor.

The Court: Well, I anticipate something else is coming, so it might as well come out now. Go ahead.

By Mr. Neville:

Q. You have appeared here in answer to a subpoena, have you not, Mr. Stone?

A. Yes, sir.

Q. And you were requested to bring with you an agreement which was entered into on or about March 31, between you and the Besser Manufacturing Company. You have just now handed me that agreement, have you not?

A. Yes, sir.

[fol. 1235] (The agreement referred to is thereupon marked Government's Exhibit 159 for identification.)

Mr. Neville: I offer in evidence Exhibit 159.

By Mr. Neville:

Q. Would you please tell us what that contract represents?

A. This contract represents to me the opportunity of getting into a business that, with proper operation, careful management, efficient supervision, would realize a very [fol. 1236] handsome profit for me for a long time to come.

Q. Let me ask you this, Mr. Stone, does it represent the contract whereby you have arranged to purchase the Stearns stock from the Besser Manufacturing Company?

A. Would you say that again?

Mr. Neville: Would you read it?

(Question read by the reporter.)

The Court: It calls for a conclusion but if there is no objection, he may answer.

(The last question read by the reporter.)

A. That is the contract.

Mr. Neville: Now, I reoffer it in evidence.

[fol. 1237] The Court: All right, it may be admitted.

By Mr. Neville:

Q. That is your signature, is it not, Mr. Stone?

A. Yes, sir.

Q. And you signed this agreement on March 30, 1950?

A. Yes, sir.

Q. You read the agreement, did you not, before you signed it?

A. Yes, sir.

Q. You understand the agreement?

A. Very well.

Q. Now, reading from paragraph 1——

The Court: I think I had better look at this paper. This is the contract that was entered into since this case was [fol. 1238] started?

Mr. Babcock: March 30, 1950.

The Court: And if it is a bona fide deal, it accomplishes one of the purposes of the government in this lawsuit. Isn't that true?

Mr. Neville: If it is not a bona fide deal.

The Court: I did not say that. I said if it is a bona fide deal it accomplishes one of the purposes of the government in bringing this action.

Mr. Neville: If it is a valid contract, yes, your Honor.

The Court: If this is a bona fide deal, it accomplishes one of the purposes of the government in bringing this action in the first place. Is that true or is it not?

Mr. Neville: I am afraid I do not understand your question, your Honor.

The Court: I do not know how I could make it any plainer. If Besser has sold its Stearns stock or all of its interest so that Besser is no longer in Stearns Company, to this man, and it is a bona fide deal——

Mr. Neville: Yes, that is one of the——

The Court: That accomplishes one of the objects of this suit in the first place?

Mr. Neville: Yes, your Honor.

The Court: All right. I do not say it is or is not a bona [fol. 1239] fide deal. I do not know. Just a minute, please. Let me look at it.

(Short delay.)

The Court: May I ask first, so that I have these figures before me, this concerns 45,000 shares. How many shares are there in the Stearns Manufacturing Company?

Mr. Neville: It is capitalized at close to 200,000 shares, as I understand it.

The Court: How many were owned by Mr. Besser?

Mr. Neville: It was close to 90,000.

Mr. Henry: About 89,000.

The Court: And this would be about a half of Mr. Besser's interest?

Mr. Henry: Approximately half.

The Court: And he would be the largest stockholder, still, other than Mr. Stone?

Mr. Babcock: No.

Mr. Henry: I think there are approximately 189,000 or 186,000 shares outstanding.

The Court: Do you know by whom they are held, Mr. Henry?

Mr. Henry: Many stockholders.

The Court: Does anybody hold any great big share like 45,000—a large amount?

Mr. Henry: No, none other than the Besser Manufac- [fol. 1240] turing Company.

The Court: All right. I think I have heard about the last part of it. I mean by that, talking about the cored pallet and the two pallets, and all that, that we have had under discussion. All right.

By Mr. Neville:

Q. Reading from paragraph 1, Mr. Stone, and quoting: "Stone will pay in cash $10,000 upon execution of this agreement."

Have you paid the $10,000?

A. Yes, sir.

Q. Did you receive anything upon payment of the $10,000?

A. A signed copy of that agreement by Mr. Besser.

Q. Did you receive any certificates of stock?

A. Yes.

Q. How many?

A. 45,000 shares.

Q. Do you have those shares of stock now?

A. I do not

Q. Where are they?

A. I believe they are held as collateral by the Alpena Savings Bank for the balance of the payments due under that agreement.

The Court: That is provided for in the agreement, as a matter of fact, isn't it?

Mr. Neville: I do not believe so.

[fol. 1241] The Court: Isn't that provided for that he is not to get the stock until it is all paid for?

Mr. Henry: Yes, sir.

By Mr. Neville:

Q. Have you signed a note for any money in favor of the Besser Manufacturing Company, Mr. Stone?

[fol. 1242] The Court: * * * Have you entered into any other obligation——

A. No, sir.

The Court: Or any contract, or signed any note to Besser, I suppose——

Mr. Neville: Yes, your Honor.

The Court: Or to Mr. Besser.

A. No, sir.

The Court: All right. That is what I expected his answer would be.

By Mr. Neville:

Q. Paragraph 2 reads, and I quote:

"Stone will have during the life of this agreement the right to vote said shares and also unless and until any such shares are sold by Besser, the right to vote all other shares of Stearns now or hereafter owned by or for the benefit of Besser. Besser from time to time will execute such proxies to Stone as may be required to effectuate this right."

Has Besser executed any proxies in accordance with this paragraph I have just read?

[fol. 1243] A. Yes, sir.

Q. Do you have a copy or do you have an original of any proxies that were executed?

A. Yes, sir.

Q. Do you have them with you?

A. Um-hum.

Q. May I look at them, please?

(A paper is produced by the witness.)

Q. You have just handed me a paper which is captioned at the top: "Proxy" and is signed "Besser Manufacturing Company, by J. H. Besser, President." Is that the proxy you have just referred to a second ago, Mr. Stone?

A. Yes, sir.

(Whereupon the proxy referred to was marked by the reporter as Plaintiff's Exhibit 160.)

Mr. Neville: I offer in evidence Exhibit marked 160.

Mr. Babcock: I have no objection.

Mr. De Gree: We have none.

The Court: What is this—a proxy?

Mr. Babcock: This is the proxy, your Honor——

The Court: It may be received.

Mr. Babcock: As a matter of fact, we furnished the government copy of this, along with others, a couple weeks ago.

Mr. Neville: Would your Honor care to look at this?

The Court: No. It is a proxy. It gives him a right to vote [fol. 1244] how many shares?

Mr. Henry: All of Stearns standing in the Besser Manufacturing Company.

The Court: 89,000.

Mr. Babcock: That is right.

The Court: He has the right to vote the Besser stock?

Mr. Babcock: That is right, your Honor.

By Mr. Neville:

Q. Have you had occasion to vote any of the Besser stock since you have held this proxy?

A. No, sir.

The Court: Did you have a meeting of the board of directors of the company? Didn't I hear something about a meeting?

Mr. Babcock: Of the board of directors, but not a stockholders' meeting.

The Court: Did they have a meeting of the board of directors? Weren't you put on the board?

A. No, sir.

Mr. Babcock: No, not yet.

The Court: All right.

By Mr. Neville:

Q. Did you attempt to have a special meeting of the stockholders called, Mr. Stone?

A. No, sir.

[fol. 1245] Q. Have you attended any meetings of the board of directors of the Stearns Manufacturing Company?

A. I attended a meeting where directors of the Stearns Manufacturing Company were present. Whether it was a board meeting or not, I do not know.

Q. Now, reading from paragraph 7, and I quote:

"Stone will do everything within his power and opportunity to cause Stearns to request and to accept from Besser Manufacturing Company the licenses described in paragraph 8 hereafter, it being recognized by the parties that there exists presently a serious question of infringement of patents by Stearns."

Now I assume, of course, that the parties referred to are you, Mr. Stone, and the Besser Manufacturing Company; is that correct?

The Court: What are you reading from there?

Mr. Neville: Paragraph 7, your Honor.

The Court: All right.

By Mr. Neville:

Q. Did you hear my question, Mr. Stone?

A. Yes, but I do not follow you at all. Will you do the whole thing over again, please?

Q. All right: "Stone will do everything within his power and opportunity to cause Stearns to request and to accept from Besser Manufacturing Company the licenses described in paragraph 8 hereafter, it being recognized by the parties

[fol. 1246] that there exists presently a serious question of infringement of patents by Stearns."

Now the parties referred to there, of course, are you and the Besser Manufacturing Company. It could not be anybody else, could it, Mr. Stone?

A. Frankly I don't know.

Q. Well, I asked you just a moment ago if you understood the contract that you signed and you said yes. Now, are you saying now that you do not understand this portion of the contract?

A. Mr. Neville, when I was introduced to these people I was informed by my introduction that they were very, very honorable people, and as a result I accepted the statements that they made because of my introduction, and I have had no reason to this date to change my thinking.

The Court: That is not the question. The question is, you said when you were asked whether you understood this contract,—you were very emphatic that you knew all about it.

A. I do.

The Court: And now he asked you a question about it and you said you don't know, so whether they are honorable people or not has nothing to do with that.

By Mr. Neville:

Q. I will have you read paragraph 7 to the point where you have read it, and state whether or not you understand that.

A. Oh, yes. Yes. The answer to your question is "yes."

[fol. 1247] Q. Now, what was this serious question of infringement of patents by Stearns which you, as one of the parties, Mr. Stone, recognized?

A. The three-at-a-time machine.

The Court: What is that? What did he say?

(Answer read by the reporter.)

By Mr. Neville:

Q. What was the question about the three-at-a-time machine?

A. Mr. Neville, I was informed by Mr. Stark and Mr.

Besser that Stearns was infringing on their patents on the three-at-a-time machine.

The Court: That who was, Stearns?

A. Yes.

By Mr. Neville:

Q. Did Mr. Stark state in what way Stearns was infringing?

A. Mr. Neville, I would be unable to understand any legal description of what way at all. I was quite satisfied with their explanation.

Q. Was that the whole explanation that Mr. Stark gave?

A. Yes.

Q. As you have just stated it?

A. Yes.

Q. And that is the explanation that you accepted?

A. Yes.

Q. Do you know or were you told at that time what par-
[fol. 1248] ticular patents were involved?

A. I did not ask.

Q. Reading from paragraph 8 of the agreement:

"Besser will grant Stearns, in consideration of Stone's undertakings as aforesaid but without limitation to the life of this agreement, non exclusive licenses as follows:

"1. To manufacture and sell cored pallet concrete block machines without limitation as to size of block produced or number of blocks produced simultaneously, so long as the said machines are adaptable exclusively to the manufacture of blocks on cored pallets and

"2. To manufacture and sell plain pallet concrete block machines provided that such machines will produce not more than one or two blocks simultaneously."

That is a portion of the paragraph, your Honor. But for our purposes I think we can stop there.

Did you know at that time, Mr. Stone, that Stearns was actually manufacturing a three-at-a-time plain pallet machine?

Mr. Babcock: At what time, please?

By Mr. Neville:

Q. At the time that you signed the agreement?

A. Yes.

Q. Did you, or do you know of any patents which the Besser Manufacturing Company has on plain pallet machines?

[fol. 1249] A. Will you say that all over again?

Q. Did you, or do you know of any patents which the Besser Manufacturing Company, or Mr. Besser has on plain pallet machines?

A. Yes.

Q. What are those patents?

A. I don't know. They showed me a number of them March 30th at Alpena, and I was not particularly interested and I didn't make any careful observations.

Q. Did you read the patents?

A. No.

Q. Weren't you interested in reading the patents, Mr. Stone?

A. Mr. Neville, I was told these people were very honorable——

The Court: Oh, no.

Mr. Neville: I didn't ask that.

The Court: That isn't the point. Honorable or not, weren't you interested in reading the patents? That is what he asked you.

A. There was no need for my reading them, your Honor.

The Court: Just answer the question, whether there was need for it or not. You had invested $10,000 and were about to invest how much more?

A. $260,000 more.

The Court: And you didn't examine the patents. Just say whether you did or not. It is immaterial to the court.

[fol. 1250] A. I did not.

The Court: Whether you did or you did not.

By Mr. Neville:

Q. Did you have your attorney examine the patents, Mr. Stone?

A. No.

The Court: There isn't any evidence he had an attorney yet.

By Mr. Neville:

Q. Well, did you seek the advice of counsel, the advice of your own counsel to pass on these patents?

A. On the patents, no. On the agreements, yes.

Q. I asked you about the patents.

A. No.

Q. Do you know how many plain pallet machines were manufactured by the Stearns Manufacturing Company in 1949, Mr. Stone?

A. No.

Q. Do you know how many were manufactured in 1948?

A. No.

Q. Do you know how many were manufactured in '47?

A. No.

Q. Did you attempt to learn the number of plain pallet machines manufactured by Stearns in 1949?

A. No.

Q. For the year '48?

A. No.

Q. And for '47?

[fol. 1251] A. No.

Q. Did you know upon signing this agreement how much of the success of the Stearns Manufacturing Company was attributable to its business in plain pallet machines?

A. Yes.

Q. What did you know on that subject?

A. Only what an examination of their statement for the year ended—fiscal year 1949 showed.

Q. What did that show?

A. Oh, about $1,000,000 in sales.

Q. $1,000,000 in sales?

A. Yes.

Q. Did that statement show the total sales of Stearns Manufacturing Company for that year?

A. I remember it was a certified audit for the year ended August, 1949. And Stearns Manufacturing Corapany showed about $1,000,000 in sales. It has been some time since I saw the certified audit. But it was that statement that prompted

me to become interested in the Stearns Manufacturing Company.

Q. Were you able to determine from that statement how much of the profits of the company were attributable to business in plain pallet machines?

A. Mr. Neville, from that statement I saw very little profit. That is why I made my deal with Besser.

Q. Do I understand you to say that the fact that there [fol. 1252] was little profit is what appealed to you in making this deal?

A. That is exactly right, Mr. Neville.

Q. Now, I will ask you again, and you will answer if you know, Mr. Stone, do you know how much of the success of the Stearns Company is attributable to its sales of plain pallet machines?

A. Will you please tell me what you mean by "success"?

Q. How much of the profits are attributable to the sales by Besser of the plain pallet machines—by Stearns, of the plain pallet machines?

A. In the certified audit that I saw, ended August, 1949, I saw very little profits.

* * * * * * * *

By Mr. Neville:

Q. I will now read from paragraph 9 of the agreement, quoting:

"Besser will assign to Stearns, in consideration of Stone's undertakings as aforesaid but without limitation to the life of this agreement, all production rights, all accounts receivable on Besser's books, and all rights of Besser to return of advances, all inventory and all engineering draw-[fol. 1253] ings in connection with the sinterizing machine for the manufacture of agelite, so-called, and all of Besser's interest in a certain contract between one Frank Leftwich and Besser. For such assignment, Stearns will assume all of Besser's obligations under said contract with Leftwich and will pay to Besser all sums advanced by Besser to Leftwich, all sums receivable by Besser from Marietta Concrete Company on account of the purchase of agelite equipment, and all sums receivable by Besser from Lightweight Aggre-

gate Corporation and the cost of inventory on hand for agelite equipment, less a credit against said sums of $30,000. Besser will make no charge for the engineering drawings. Besser unconditionally guarantees payment of all accounts receivable from Marietta Concrete Company, and Lightweight Aggregate Corporation which are hereby assigned to Stearns."

Now, Mr. Stone, do you know what the obligation of Besser under the Leftwich contract, so-called, the Stearns Manufacturing Company would be assuming upon performance of this contract?

A. Nothing. It was a stand-off and a washout.

Q. Do you know what sums were to be paid to Besser which had been advanced by Besser to Leftwich?

A. That credit of $30,000 left Leftwich out.

[fol. 1254] Q. Oh. That isn't responsive to the question.

* * * * * * * *

[fol. 1255] Mr. Neville: Mr. Reporter, will you please read the question?

(Question read by the reporter, as follows:

"Q. Do you know what sums were to be paid to Besser which had been advanced by Besser to Leftwich?")

A. Nothing.

* * * * * * * *

[fol. 1256] "Q. Do you know which sums receivable by Besser from Marietta Concrete Company on account of the purchase of agelite equipment was to be paid by Stearns under this agreement?")

A. Mr. Neville, I believe that as of this moment Marietta Concrete Products have settled their account with Besser in full. I don't think that there is any money outstanding on that account.

Q. Well, did you ascertain that fact, Mr. Stone?

A. Oh, yes. I have been working very closely with the [fol. 1257] Christy's. They own Marietta Concrete Products.

Q. Yes, but upon signing the agreement, did you know in dollars and cents what that represented?

A. I believe the figure was mentioned. But then I got a guarantee from Mr. Besser that they would hold me harmless. In other words, I would only act as the collection agency. Marietta Concrete——

The Court (Interposing): Where is that? In the contract?

A. Yes.

Mr. Babcock: Yes, your Honor.

The Court: All right.

By Mr. Neville:

Q. Do you know, Mr. Stone, what sums receivable by Besser from Lightweight Aggregate Corporation and the cost of inventory on hand for agelite equipment was to be paid by Stearns to Besser?

A. Well, Lightweight Aggregate again was a guaranteed account. That was a standoff, and we would collect and transmit to Besser. On the inventory, there was approximately $150,000 worth of inventory. I checked that.

Q. Did you have any conversations, Mr. Stone, with Mr. Besser incident to the execution of this agreement which related to the possibility of Stearns buying out the Gocorp Corporation?

A. Not with Mr. Besser, but with Ralph Bailey, and I think Mr. Besser was present at one meeting; well, we discussed it.

[fol. 1258] Q. When?

A. Oh I drove down with Mr. Rosenthaler and Mr. Bailey down to Adrian in February because I wanted to look the Stearns Manufacturing Company over and see what they had. At that time I met Mr. Hultmark and was taken through the plant, and I always had agelite in mind, and so we drifted over to see Gene Olsen, and I went through his plant and saw it.

Q. You say "we drifted over;" who does that include?

A. Mr. Rosenthaler, Mr. Bailey and myself.

Q. Where was Mr. Besser?

A. He was not there.

Q. All right.

A. We saw Gene Olsen's plant. It had the physical capacity that I wanted, the plant size; it did not have very much

of anything else that I was interested in, but I was interested in the physical size of his plant. Stearns is small and with the picture I had in mind for agelite the physical plant at Stearns would be most inadequate. So I visited with Gene and I had a number of visits with him and with the constant thinking in mind that if we could work something out on a practical basis that would be sound I wanted that big plant of his, and there were some more things he had that I was interested in.

Q. But were you interested in this Gocorp plant from the point of view of furthering the agelite venture or of operating the Gocorp Corporation as a concrete block machine manufacturer?

[fol. 1259] A. My thinking on this entire matter has always been conditioned by agelite. That was my—the two things that appealed me in this deal are, one, the statement, the year-end statement of Stearns which did not look too good; I saw a lot of things about it that I did not like where I could save some money and increase the efficiency; and agelite was the thing that really made me enthusiastic. Without that in I would not be interested in the deal.

Q. Did you talk with Mr. Besser with reference to Stearns acquiring the Gocorp Corporation?

A. Well, during January and February and March we had a lot of meetings and they were about various things that I did not like, and I wanted more information.

Q. Well, do I understand your answer to be that you did discuss that subject with Mr. Besser?

A. Mr. Besser was present at discussions that we had relative to agelite. I wanted to stall until I saw the Marietta plant in operation, so I was in no hurry to sign any contract until Marietta was actually producing agelite, so we had lots of conferences; I would get George Tilley to stall—my attorney—until I saw something actually in operation.

The Court: Did you think you could make a success of the Stearns plant?

A. Oh, good Lord, your Honor, certainly could.

Q. Had you ever been in the block business before?

[fol. 1260] A. No, sir, but I had been successfully running manufacturing plants.

The Court: Did you know who was running the Stearns Manufacturing Company plant up to that time?

A. Yes, sir.

The Court: Who?

A. Myron Hultmark, the president.

The Court: Did you know that Mr. Besser had 89,000 shares in that?

A. Yes, sir.

The Court: Did you know that Besser has been in this business,—grew up in it,—that he was making pavement blocks or blocks of this kind probably before you were born?

A. Yes, sir.

The Court: But you could make a success of the business that you said was losing money, is that your idea?

A. I have a definite record to that effect, your Honor.

Mr. Babcock: I might invite your Honor's attention to the fact that, on the state of this record up to this moment, even though Mr. Besser has owned this stock, he has not taken one bit of any part in the management of Stearns Manufacturing Company or has he had anything to do with its operation.

The Court: All right. The court has its own idea on these things. He owned 89,000 shares. And here is a man who [fol. 1261] is going to make a big success of something that Mr. Besser was losing money on,—if that is his testimony, it is all right. It may stand.

By Mr. Neville:

Q. I do not believe you have answered my question, Mr. Stone.

A. What was the question?

Q. The question was, did you have any conversations with Mr. Besser relative to Stearns acquiring the Gocorp Corporation?

A. Mr. Besser was present when we had discussions relative to the agreement, but it is very difficult, Mr. Neville, in a general discussion such as we had to say who said what and who said when. I do know that Mr. Besser was present——

Q. I wonder if you have understood my question. I am going to state it once more. Do you recall having any conversations with Mr. Besser relative to the Stearns Manufacturing Company acquiring the Gocorp Corporation?

A. Yes.

Q. Where?

A. Well, we had a session at the Shelby Hotel some time shortly after my visit to Adrian.

Q. When was that?

A. Oh, some time in February.

Q. Wo was present at the Fort Shelby?

A. Oh, Mr. Rosenthaler was present, Ralph Bailey, myself, Mr. Besser. I am not certain whether Stark was there or not.

[fol. 1262] Q. All right. Now, what was said as closely as you can remember, by Mr. Rosenthaler, by Mr. Stone, yourself, and the other parties who were present at that conference?

A. Well, I pointed out that the Stearns Manufacturing Company did not have a sufficient plant capacity, in my estimation, to be able to manufacture the agelite machinery there, and it looked like Gene had enough plant capacity; probably had several hundred thousand feet under roof and a good railroad siding there—an old building, but it looked like it could be used. I checked Gene's inventory but with the exception of I would say some odds and ends that you always accumulate in manufacturing, the inventory was not too bad. I did not think too much of his machine tools as they were second hand, and he had the standard job shop tools which I was not overly impressed with, but aside from that, in my estimation, he did not have a hell of a lot, so my thinking was——

The Court: Did I hear you correctly? If I heard that correctly, strike that word out, and you do not use that word here.

A. I am sorry, your Honor.

The Court: And you do not um-hum and uh-huh and all that. You answer "yes" or "no,"—so the witness will conduct himself and keep his language within bounds.

By Mr. Neville:

Q. What did Mr. Besser say, if you remember, on the subject of Stearns acquiring the Gocorp Corporation?

[fol. 1263] A. Mr. Besser said very little.

Q. Did he mention that as one of the conditions to signing the so-called Stone agreement?

A. No, there were not any conditions.

Q. There were no conditions?

A. No, outside of those in the agreement.

Q. Did anyone else at that meeting mention the acquisition of the Gocorp Corporation by Stearns as one of the conditions to the signing of the agreement?

A. Well, Mr. Neville, at no time in any of our discussions was the acquisition of Gocorp a part of the agreement.

Q. How did the question happen to arise then, Mr. Stone?

A. Well, I thought that if we could work out some sort of a set-up with Gene to get hold of that big plant and use that for agelite, on a basis where it would be profitable my ultimate thinking was that the Stearns plant is old, dilapidated, and inefficient, and to sell off the physical plant at Stearns, reduce our investment in capital assets and give us more working capital, get rid of the foundry, sell off the physical plant——

The Court: Are you through with your answer?

. . . . . .

[fol. 1264] The Court: You may finish.

A. My thought was to sell off the physical plant Stearns because, as I said, it was old and dilapidated, and convert the physical assets into additional working capital which we would need, and that we could use the big plant that Gene had on a satisfactory basis, either on a rent or on a basis that would be equitable, I was all in favor——

The Court: When you say Gene, I suppose you mean Olsen?

A. Olsen.

The Court: The Gocorp Corporation plant?

A. Yes.

By Mr. Neville:

Q. Have you finished with your answer, Mr. Stone?

A. Yes, sir.

Q. I believe you have just testified, and you will correct me if I am mistaken, that you first discussed this contract with Mr. Besser some time in February of this year?

A. Yes, sir.

Q. Are you sure, Mr. Stone, that you did not discuss this transaction with Mr. Besser in January; I am thinking particularly of a possible dinner party at the Statler or at the D.A.C.?

[fol. 1265] A. No, that was in February.

Q. In February?

A. Yes, February. I discussed it with Mr. Rosenthaler in January.

Q. Did you discuss with Mr. Rosenthaler the possibility acquisition by Stearns of the Gocorp Corporation?

A. Not in January.

Q. When?

A. When we drove back from Adrian in February, Mr. Rosenthaler, Mr. Bailey and myself, it added up like it could have some very excellent results.

The Court: When the witness volunteered a little while ago to tell about the businesses that he was in and I said I was merely interested in his own business right then, what he did, I did not know that this was the man who is the Stone referred to in this contract. If the government or the defendant desires to inquire, I do not have the same objection now that I did then.

Mr. Neville: Thank you, your Honor.

By Mr. Neville:

Q. Am I to understand, Mr. Stone, that at no time did you and Mr. Besser discuss the acquisition of Gocorp by the Stearns Manufacturing Company as one of the conditions of this agreement?

A. Mr. Neville, we discussed Stearns taking over or merging or acquiring Gocorp a number of times, but at no [fol. 1266] time was it a condition of this agreement.

Q. Well, did discussions pertaining to the acquisition of Gocorp by Stearns take place outside of conferences where the agreement itself was discussed?

A. Mr. Neville, as late as yesterday I talked to Gene Olsen. I have been visiting with Gene Olsen off and on for months because I want to maintain a friendly relationship with him. That big plant of his is to me very enticing. I like it. It has got room to breathe. And if it ever works out that it is going to be a reasonable deal, I would very much like to acquire Gocorp.

Q. Do you have an understanding or an agreement with Mr. Besser—and I am not speaking of the written agreement, Mr. Stone—do you have an understanding or an agreement with Mr. Besser which provides in substance that you will use your best efforts when you are in a position to do so to have Stearns acquire the Gocorp Corporation?

A. I do not.

Mr. Babcock: I object, if your Honor please.

The Court: He has answered and said he does not.

Mr. Neville: You may cross-examine.

[fol. 1267] Cross-examination

By Mr. De Gree:

Q. Who first suggested, Mr. Stone, that you buy the stock of Besser in the Stearns Manufacturing Company?

A. Ed Adams.

The Court: Who was that?

Mr. De Gree: Ed Adams.

The Court: Is that somebody I have heard of before in this case?

Mr. Babcock: He is an officer of the National Bank of Detroit.

The Court: Oh, all right.

By Mr. De Gree:

Q. And when was this suggested to you, Mr. Stone?

A. In January.

Q. What year?

A. This year.

Q. Now, at that time, had you known Mr. Rosenthaler?

A. No.

Q. When did you first meet Mr. Rosenthaler?

A. Oh, I guess about the middle of January, this year.

Q. Who introduced him to you?

A. Ed Adams.

Q. And you knew that Mr. Rosenthaler had been employed by the Besser Manufacturing Company?

A. Yes.

[fol. 1268] Q. Do you know how long he had been employed by the Besser Manufacturing Company?

A. I did not.

Q. Now, Mr. Stone, when did you first become interested in the Stearns Manufacturing Company as such?

A. After I came back from Marietta, Ohio.

Q. When is the time?

A. Oh, February, this year.

Q. February?

A. Yes.

Q. When did you go through the Stearns Manufacturing Company plant to inspect it, if you ever did?

A. Shortly after the Marietta trip in February.

Q. In February.

A. Um-hum. Mr. Hulfmark took us through.

Q. All right. What block machinery did Stearns Manufacturing Company manufacture?

Mr. Babcock: At that time?

By Mr. DeGree:

Q. Yes, at that time, we will start with.

A. Would you like to have me recite the inventory I saw?

Q. No. I did not ask you that, Mr. Stone. I asked you what block machinery this Stearns Manufacturing Company was manufacturing, if you know.

A. I saw six 50's on the floor.

Q. Six 50's?

[fol. 1269] A. That is right.

Q. All right. What else did you see?

The Court: What is that?

A. It is a two-at-a-time machine.

The Court: Two pallet?

A. No.

Mr. Babcock: No.

A. I saw one .15 being built.

The Court: Wait a minute. You said no?

Mr. Babcock: Not a two pallet, your Honor.

The Court: I have done that for six months. Two blocks on one pallet.

A. And there were odds and ends of machines being built up.

By Mr. DeGree:

Q. You saw the inventory, is that correct, or do I understand you to say you saw some machines in the process of construction? Which?

A. I saw both the inventory, machines in the process of construction, the foundry, the physical plant, the engineering room, the general office——

Q. (Interposing) Just a minute, Mr. Stone.

* * * * * * * *

[fol. 1270] By Mr. DeGree:

Q. I interrupted you there, Mr. Stone, because I do not believe I had asked you for that information. I wanted to know what types of machines Stearns Manufacturing Company was making at that time. And you say you saw both inventory of machines and the machines in the process of manufacturing. Right?

A. That is right.

Q. You enumerated the 50 machine?

A. That is right.

Q. Or several of them that you saw?

A. Six of them.

Q. Six of them. You enumerated the 15 machine?

[fol. 1271] A. One.

Q. Were there any other machines that you saw?

A. There may have been some more in various stages of build-up.

Q. That is, any that you recognized?

A. No, not that I recognized.

Q. All right. Have you ever seen concrete block machinery manufactured before?

A. No, sir.

Q. These machines were entirely new to you?

A. No machines are new to me.

Q. I said, these concrete block machines that you observed in the process of manufacturing, or as inventory, were new to you at the time. Is that right?

A. You mean I had never seen these machines before? No, I had never seen——

Q. (Interposing) Or machines of the same type?

A. Yes. I have seen machines of the same type.

Q. Where?

A. Marietta.

Q. What machines did you see at Marietta, what type machines?

A. Some Besser Vibra-Packs.

Q. Was that the No. 50?

A. They don't make a No. 50.

Q. And to what Stearns Manufacturing Company machine does the Besser Vibra-Pack correspond?

[fol. 1272] A. Well, the 15 makes three-at-a-time.

Q. What does the Vibra-Pack do?

A. Makes blocks.

Q. Does it make three-at-a-time?

A. Three-at-a-time, six-at-a-time, two-at-a-time.

Q. I see. Is it fair to assume, then, Mr. Stone, that the Besser machine, Vibra-Pack, which you saw af Marietta, corresponds with the particular make of Stearns machine?

A. I never saw a Stearns 15 work. I don't know.

Q. I see. Didn't you ever see any Stearns machine work?

A. No.

Q. How many blocks at a time would the Stearns machines make?

A. You want me to tell you what I have been told, or what I know?

Q. No. What you know, Mr. Stone.

A. I don't know.

Q. Do you know what the hourly rate of production for the Stearns machines is, of the various types?

A. Again, do you want me to repeat what I have been told, or what I know?

Q. Just what you know, Mr. Stone.

A. I don't know.

Q. And for the rest of the questions that I ask you, I only want what you know.

A. Thank you.

Q. Now, what percentage of dollar sales of the Stearns [fol. 1273] Manufacturing Company was represented by the sale of each type of machine that is manufactured, if you know?

A. I believe I can make a fairly accurate guess.

Q. Let's not guess, Mr. Stone.

A. Would you want it down to pennies?

Q. Do you know, yes or no?

A. Yes, fairly well, for purposes of this.

Q. All right. Then let's have it. Not to pennies, approximately.

A. Approximately, taking 1949 sales, closing August, 1949, Stearns had a total sales of approximately $1,000,000. Of that $1,000,000, I would guess very accurately that $250,000 were parts. Of the $750,000 remainder, I would break that down into probably one-third the three-at-a-time, and the balance two-at-a-time and one-at-a-time, and I don't think my ratio is too far wrong.

Q. One-third three-at-a-time. That would be one-third of $750,000?

A. One-third in dollar volume.

Q. All right. Now, just so I can write this down, not forget it, how did you break the rest of it down?

A. I believe that there is a——

Q. (Interposing) No, I am just asking what you said.

A. Mr. DeGree, I saw that statement——

Q. (Interposing) No, I am not interested in what you saw. You gave an answer, and I want you to repeat it to [fol. 1274] me so I can write it down.

A. I would like to see the copy of the year-end audit. I will give it to you exactly.

Q. Mr. Stone, just answer my question, if you will. You broke it down to one-third three-at-a-time. What else did you say?

A. Approximately $250,000 in service parts.

Q. You have given me that. Now I want your breakdown of the $750,000.

A. Approximately $250,000 in three-at-a-time.

Q. Right after that.

A. And approximately a half a million in everything else.

Q. You gave me something else. A half a million made of what?

A. Made up of two-at-a-time, one-at-a-time, batch mixers, and other items that Stearns makes as a part of its regular line.

Q. One-at-a-time, two-at-a-time, and mixers, you have mentioned.

A. And auxiliary equipment, molds, core boxes, et cetera, et cetera. Would you like a list?

Q. No, not right now, Mr. Stone. Now, do you know what a high production and a low production block machine is?

A. I do.

Q. What is the difference? What is your definition for a low production machine?

A. A tamper.

Q. What type of low production machine does Stearns Manufacturing Company make?

[fol. 1275] A. I don't believe that at this time they are in production on any low production machines.

Q. Now, your tamping machine, that is, as you have—you have finished your description of a low production machine?

A. Yes.

Q. Do I understand that any machine that is——

A. (Interposing) Do I understand that you are——

Q. (Interposing) We can't both talk at once.

A. Is it your understanding that I am an expert?

Q. I am just asking you some questions, Mr. Stone. All you need to do is to answer them. I wouldn't characterize you as an expert; to answer your question. But the question before you is your definition of a low production machine, and, as I understand it, you say that a tamper is a low production machine. Is that right?

A. Yes.

Q. Do you have anything further to add to your definition as to what constitutes a low production machine?

A. Yes. I could add.

Q. All right. Please do so.

A. A low production machine would be any machine designed, manufactured and built for the purpose of making blocks with a relatively small production as compared to a high production machine.

The Court: You are absolutely safe with that definition, [fol. 1276] but it doesn't answer the question. Go ahead.

By Mr. DeGree:

Q. Would you like to commit yourself a little more definitely, Mr. Stone?

A. I would not.

Q. Can you? Can you commit yourself more definitely than that? I am waiting for your answer.

A. No.

Q. Now, do you have a separate definition for a high production machine?

A. Yes.

Q. Will you give us the benefit of that?

A. I take it you are referring to block machines?

Q. Oh, yes. That is understood. Those are the only machines I am talking about, concrete block machines such as manufactured by Stearns Manufacturing Company.

A. A high production concrete block machine would be a machine that would produce blocks in excess of 500 blocks an hour.

Q. Have you ever seen a concrete block machine in operation?

A. Yes.

Q. Prior to January of 1950?

A. No.

Q. From what source did you obtain your opinion as to what a high production machine is?

A. From Sig Hudberg.

Q. Who is he?

[fol. 1277] A. He owns Sona. The owner of Sona in Detroit.

The Court: Of what in Detroit?
A. Sonac.

By Mr. DeGree:

Q. How is that spelled, S-o-n-a?
A. S-o-n-a. They manufacture blocks. Bill Boren.
Q. Will you identify him?
A. Bill Boren has Boren Concrete Mix and Boren Building Products. Ben Wilk. Harry Brown. Those gentlemen respectively own Standard Building Products.
Q. I see. So you obtained the information from them as to what they considered a high production machine?
A. They are in the business. They are making them.
Q. But you obtained your information from them. Is that right?
A. That is right.
Q. All right. Now, at what price did Stearns Manufacturing Company sell its various concerted block machines?
A. Hultmark told me that——
Q. Wait a minute. Do you have any information of your own other than what Mr. Hulmark told you?
A. Mr. Hultmark is president of Stearns.
Q. I understand who he is. But this is a preliminary question. Do you have any information of your own, other than what Mr. Hultmark told you?
A. Well, where else would I obtain it?
The Court: Answer the question.
[fol. 1278] A. Except from the president of the company?
The Court: Answer the question. Have you any information other than what Mr. Hultmark, the president of the company, told you?
A. No.

By Mr. DeGree:

Q. All right. As a matter of fact, you weren't familiar with the industry whatsoever in January of 1950, were you? January 1, let's put it, 1950? And I am talking about the concrete block machinery industry.
A. I knew nothing whatever about it.
Q. All right. What other products did the Stearns Manu-

facturing Company make in January of 1950, other than what you have mentioned? And you have mentioned a 50 machine, a 15 machine, you have mentioned mixers. Now what other products did that company manufacture, Mr. Stone?

A. Well, they made a Jolt-crete.

Q. That is a block machine, is it?

A. Yes.

The Court: What did they call that?

Mr. DeGree: Jolt-crete.

Mr. Babcock: J-o-l-t-c-r-e-t-e.

A. And then various auxiliary attachments that go with the block machine.

By Mr. DeGree:

Q. Such as what?

A. Such as molds, such as core boxes, such as wearable parts.

[fol. 1279] Q. How many different types and sizes of mixers did they manufacture?

A. You know, you are cute.

The Court: Witness, please answer the questions.

A. Well, your Honor——

The Court: Whether he is cute or not is absolutely immaterial. Just answer the questions.

A. Your Honor, I had——

The Court: There are attorneys here that will take care of——

A. Yes, but who is going to take care of me?

The Court: I will take care of you if you continue with these remarks there. You just answer the question.

A. Your Honor, have I——

The Court: Answer the questions; whether he is cute or is not cute does not make any difference in this lawsuit.

A. Well, it makes a lot of difference to me, your Honor.

The Court: Answer the question.

By Mr. DeGree:

Q. Do you understand the question, Mr. Stone?

A. Will you repeat it, please.

Mr. DeGree: Will you please read it?

(Whereupon the reporter read the last question.)

A. I don't know.

Q. Did they make bins?

A. They did.

[fol. 1280] Q. Loaders?

A. I don't know.

Q. Did they make hoists?

A. I don't know.

Q. Did they make pallet returns?

A. Yes.

Q. What kind?

A. Plain pallets.

Q. A plain pallet return?

A. Um-hum.

Q. Do you know whether they made an automatic cored pallet return?

A. I don't know.

Q. What part of the product or the materials going into the making of the machines that Stearns Manufacturing Company manufactured, did the company make at its plant?

A. A large part of it.

* * * * * * * * *

The Witness: If the court please, may I say something?

The Court: Yes, certainly.

The Witness: First I want to apologize to the court for my rather unseemly conduct, but there is another purpose involved in Mr. DeGree's questioning that has nothing to do [fol. 1281] with this case, of which I am aware and Mr. DeGree is aware. And I have a very, very important contract involved here, and at the next meeting of shareholders in November I do not have enough shares that I control to get a board of directors that will work along the lines I want them to work. I think, your Honor, that the purpose of this questioning has nothing to do with this case, because the transcript will show that my answers to Mr. DeGree's questions in a search for proxies among the other stockholders, that I am not competent to run the business, and

I have no way of getting into the record the fact that I am not only competent but very capable of running it.

The Court: If the questions are improper, there is a battery of attorneys there who will object. Don't you worry about that.

The Witness: Only so far as this case is concerned.

The Court: That is all; if they are not competent for this case, they will object. You answer the questions.

By Mr. DeGree:

Q. The last question I asked you, Mr. Stone, was what part of the finished product did the company make and I believe you said a large part. My next question then is what parts did the Stearns Manufacturing Company purchase from outside sources for assembly?

A. I believe motors, the electrical gear, all the electrical equipment, probably gears and standard parts that it would [fol. 1282] not be practical for Stearns to manufacture itself.

Q. Do you have any exact knowledge on the subject, Mr. Stone?

A. I do not.

Q. And what knowledge you do have is gained from looking at a 1949 financial statement of Stearns?

A. And in talking with Mr. Hultmark, and directors of the Stearns Manufacturing Company.

Q. I see. Now, I believe you talked on your direct examination with respect of this stock. How many shares of stock of the Stearns Manufacturing Company did you receive at or after March 30, 1950, that being the date that you entered into the contract?

A. 45,000 shares.

Q. Will you state whether or not those shares of stock have been transferred to your name on the books of the company?

A. I believe they were.

Q. Do you know when?

A. I believe some time around April 15; it might have been a few days one way or the other; the treasurer of the Besser Manufacturing Company and I went to the Detroit Trust Company and had the stock recorded in my name.

Q. I see. And thus far you have paid $10,000; is that correct?

A. Yes, sir.

. . . . . .

[fol. 1283] By Mr. DeGree:

Q. What patents does the Stearns Manufacturing Company have or operate under in manufacturing concrete block machines?

A. I don't know.

Q. What patents does the Besser Manufacturing Company have or control under which it manufactures concrete block machinery?

A. I don't know.

Q. Up to March 30, 1950, was Stearns Manufacturing Company infringing any patents owned or controlled by Besser, or Besser Manufacturing Company?

A. I was told they were.

. . . . . .

[fol. 1284] By Mr. DeGree:

Q. I believe you said you did not seek advice of patent counsel with respect to these patents of these two companies?

A. I did not.

Q. You did, however, talk to Mr. Stark?

A. I did.

Q. You knew at the time that Mr. Stark was Mr. Besser's attorney and attorney for the Besser Manufacturing Company?

A. I did.

Q. And based upon what the Besser Manufacturing Company attorney told you, you were satisfied to obligate yourself under this contract to require Stearns Manufacturing Company to take a license from Besser. Is that right?

A. That is right.

Q. And you were satisfied under the terms of this contract that if you were unsuccessful in doing this, that the contract could be immediately canceled by Besser?

A. I was.

Q. Did you receive any information whatsoever from Mr. Stark other than the bald statement that the Stearns Manufacturing Company was infringing a Besser patent?

[fol. 1285] A. No.

Q. And that is the extent of the statement Mr. Stark made to you concerning the infringing?

A. It is.

Q. Now, Mr. Stone, you have been in various businesses, haven't you?

A. I have.

Q. You have been an officer of corporations, have you not?

A. I have.

Q. You have been a director of corporations, have you not?

A. I have.

Q. Do you understand what the duty of a director is?

A. I do.

Q. Do you understand that the duty of a director is to protect the interest of the company of which he is a director?

A. I do.

Q. Do you understand that he is to protect the interest of all of the stockholders of the company?

A. I do.

Q. And do you think under this contract, with as little knowledge as you had concerning this question of infringing, that it would be to the best interests of the Stearns Manufacturing Company to take a license from Besser Manufacturing Company?

A. Under the terms of the contract, I do.

Q. I am asking you whether you think it is to the best [fol. 1286] interests of the Stearns Manufacturing Company and all of its stockholders for Stearns Manufacturing Company to take a license from Besser under a Besser patent?

A. I do.

. . . . . .

VOLUME

II

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Vol. II

TRANSCRIPT OF RECORD

(Pages 689 to 1178)

Supreme Court of the United States

OCTOBER TERM, 1951

No. 230

BESSER MANUFACTURING COMPANY AND JESSE H. BESSER, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

FILED AUGUST 9, 1951

PROBABLE JURISDICTION NOTED OCTOBER 8, 1951.

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VOL. II

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[fol. 1287] By Mr. DeGree:

Q. Nevertheless, you were going to use your power as a director to cause Stearns Manufacturing Company to recognize Besser's patent and take a license?

A. I was.

* * * * * * * *

[fol. 1288] By Mr. DeGree:

Q. Now, Mr. Stone, referring to paragraph 8 of this contract—here is a copy of the contract that I hand you—subdivision 1:

"Besser will grant to Stearns, in consideration of Stone's undertakings as aforesaid, but without limitation to the life of this agreement, non exclusive licenses as follows:

"1. To manufacture and sell cored pallet concrete block machines without limitation as to the size of block produced or number of blocks produced simultaneously, so long as much machines are adaptable exclusively to the manufacture of blocks on cored pallets; and

"2. To manufacture and sell plain pallet concrete block machines provided that such machines will produce not more than one or two blocks simultaneously either eight by eight by sixteen or eight by eight by eighteen, or equivalent, or a size which can be made in a mold not larger than required for two eight by eight by eighteen blocks, or can be made on a pallet not more than eighteen inches square."

Is it your understanding of that contract, Mr. Stone, that Stearns Manufacturing Company, under such license, would be prevented from making a three-at-a-time plain pallet machine?

[fol. 1289] A. Would you repeat that question, please?

Mr. DeGree: Would you read it, please?

(Question read by the Reporter.)

A. It was.

By Mr. DeGree:

Q. It was your understanding?

The Court: That isn't as I understand or read the contract. That is not exactly so. They just don't get the license to use or to make the three pallet or three block machine. Isn't that it? Is it specifically stated in there they will not make a three block machine?

Mr. DeGree: No.

Mr. Babcock: No, your Honor.

The Court: Somebody else could come along and make a machine, perhaps, that does not violate the Gelbman patents, and the Stearns people could make a three block machine then.

Mr. Babcock: That is correct.

Mr. Goreff: The Gelbman patient is in no way involved in this license agreement, I don't think. I think the license agreement dealt with the Besser patent, whatever that would be.

The Court: The Besser controlled patent.

Mr. Goreff: No, I don't think so, your Honor.

The Court: Why, Gelbman has paid—Gelbman's name is mentioned in this contract, as I recollect.

[fol. 1290] Mr. Goreff: No.

Mr. DeGree: This has reference to the Scott patent, according to the testimony.

Mr. Goreff: Which is wholly Besser controlled, your Honor.

Mr. DeGree: The Scott patent. That is the one that they seek to have Stearns take a license under and recognize that patent of Besser's.

The Court: How about the Gelbman patent? The Scott patent doesn't have any tamping, or the Scott patent doesn't provide for tamping or pressure. It is a vibrating block entirely, isn't it?

Mr. DeGree: They weren't concerned with that, your Honor, for the purpose of this contract. It was to get them to recognize the Besser patent, which is the Scott patent, and then under the license agreement they would be bound hand and foot.

You know very well if we were to recognize——

The Court: (Interposing) Well, they couldn't make a real block without the Scott patent, or with the Scott patent alone. That is, they can get a vibrating block. But they don't use the Scott patent alone in their machines.

Mr. DeGree: That is correct. But the Stearns Manufacturing Company would be a licensee under this Scott patent, and because of that pretext Stearns then would have to [fol. 1291] agree to the terms of the patent agreement and by spelling out what we could make, that is what—this is what the license agreement will spell out for us.

The Court: As I understand it now, this agreement merely says you can go ahead and use the patent that Besser has, and then let you use the Gelbman patent——

Mr. DeGree: (Interposing) No, no.

The Court: Well, they are paying Gelbman $175.

Mr. DeGree: They are paying——

The Court: (Interposing) What is that?

Mr. Goreff: $125.

The Court: $125 and $75. What for?

Mr. DeGree: Paid to Besser.

The Court: What is that?

Mr. DeGree: Stearns will pay to Besser. It says—I am reading paragraph 8——

The Court: (Interposing) Gelbman has no two-at-a-time.

Mr. Babcock: $125 to Besser and $75 to Gelbman.

The Court: Yes. What are they doing that for? Do you claim that Stearns would have no right to manufacture machines except one that used the Scott patent? Is that your claim?

Mr. DeGree: Not precisely. But it does mean this: That when we come in and acknowledge the license—or the [fol. 1292] patent of Besser, if we are forced to do that, then we will have to recognize that we can make only certain machines, because, by enumerating what we can make, that is all we can make, and——

The Court: (Interposing) Why, surely.

Mr. DeGree: (Continuing) —they have carefully not mentioned the three-at-a-time machines, so that therefore——

The Court: (Interposing) They give you the right, so

that you can make the two pallet machine—you can make the one block machine and you can make the two block machine, but from now on you can't make the three block machine.

Mr. DeGree: That is precisely it.

The Court: That is all they say. And you can't make—unless I am entirely off the track on this business, you can't make a block and make a block such as—you can make a block such as it is, but not the kind of a block that the Besser people want to make, with the Scott patent alone, and the Besser machine does not use the Scott patent in its entirety.

Mr. DeGree: I have no——

The Court: (Interposing) If I have made a misstatement, here is both Mr. Besser and Mr. Stark, and I hope they will correct me.

[fol. 1293] Mr. DeGree: That is a little different from the positions they have taken, because in this agreement it recites that the Stearns Manufacturing Company is infringing the Besser patent, in manufacturing the machines that we make. Now, from the standpoint of making these machines, yes, it is a combination of a number of patents. But we would be bound by the contractual relationship if Stearns had to recognize this Scott patent of Besser's, and if we made anything other than spelled out in this agreement here, we would be in default.

The Court: I think you would be, but what they say to you is this: You can make all the machines you have been making, the one block machine and the two block machine, but they don't give you the right to make the three block machine.

Mr. DeGree: That is correct.

The Court: That is, the three block machine that they make.

Mr. DeGree: That we make.

The Court: Now, all right. Somebody else comes alone here, whether it is Lith-I-Bar or somebody else, and they make an entirely new machine that puts out, say, five blocks at a time, and there is nothing in that contract that stops you from doing it.

Mr. DeGree: Well——

[fol. 1294] The Court: (Interposing) It just says we will give you this, we will give you the right to make a one block machine and a two block machine. Isn't that your understanding, Mr. Stark?

Mr. Stark: Yes, sir.

The Court: It must be. That is all it says in there.

Mr. DeGree: But——

The Court: (Interposing) It doesn't tell you about——

Mr. DeGree: (Interposing) We have got the right to make the three at a time machine now under the Gelbman patents.

The Court: Wait a minute now. Just a minute. You had it. Let's say that this contract didn't go through. When the other arrangement—when Mr. Besser owned 89,000 shares of Besser Manufacturing Company—I don't know if he owned 89,000 shares of Stearns Manufacturing Company, the Stearns Company—I guess he did have the right at that time to make a three block machine. I don't know whether they did or didn't.

Mr. DeGree: Yes, they did. Stearns was the original licensee from Gelbman, your Honor.

The Court: I guess that is right.

Mr. DeGree: Then Stearns——

[fol. 1295] The Court: (Interposing) All right.

Mr. DeGree: Then Besser came into it.

The Court: Now, Mr. Besser says, "No, I won't go through with this deal." Why, what he has said is this: I am going to give you the right to get in the one-two field, but you can't get into the three field because I will not sell my stock if that is true.

Mr. DeGree: That is just what we complained about, because this is a contract in restraint of trade.

The Court: Well, wait a minute now. Just a minute. That is something you can argue about later on.

Mr. DeGree: Well, your Honor, here we have got those rights under the Gelbman contract now, regardless of who owns the stock in Stearns Manufacturing Company. I don't care if Mr. Besser owns one hundred per cent of the stock of the Besser Manufacturing Company, Besser already has the right exclusively with the Besser Manufacturing Company.

The Court: That is a matter of argument.

Mr. DeGree: It is not argument. It is the fact.

The Court: The question of restraint of trade is something else again. I don't think that they have denied that they are going to try to keep, if it is legal, the three block machine. I don't think they have denied that at any time. Whether it is in restraint of trade or not, that is something to take up later.

[fol. 1296] Mr. DeGree: Well, your Honor asked me about this three-at-a-time machine, and whether or not we would be prevented, under the terms of this contract, and that is what I was getting to.

The Court: You are not prevented from making the three-at-a-time, or four-at-a-time, or five-at-a-time, but you are prevented from making the three-at-a-time with the patents to Gelbman or that Besser has under control.

Mr. DeGree: And the ordinary provisions of a license contract whereby we have to recognize those patents, and sew us up tighter than a drum.

The Court: Oh, no. Oh, no. Not at all. Let somebody come out and get out a different machine. Look at that Shinn pallet, or that Shinn machine. That seems to be capable of making twenty-five blocks at one time. Somebody might come along with one of those systems, for all I know.

Mr. Goreff: Your Honor, my only point in making the statement before was that under Exhibit 10 in evidence, Stearns Manufacturing and Besser both are our exclusive licensees and there is nothing in this agreement which makes Gelbman a party to it. Nor is there anything in there which, so far as I can see, can affect the rights of the defendants Stearns Manufacturing Company in the Gelbman patents under the license agreement, Plaintiff's Exhibit 10.

The Court: Who licensed Stearns in the first place?

[fol. 1297] Mr. Goreff: Gelbman and Andrus, both.

The Court: All right. And they made a three block machine, didn't they?

Mr. Goreff: That is right.

The Court: Under this agreement, you understand that

Stearns cannot make a three block machine and use this patent, isn't that right?

Mr. Goreff: No, your Honor. We don't understand it that way.

Mr. Speer: No. If it please the court, I would like to make a statement.

The Court: Do you mean to tell me that under this contract they can use your patents, the Gelbman patents, and make a three block machine?

Mr. Goreff: They may, your Honor.

Mr. DeGree: How could we, in conformity with the binding agreement with Stearns?

The Court: Now we are talking about the Scott patent. You realize this, do you not, that under that contract, if that contract was binding, you can't use the Gelbman patents in any part to make the three block machine, can you?

Mr. Babcock: Oh, yes.

Mr. Goreff: They certainly can, your Honor. There is nothing in this thing, nothing with respect to the Gelb- [fol. 1298] man patents which have been licensed to the Stearns Manufacturing Company that is under the control of the Besser Manufacturing Company, aside from the matter of stock control which is another matter. If Stearns, as an entity, has——

The Court: (Interposing) Doesn't this company agree not to make a three block machine?

Mr. Goreff: Under the Scott patent, whatever that may be.

The Court: Why, you know that they can't make a concrete block under the Scott patent, don't you?

Mr. Goreff: Yes, I do, your Honor.

The Court: And whose patent do they utilize to make a three block machine?

Mr. Goreff: They use a combination of——

The Court: (Interposing) Yes.

Mr. Goreff: (Continuing) —a combination of Gelbman and others.

The Court: What others?

Mr. DeGree: At this point, Scott.

The Court: Scott. They use the resiliency.

Mr. Goreff: That is right.

The Court: The suspended mold.

Mr. Goreff: Correct.

The Court: The Gelbman apparatus. They use the roller, the feed box, the plate at the end, the feed box sitting [fol. 1299] over the top of the mold, the vibration of the feed box or of the mold without the feed box, and pressure. Paragraph 7, Claim 7 of the appartus patent.

Mr. Goreff: That is right.

The Court: And they use the method patent, the same combination, except the pouring of the concrete in there, the vibrating of the mold while the concrete is being poured in, plus the pressure again, and the agitator. Now, can you still tell me that they can go ahead and make a three block machine.

Mr. Goreff: Your honor, all I am saying, and all I am trying to get across, is the fact that there is an exclusive agreement running to Stearns Manufacturing Company. Neither Gelbman nor Andrus are party to this agreement.

The Court: I know they aren't.

Mr. Goreff: And there is nothing in that which can, so far as the defendants Gelbman and Andrus are concerned, affect or impinge upon the right of the defendant Stearns Manufacturing Company to use the Gelbman patents.

The Court: That is absolutely correct, and I was going to suggest it to you, but the minute you accept one $125 payment you are bound by it—or they could put up an awfully good case against you.

Mr. Goreff: Well, we have never seen this agreement, your Honor.

[fol. 1300] The Court: I know. But you will see the agreement, because it will be made known to you because you will have to know how it is you are getting $125 or $75 from Stearns. Now, please. The court wasn't born yesterday on these things, you know.

Mr. DeGree: May I say this, your Honor, and may I say it briefly——

The Court: (Interposing) If you don't know anything about this thing, you are the only one that can object, and you can't object to it, I think.

Mr. Goreff: Well, of course, we know nothing about it. We never knew anything about it until it was offered in evidence here.

The Court: All right.

Mr. Goreff: That is, we have heard some conversation about it.

The Court: All right. What you say is true. You are not a party to it, and they can't, from anything you have said so far, they can't take away from you your——

Mr. Goreff: (Interposing) Rights of our royalties.

The Court: Yes.

Mr. Goreff: Rights under our license agreement.

The Court: Yes. I think we understand each other.

Mr. DeGree: I want to say this, and make it very brief: [fol. 1301] We have got to recognize the position of Besser Manufacturing Company as it is. I understand in the suit that is pending before your Honor on the patents, they are taking the position that the Scott patent is valid. Consequently, if that position be true, it would be impossible to make a three-at-a-time machine without the Scott patent.

Mr. Babcock: Oh, no.

Mr. DeGree: Now, it is the Scott patent we are going to be forced to take a license under, and we can't make a three-at-a-time machine because that specifies we can make the cored pallet machines, but plain pallet machines only up until two-at-a-time.

The Court: Of course, I don't know. Do you know that the Gelbman patent does have a suspended mold? You know that?

Mr. DeGree: I am not too familiar with the patents, your Honor.

The Court: The Gelbman patent does have a suspended mold, does it? No.?

Mr. DeGree: But the Scott patent, I understand, is so broad it covers any vibrating principle, such as one or two witnesses have said.

The Court: That is what they claim.

Mr. DeGree: That is what they said.

The Court: That is what they said.

[fol. 1302] Mr. DeGree: So that if we come under that patent and couldn't make a vibrating machine if that were valid then we would go as far as the two-at-a-time and we would be cut off from the three-at-a-time machine because that would be Stearns' commitment to the patentee, Besser.

The Court: Well, wait a minute. The Gelbman patent had a vibrating mold, didn't it? It has a vibrating mold but it is not necessarily suspended, is it? And couldn't you make a three block machine with the Gelbman method and apparatus patent?

Mr. Goreff: Quite so, your Honor.

The Court: I think so, too.

Mr. DeGree: But you see the claim is made, your Honor, that this Scott patent even antecedes the Gelbman patents. [fol. 1303] The Court: Oh, no, no, no that is not true, as I remember it now; and if I am wrong I can be corrected easily. Remember this: The Besser machine as it comes out now takes the good features of several patents. That is what it took.

It took the suspended mold feature of the Scott patent. But according to Gelbman's interpretation, and I think probably most courts—I won't say anything outside—if the Gelbman apparatus patent is good they can make a three-block machine. It will not have the suspended mold. It will have a vibrating mold, and it will have a feed box that does not come in contact with the mold, and according to them not even by seepage. I have stated it correctly, have I not, gentlemen?

Mr. Henry: I think so, your Honor.

Mr. Speer: If the court please, in behalf of the Government I would like to enter this observation at this time. The Stone agreement is an agreement under the Gelbman and Besser patents, as I understand, which includes the Scott patent. I do not believe there is any claim in any of those patents pertaining to the kind of a pallet that the machine will use, nor to the number of blocks which can be produced on these machines. And here this particular agreement states that Stearns, under the cored pallet, without limitation as to the size of block produced or the number of block produced, can manufacture all the machines it wants to. But when it comes to the machine which has the plain pallet Stearns company is restricted to one or two blocks at a time, and those claims [fol. 1304] do not appear in all these patents.

The Court: That is right. I understood that all the time. But I think, taking the contract as a whole, it would only

include the patents that Besser owned or controlled. And if somebody came along tomorrow with another machine that would make more than three blocks, they could use it.

Mr. DeGree: That raises an interesting question too, as your Honor has pointed out, that there is money payable to Gelbman. Now Stearns on its own, under this license that it has from Gelbman, pays Gelbman a royalty. But why should it be recited in this agreement that there will be money paid by Stearns to Gelbman and money paid to Besser, if the hidden purpose is not to do something further to deprive Stearns of the rights under the Gelbman patent?

The court: Of course I don't know. You can argue that, but I think if the contract ever did go through to the stage the people anticipated, then they would probably send a copy to Gelbman and get him to agree to it. Otherwise, Gelbman would say, "No, I won't stand for that, as that is cutting off part of our bread and butter." I don't know. Go ahead.

By Mr. DeGree:

Q. Now Mr. Stone, I think you answered the last question that it was your understanding,—I will repeat it and correct me if I am wrong—that it was your understanding that this would deprive Stearns from making the three at a time machine; you answered that question, did you not?

A. I understand your question much better now with all [fol. 1305] the explanations, so I would like to answer it the way I now understand it.

Q. Well I would like your understanding at the time that the contract was signed.

* * * * * * * *

A. We would be licensed to make the two-at-a-time plain pallet and if we wanted to make the three-at-a-time plain pallet we could, recognizing that we were in patent violation.

By Mr. DeGree:

Q. Recognizing that you were in patent violation, if you made a three-at-a-time machine; is that it?

A. Yes.

Q. That is your understanding?

A. That's right.

Q. Now let us go back to the understanding at the time that the contract was drawn; was the purpose of this contract to deprive Stearns of the opportunity of making a [fol. 1306] three-at-a-time machine?

A. No.

Mr. Babcock: I will object to that, if the court please; I think that is a conclusion that the court could draw from the contract.

The Court: Yes, I think so.

Mr. DeGree: All right.

The Court: When he says it would be in violation of the patent I do not think he means that; what it would be in violation of would be his contract, because by his contract he agreed not to manufacture anything more than the two-block machine.

Mr. DeGree: Well he used the word "Stearns"; he said "we"; and now it is true that it would be in violation of his individual contract with Mr. Besser, but I was interested in the Stearns angle of it.

By Mr. DeGree:

Q. Now Mr. Stone, when did you first meet Gene Olsen?

A. In February of this year.

Q. And that was at Adrian?

A. Um-hum.

Q. Was Mr. Rosenthaler present with you at the time?

A. He was.

Q. And you were introduced to Mr. Olsen by Mr. Rosenthaler, were you?

A. I was.

[fol. 1307] Q. Were you informed up to that point that attempts had been made by the Besser Manufacturing Company to purchase the Gene Olsen Company and that the attempts had failed?

A. No.

Q. Mr. Rosenthaler did not tell you that?

A. No.

Q. Mr. Besser didn't?
A. No.
Q. Mr. Bailey didn't?
A. No.

. . . . . .

[fol. 1308] By Mr. DeGree:

Q. In February, at that time when you, Mr. Olsen and Mr. Rosenthaler were all present at Adrian, do I understand that you were interested in purchasing the Olsen Company?
A. No; I was interested in finding out what he had.
Q. You didn't make any proposal to Gene Olsen to purchase the Gene Olsen Company at that time, did you?
A. Yes.
Q. Then you must have been interested in so doing, in buying it?
A. Sure; I will buy anything if I can get it cheap enough.
Q. All right, Mr. Stone; I asked you if you were interested in buying it; perhaps you misunderstood me, but you were interested in buying the corporation in February when you talked to him?
A. Well, yes and no.
Q. Do you want to explain the "yes and no" feature of it?
A. No, if the price was too high; yes, if it was a good buy.
Q. And you talked terms with him, did you?
A. Yes.
Q. Whom were you representing at that time, Mr. Stone?
A. Myself.
[fol. 1309] Q. You were not representing Mr. Besser?
A. No, sir.
Q. Had you discussed the question with Mr. Besser previous to that time of your acquiring the Olsen Company?
A. I don't believe I had met Mr. Besser until after we had been to Marietta and to Adrian.
Q. I see; and was Mr. Rosenthaler, who accompanied you, at that time an employee of the Besser Manufacturing Company?
A. Yes.
Q. Did he go along with you as a disinterested person, or was he interested, if you know? In your transaction with Mr. Olsen?

A. Well I wanted to see what Stearns looked like; I had never been there before, and I wanted Mr. Rosenthaler to take me down and show me what the property was like; and then on the way down—we drove down—we had some discussions in the car, and Bailey—my thinking again was thinking in terms of agilite, and Bailey mentioned the fact that Olsen had a big plant, so I said, "While we are down there why don't wee see that plant also; I would like to see what the picture looks like."

The Court: Where is the olsen plant?

Mr. Babcock: In Adrian.

The Court: That is what I thought. And the agilite plant is in Indiana, isn't it?

Mr. Babcock: Marietta, Ohio.

[fol. 1310] The Court: I mean Marietta. All right.

By Mr. DeGree:

Q. That is the only interest Mr. Rosenthaler had in your purchasing the Olsen Corporation, so far as you know?

A. Yes.

Q. Now you had further discussions with Mr. Olsen after this date in February?

A. Yes.

Q. You had one discussion, did you not, in which you discussed price?

A. Yes.

Q. And that price was in the neighborhood of $268,000.00 or $270,000.00, was it not?

A. No, way over that.

Q. How much was it?

A. Three hundred and about fifty-five thousand dollars at that time.

Q. I see. And the proposition, the details of the sale were discussed in the presence of Mr. Besser, were they?

A. No.

Q. Where was this discussed?

A. At a meeting with Gene Olsen at the Shelby Hotel in Gene's room, in February, about a week after we had been to Adrian, and we discussed price and terms and methods

of purchase, and Gene's ideas of what he wanted were so utterly fantastic——

Q. Well Mr. Stone, I am endeavoring to find out who else [fol. 1311] was present at the meeting.

A. Ralph Bailey, Gene Olsen, and myself.

Q. And Ralph Bailey was then an employee of the Besser Manufacturing Company?

A. Yes.

Q. What interest did he have in the discussion, if you know?

A. Nothing more than that he is a friend of Gene's.

Q. He did not participate in the discussion, did he?

A. No.

Q. How long did the conference last?

A. Several hours.

Q. Do I understand, Mr. Stone, that you got into this picture because of your interest in an agilite process?

A. Yes, primarily.

Q. And what particular plant did you have in mind, if any? Were you going to purchase a plant.

A. No.

Q. Where were you going to operate?

A. Well it looked to me that Stearns, the physical plant, that is the buildings at Stearns were inadequate for the manufacture of the type of heavy machinery necessary in the agilite process, and Olsen had this great big plant that would be very, very attractive; so my thinking was that if we could work out a basis with Gene where we could use his plant, sell Stearns' physical plant in order to get additional [fol. 1312] working capital, and we could get Gene on a proper basis, why it looked like it was a pretty good picture, because Gene knows the business and he had the physical plant and we could eliminate one overhead and effect economies that might make the whole thing very attractive.

Q. When did you first become interested in this agilite process?

A. Oh after I met Mr. Rosenthaler.

Q. And is that in January of 1950?

A. Yes, sir.

Q. So you had no other plant in mind at which to operate

other than the plant of the Stearns Manufacturing Company or the Olsen Company; is that right?

A. No, not entirely.

Q. Well I asked you what plant you intended to operate in, so give us the first one you had in mind?

A. Well Mr. DeGree, I hadn't bought the deal; I had not been to Marietta; I didn't know even for certain that I wanted to buy it; I wanted to get a lot of information; I wanted to talk to a lot of people; and I was doing a lot of looking and a lot of talking, but I was not spending any money.

Q. I see; is it correct that Mr. Adams of the Bank is the man who suggested to you that you get into the agilite process, or did you have that idea before you talked to him?

A. No, no; Mr. Rosenthaler brought up agilite; Mr. Adams called me one day and wanted to know if I would [fol. 1313] like to sit down and have lunch with he and Mr. Rosenthaler; I acquiesced and he left us, and Mr. Rosenthaler outlined the picture of Stearns for me, and then we proceeded to his office where he had a financial statement. I looked over the statement and it looked to me like there were considerable economies could be effected in the operation of the company, so on a million dollars of sales it would still show a handsome profit.

So that—I am not going to say any more on that subject.

The Court: Did he say that it showed a handsome profit to the Stearns Company?

A. No, it did not. But with proper operation, your Honor, it could show a very handsome profit, by economies in operating, overhead, and other expenses that to me did not seem justified by the volume of business that they were doing.

The Court: What did the financial statement show as to whether there was a profit or a loss?

A. Well, they showed about $560,000 some odd thousand dollars inventory.

The Court: No, no. What did they show in the way of profit?

A. Approximately $17,000 on $1,000,000 in sales.

The Court: I see. All right.

By Mr. DeGree:

Q. Do I understand, Mr. Stone, that you can get all the information you need from an operating statement or a [fol.1314] financial statement of a company, that you need know in order to make the company successful?

A. Well, that is a very good indication. The financial statement, if it is properly drawn up, has a lot of information that will show a red flag if something is wrong.

Q. And you feel as though, then, you could step in and remedy the bad position of the company, regardless of what the business was?

A. I am sure I can, Mr. DeGree.

Q. I see. Now, did Mr. Adams tell you as an official of the bank what Mr. Besser's position with the bank was, or the Besser Manufacturing Company, at the time he suggested that you interest yourself in the Stearns stock?

A. No, he did not.

Q. Did you know what Mr. Besser's position was-

A. No.

Q. You never discussed that with Mr. Besser, did you?

A. No.

The Court: What bank was this?

By Mr. DeGree:

Q. The National Bank——

A. (Interposing) ——of Detroit.

Q. (Continuing). ——of Detroit?

A. Yes, Detroit.

The Court: Mr. Adams? What is he over there?

A. A vice president.

[fol. 1315] The Court: A vice president: Do you know what department he is in?

A. Yes. In Chick Fisher's Department.

The Court: Chick Fisher? You mean Charles Fisher, Jr.? Is that who you mean?

A. Yes, sir.

By Mr. Degree:

Q. Was there ever any discussion between you and Mr. Olsen concerning the purchase of his plant by you at which Mr. Besser was present?

A. No, sir.

The Court: Well, you have intimated something about Mr. Besser's connection with the National Bank.

Mr. DeGree: Yes, your Honor.

The Court: Is he a Director?

Mr. DeGree: No. I wanted to know what his financial position was and whether or not Mr. Stone was informed of any relationship between the bank and Mr. Besser, but this witness does not know.

A. Not at that time, in the bank, when we had the first discussion. Not when I first met Mr. Rosenthaler.

Q. Yes. Well, then, your answer implies that you learned at a later time?

A. Yes.

Q. But that it was after Mr. Adams had——

A. (Interposing) Introduced us.

[fol. 1316] Q. (Continuing) —introduced you. And had suggested, I believe you said, that you interest yourself in acquiring the Stearns stock?

A. No, I don't think it was quite that way. He called me and thought that there was a company that I might be interested in, and would I like to meet one of the people that were in it.

Q. I see. And then?

A. I said, "Yes," and a lunch was arranged.

Q. And who is the person who ran it that you had lunch with?

A. Mr. Rosenthaler.

Q. Mr. Rosenthaler?

A. Mm-hm.

Q. All right. Then going a little further into the Olsen transaction, how long after your meeting with him in February did you accompany him to Marietta?

A. We made the Marietta trip in—I believe it was towards the end of April. It was in April.

Q. In April.

A. Or it might have been the early part of May.

Q. I see. Was that pursuant to the negotiations that were being carried on between you and Olsen, or had those negotiations for the purchase of his plant by you been dropped at the time?

A. No. Gene and I, we visited once a week.

[fol. 1317] Q. I see. Well, you went to the Marietta plant?

A. Mm-hm.

Q. For the purpose of doing what, Mr. Stone?

A. Well, I wanted to show Gene the light weight aggregate operation and have him take a look at it. He has been in the clay products business practically all of his life and has a lot more practical background than I have, and I wanted him to see it and get his thinking on it, and from then on we would explore and see where we went.

Q. You had nothing more definite than that in mind, or expressed to him?

A. Well, we did discuss that. We spent two days together. We discussed that if it could be worked out on a proper basis, Stearns and Gocorp and Agolite, on a proper basis, would be a very lucrative and a very profitable operation, and we agreed we would explore farther.

Q. All right. Now, is it true that in February, when you first met Olsen, that you discussed the Agolite proposition with him, and that his plant, if you bought it, would be used in connection with the Agolite process?

A. No. At my first meeting with Gene I didn't say a word about Agolite.

Q. I see. When was your first discussion with Mr. Olsen with reference to the Agolite process?

A. That was some time after I had bought my shares from Besser.

[fol. 1318] Q. All right. Now, let's try to get the time fixed. When you first saw Mr. Olsen you had not obtained any stock in the Stearns Manufacturing Company?

A. No.

Q. Did you make any statement to Mr. Olsen that the acquiring by you of the Stearns stock was conditioned in

any manner upon your ability to buy his company from him?

A. You see, Gene and I had a lot of conversations.

Q. That is right, but just——

A. (Interposing) I was interested in price.

The Court: Answer the question, please.

By Mr. DeGree:

Q. Just pause a minute, and do your thinking silently, and then try to answer my question, if you can.

A. I believe not. I believe not.

Q. In April of 1950, did you authorize Mr. Rosenthaler to represent in your behalf to Mr. Olsen that the Besser Manufacturing Company or Mr. Besser, Mr. Olsen and yourself form a new corporation to engage in the Agolite business?

A. Well, I don't know whether I authorized Mr. Rosenthaler to do that, but in view of the actions of the directors of the Stearns Manufacturing Company, wherein I couldn't vote my stock and get on the Board until November, with the amount of interest in Agolite—we have had inquiries from practically all over the world—I felt that it would be most——

Q. (Interposing) Mr. Stone, please.

[fol. 1310] A. I am answering the question.

Q. I don't think you are.

A. I am trying to.

Q. No.

A. Well, I felt——

Q. (Interposing) No. Just one minute, please. Will you read the question to him, Mr. Reporter.

(Question read by the Reporter as follows:

"Q. In April of 1950, did you authorize Mr. Rosenthaler to represent in your behalf to Mr. Olsen that the Besser Manufacturing Company or Mr. Besser, Mr. Olsen, and yourself form a new corporation to engage in the Agolite business?")

The Court: Answer that question.

A. Yes. The answer would be "Yes".

By Mr. DeGree:

Q. All right. And then wasn't it pursuant to that statement that you and Olsen went to Marietta plant to look it over?

A. Yes.

Q. And isn't it true at that time that you had had no contact with the directors of the Stearns Manufacturing Company?

A. My last contact with the directors of the Stearns Manufacturing Company was——

Q. (Interposing) Your first. Your first, Mr. Stone. That is what we are after.

[fol. 1320] A. Well, I met with Mr. Fildew on April the 2nd; with Mr. Fildew and Mr. Wright on, I believe, April the 4th; with Mr. Hultmark on April the 4th. I met with Mr. Fildew again the week of April the 4th. And I met with Mr. Batchellor (?) the week of April the 18th.

Q. I see.

A. I have kept Mr. Sheldon Noble advised constantly of my progress with Agolite and what was going on. I believe the last time I saw Mr.——

Q. (Interposing) I think you have mentioned enough there, Mr. Stone. The point is that your going to Marietta occurred after you had contacted the stockholders of Stearns.

A. The directors.

Q. The directors of Stearns?

A. That is right.

Q. That is correct. Now, what was there at Marietta that you looked at?

A. A going plant that was producing a very fine product.

Q. Whose plant was it?

A. The Marietta Concrete Products Company.

Q. What interest did the Besser Manufacturing Company have in it?

A. The Besser Manufacturing Company sold them a good part of the equipment that went into the making up of that plant.

Q. Did that plant owe the Besser Manufacturing Company some sums of money for the equipment that they purchased?

[fol. 1321] A. I believe at the time of our visit that that account had been settled, but I am not certain.

Q. Do you know? Do you know, Mr. Stone?

A. No.

Q. Do you know how much money the Besser Manufacturing Company had invested in that Marietta plant?

A. This is a guess——

Q. (Interposing) No. I don't want any guess.

A. Then I don't know.

Q. Mr. Besser never told you?

A. No.

Q. Did Mr. Besser have any conversation with you about your going down to the Marietta plant to look it over?

A. No.

Q. Did he have any conversation with you with respect to your interesting Olsen to get into a company with you and him to take over the plant?

A. No.

Q. Did you ever have any conversation with Mr. Besser about he and you being in this same corporation to take over the Marietta plant?

A. To save you a lot of questioning, I haven't discussed anything with Mr. Besser.

Q. All right. Then let's put it this way: Did you have any conversation with any representative of Mr. Besser's [fol. 1322] about you and Mr. Besser being in the same corporation with Olsen to take over this Marietta plant?

A. Yes.

. . . . . .

By Mr. DeGree:

Q. Do I understand correctly that you and Olsen went down there to look over this Marietta plant with the purpose of determining whether or not you would try to acquire it?

A. We didn't go down there to acquire Marietta. We went down to show Olsen the process that they were using. Our interest was in the process and not in the Marietta plant.

Q. I see. Now, this corporation that Rosenthaler spoke

about and which you say you authorized him to speak to Olsen about——

A. (Interposing) Yes. Mm-hm.

[fol. 1323] Q. (Continuing) —was for the purpose of doing what? If it were formed?

A. It was for the purpose of selling plants to customers who were desirous of making the light weight aggregate.

Q. You were not going to have any plant, then?

A. Only insofar as——

Q. (Interposing) No pilot plant?

A. Yes. We were going to have a pilot plant.

Q. Did you have any pilot plant in mind at the time?

A. Well, yes, I did have a pilot plant in mind.

Q. Was it the Marietta plant?

A. No, no. A small plant, testing clay.

Q. I see.

A. To see whether clay would sinter.

Q. That is the only thing within the contemplation of Besser, Olsen and you, just to have a pilot plant?

A. A pilot plant to determine whether or not clay from a given area would sinter satisfactorily. A plant, if necessary, to manufacture the equipment to make the light weight aggregate.

Q. Mm-hm. Now, referring to paragraph 9 of this contract that you and the Besser Manufacturing Company entered into, I will read it so we will both understand what we are talking about:

[fol. 1324] (Reading) "Besser will assign to Stearns, in consideration of Stone's undertakings as aforesaid, but without limitation to the life of this agreement, all production rights, all accounts receivable on Besser's books, and all rights of Besser to return of advances, all inventory and existing engineering drawings in connection with a cinderizing machine for the manufacture of Aglite."—

Where was that cinderizing machine located?

A. Up in Alpena there are parts for—I believe there are sufficient parts to make another complete cinderizing unit.

Q. Where was the machine located that is mentioned in this contract, "in connection with a cinderizing machine for the manufacture of Aglité"; wasn't that at Marietta?

A. No; I think what he is referring to there, in fact I

know what he is referring to there is the process or design, the manufacturing in Ohio in making a cinderizing machine for the purpose of making a light weight aggregate.

Q. Let me repeat this to you, Mr. Stone: "All inventory and existing engineering drawings in connection with a cinderizing machine for the manufacture of Aglite"; so you say that does not have reference to any particular machine itself?

A. It does not have reference to Mariette or Detroit.

Q. All right; and then, "And all of Besser's interest in a certain contract between one Frank Leftwich and Besser." What contract was there between Leftwich and Besser?

[fol. 1325] A. Well I—it is a very simple contract.

Q. Well what was it? What did it relate to?

A. It related to Frank Leftwich assigning to the Besser Manufacturing Company——

• • • • • • • •

[fol. 1326] A. Leftwich developed this process for making a light weight aggregate and he brought it to the Besser Manufacturing Company.

The Court: What had it to do with? Did it have to do with the use by Leftwich——

A. That's right.

The Court: Why don't you say so? The development may be in another lawsuit.

By Mr. DeGree:

Q. All right; further reading from this contract, "For such assignment Stearns will assume all of Besser's obligations under said contract with Leftwich"; in dollars and cents do you know what Besser's obligations were to Leftwich?

A. I was not interested in Besser's obligations.

The Court: Just answer the question; did you know what it was?

A. No.

The Court: Read that again, please.

Mr. DeGree: "For such assignment Stearns will assume all of Besser's obligations under said contract with Leftwich".

The Court: But you were not interested in knowing what they were?

A. $30,000.00.

The Court: Now witness, that indicates to the court that [fol. 1327] you are not answering the questions to the best of your ability, because he asked you that question before, and you said no, you were not interested, indicating that you didn't even know or pay any attention——

A. But your Honor——

The Court: And listen! Then when the court asks you the question you turn around and say "$30,000.00". Now were you interested in knowing how much Besser was obligated to Leftwich? Were you interested at all?

A. Yes, I was interested.

The Court: Why didn't you say so?

A. But he is not asking the questions the way you are, your Honor.

The Court: He is asking them better than I am.

A. No, he is not.

The Court: Read the question again, please; read that clause; a man that has the undoubted ability that you have to make losing plants profitable, to answer that question the way you did could hardly be sensible.

(Whereupon the reporter read a considerable part of the record immediately preceding)

A. Both of my answers are wrong.

By Mr. DeGree:

Q. Have you got a new one now?

A. This is the correct one now.

The Court: All right; let us have it.

A. Question Number one, what were Besser's obligations [fol. 1328] to Leftwich? To manufacture cindering machines; question number two, what did Stearms assume——

By Mr. DeGree:

Q. I have not asked you that yet.

The Court: He has not asked you that at all.

A. It is right there.

The Court: Ask the question again and see what his answer is going to be this time.

By Mr. DeGree:

Q. Here is the question, reading from Paragraph nine of the contract: "For such assignment Stearns will assume all of Besser's obligations under said contract with Leftwich". In dollars and cents what were Besser's obligations under the Leftwich deal?

A. Besser's obligations under the Leftwich deal?

The Court: In dollars and cents.

By Mr. DeGree:

Q. In dollars and cents.

A. Well, your Honor, it could be $50,000,000.00 or it could be nothing.

The Court: All right; say, "I cannot answer it in that way",—and I think he is right.

A. It could be anything.

The Court: All right; just say so. The court will protect you when you are right, but not when you testify the way you have been.

By Mr. DeGree:

Q. Then continuing from that same paragraph——

The Court: Why don't you ask him a question he can [fols. 1329-1334] answer? He says he could not answer the question in that way, because evidently there were other obligations other than dollars and cents obligations. Is that the reason?

A. Yes, sir.

* * * * * * * *

By Mr. DeGree:

Q. Continuing with that sentence, "And will pay to Besser all sums advanced by Besser to Leftwich." Now my question is, do you know in dollars and cents what sums of money were advanced by Besser to Leftwich?

A. $30,000.00.

The Court: He asked you if you know.

A. Yes.

* * * * * * * *

[fol. 1335] By Mr. DeGree:

Q. Mr. Stone, with reference to paragraph 9 of your agreement with Mr. Besser, who was Mr. Leftwich in that deal?

A. Mr. Leftwich developed the method of sintering clay products.

Q. That you were interested in?

A. Yes, sir.

Q. And did Mr. Besser hire him or did Besser Manu-[fol. 1336] facturing Company hire him to make a machine?

A. No, sir.

Q. Did they employ his services in any manner?

The Court: Who is this you have reference to?

Mr. DeGree: Leftwich, the person mentioned in paragraph 9.

The Court: That is the man that had the process for Marietta?

Mr. DeGree: The sintering method, yes.

A. Not directly.

By Mr. DeGree:

Q. Well, how much did the Besser Manufacturing Company pay Leftwich, if you know?

A. I believe they advanced him $30,000.

Q. And then how much was due and owing to him by the Besser Manufacturing Company on March 30?

A. Nothing.

Q. Did Leftwich build a machine for Besser?

A. No, sir.

Q. He did not participate in the building of a machine?

A. He did.

Q. And whose obligation was it to pay for the cost of the production of that machine?

A. There were two machines sold. The customers who purchased those machines.

Q. And those two customers were Marietta Concrete [fol. 1337] Company and the Lightweight Aggregate Corporation?

A. Yes, sir.

Q. Then getting to the Marietta Concrete Products Company; if that is the correct name, what agelite equipment did it purchase from Besser?

A. The sintering machine.

Q. And how much was that to cost?

A. Under $100,000.

Q. Under $100,000. How much had been paid up to March 30, 1950?

A. I don't think very much.

Q. I see. And your answer would be, then, that most of that sum was due on March 30, 1950?

A. I believe so.

Q. All right. Mr. Stone, did you investigate the financial responsibility of the Marietta Concrete Products Company to pay the obligations of approximately $100,000?

A. Yes.

Q. And what was the capital investment of Marietta to begin with?

A. In excess of $1,000,000.

Q. How much was paid in, if you know?

A. Oh, all of that.

Q. Now, what agelite equipment was furnished to the Lightweight Aggregate Corporation?

A. The sintering machine, and then all the other equipment used in the process was furnished to them.

[fol. 1338] Q. I see. And in what amount?

A. $248,000.

Q. $248,000. How much of that had been paid up to March 30th?

A. Nothing.

Q. And it is correct, then, is it not, that $248,000, approximately, was due as of March 30?

A. Yes, sir.

Q. At the time of this contract. You referred, Mr. Stone,

in your direct examination, to an inventory of materials, mentioning approximately $150,000?

A. Yes.

Q. Which was on hand at Alpena?,

A. Yes, sir.

Q. In the Besser Manufacturing Company plant. Do I understand that $150,000 was agelite inventory?

A. Yes.

Q. With reference to parts of machines, for machines such as were sold to agelite and Marietta?

A. Yes.

Q. Now, with reference to the two plants, Marietta and the Lightweight Aggregate plant, are those experimental, Mr. Stone, or have they been perfected?

A. They are in production.

Q. How much production?

A. Marietta Concrete is working one shift and producing [fol. 1339] approximately 200 yards of saleable material a shift.

Q. I see. How about the Lightweight Aggregate?

A. Lightweight Aggregate is not yet in complete production. They have been running successfully on eight hour shifts, but they are not quite ready to go on full production.

Q. Did you know, Mr. Stone, that it was necessary for the Besser Manufacturing Company to build these machines and have them in satisfactory working order before the balance of money for the purchase of those machines would be paid to Besser?

A. Yes, sir.

The Court: You are talking about machines. You are not talking about the concrete block machines now?

Mr. DeGree: No. We are talking about sintering machines.

The Court: Talking about the machines in the Marietta plant.

Mr. DeGree: In the Marietta plant.

The Court: All right.

Mr. DeGree: And in the Lightweight Aggregate plant.

The Court: All right.

* * * * * * * *

[fol. 1340] Q. All right. Mr. Stone, did you know on March 30, 1950, or a few months before that, that the Stearns Manufacturing Company already had a sintering process?

A. Yes.

Q. Which they were operating under?

A. Yes.

Q. Under the Gelbman patent?

A. Yes.

Q. In connection with the contract, Mr. Stone, would you state whether or not a list of receivables was furnished you?

A. No, sir.

* * * * * * * *

[fol. 1341] Cross-examination

By Mr. Babcock:

Q. Mr. Stone, at the beginning of your actual negotiations leading up to the contract, Exhibit 159, you retained a firm of attorneys to represent you, didn't you?

A. Yes, sir.

Q. That was Miller, Canfield, Paddock & Stone?

A. Yes, sir.

The Court: When was that, Mr. Babcock?

Mr. Babcock: During the negotiations leading up to the contract of March 30, your Honor.

The Court: All right.

By Mr. Babcock:

Q. And in the conversations directly related to the formation of the contract, one of the representatives of that firm was present at all conferences, isn't that correct?

A. Yes, sir.

Q. And advised you during negotiations and in the execution of the contract?

A. Yes, sir.

Q. Mr. Tilley was one of the members of the firm who participated in representing you?

A. Yes, sir.

Q. And another was Mr. Bailey, as I recall?

A. Mr. Miller.

Q. Mr. Miller?

[fol. 1342-1344] A. That is right.

* * * * * * * *

[fol. 1345] By Mr. Babcock:

Q. Mr. Stone, when you were giving your testimony about the conferences which had as their objective the formation of a company to enter into manufacturing business, the product which was contemplated was machinery, was it not?

A. Yes, sir.

Q. The company you were thinking about organizing or talking about organizing was to manufacture machinery which would be used in the production of aglite?

[fol. 1346] A. Yes, sir.

Q. You were not contemplating organizing a company to produce the aglite itself?

A. No, sir.

Q. Nor were you contemplating organizing a company to own and operate a plant such as is portrayed by the picture on Exhibit 161?

A. No, sir.

* * * * * * * *

Redirect examination

By Mr. Neville:

Q. Mr. Stone, I believe you testified yesterday that upon signing the Stone agreement, so-called, you paid $10,000 as called for under the agreement?

A. Yes, sir.

Q. How was that paid?

A. By check.

Q. Your personal check?

A. Yes, sir.

Q. On what bank?

A. The Detroit Bank.

Q. And were those your own funds in there?

A. Yes, sir.

[fol. 1347] Q. How long had they been on deposit?

A. Oh since 1936.

Q. What was the balance in your bank account, say, on January 1, of this year?

A. Oh maybe $80,000 or $70,000.

Q. Is that The Detroit Bank, or the National Bank of Detroit?

A. No, the check was drawn on funds at The Detroit Bank. I have accounts in both banks.

Q. I see. Well, what was your account in The Detroit Bank on January 1st?

* * * * * * * * *

By Mr. Neville:

Q. What was your balance on January 1?

A. It was in excess of $50,000.

* * * * * * * * *

[fol. 1348] The Court: What is your real business? Are you an engineer, a graduate of any school or anything?

A. No, sir.

The Court: The school of hard knocks, I suppose?

A. Yes, sir.

The Court: Where did you go to school?

A. Central High School in Cleveland, and two years at Ohio State University in Columbus.

The Court: And do you rehabilitate firms or institutions [fol. 1349] like this, manufacturing institutions?

A. Yes, sir.

The Court: What is your business?

A. Well, my business, actually, your Honor, is to find a company that either through bad management or bad circumstances has become financially involved or is not making as much money as they could be making, and going in there and by virtue of the experience that I have and also by virtue of doing a lot of work, getting that firm on a sound operational basis where they can produce an equitable profit.

The Court: And you didn't know about the Stearns firm here, did you?

A. Not until January of this year.

The Court: That is when Mr. Lane——

Mr. Babcock: Adams.

The Court: (Continuing) ——Adams from the National Bank directed your attention to it?

A. Yes, sir.

The Court: How do you suppose that happened? Did you ever know Adams before?

A. He was head of the Financial Division for the Army during the war, your Honor, and he had a bad loan in a local manufacturing company.

The Court: Where?

A. Here in Detroit. The Rafco Tool & Manufacturing Company.

[fol. 1350] The Court: What is that?

A. They had——

The Court: (Interposing) What is that name?

A. Rafco, R-a-f-c-o.

The Court: R-a-f-c-l?

A. C-o.

The Court: Where is it located?

A. 7350 Central Avenue in Detroit.

The Court: Central Avenue. Where is that?

A. Between Warren and Tireman.

The Court: All right. I know just about where it is.

A. Mr. Adams at that time had a loan with them, an R.F.C. guaranteed loan on some airplane contracts, airplane parts contracts that Rafco Tool had with the Ford Motor Company. Simultaneously, the Rafco Tool & Manufacturing Company had a five inch rocket contract with the Ordnance Department of the United States Navy, and they were in default on the Navy advance, Navy cash advance in excess of $200,000, and were also in default on the R.F.C. loan that was administered by Mr. Adams.

I, at that time, had completed a company in the one and a quarter inch rocket program for the Navy at Johnstown, New York, which also was in default and was not in full production, and Captain Linke from the Navy asked me to [fol. 1351] look into this Rafco Tool deal.

The Court: Is that the way you became acquainted with Adams? Is that what you are leading up to?

A. Yes, sir.

The Court: And he knew of the success you had had with some other firms?

A. Yes, sir.

The Court: In pulling them out of default situations?

A. Yes, sir.

The Court: What other firms have you been identified with?

A. In 1947 I stepped into an aeronautical manufacturing plant in Detroit.

The Court: What is the name of it?

A. Fabco.

The Court: What?

A. Fabco, F-a-b-c-o.

The Court: I thought you said Babcock.

A. No, Fabco in Trenton.

Mr. Babcock: Glad to have him get some money for me.

A. They had a working capital deficit of some eleven thousand dollars, and total assets of twenty-three thousand. I stepped in there in June. By February of 1948 I was borrowing $150,000 a month from the National Bank. Mr. [fol. 1352] Adams handled the loan. And we worked that thing up where today that company has current assets in excess of half a million dollars.

The Court: Are you in it yet?

A. No, sir. I pulled out. I sold my interest in the spring of 1948.

The Court: Do you have any interest in any industrial plant at all?

A. At the present moment, no, sir. We have a building company and——

The Court (Interposing): Now, you say "we." Do you mean some company or some corporation, or do you mean you yourself? How do you manipulate, individually or with some company?

A. The heating company is mine individually.

The Court: What do you call that?

A. The Leland Gas Heating Company.

The Court: The Leland Gas Heating Company?

A. The Leland Gas Heating Company.

The Court: And that is yours?

A. That is mine individually.

The Court: What does that do?

A. Leland Gas Heating Company came into business——

The Court (Interposing): What does it do? What is its business?

A. It sells heating installations.

The Court: How many have you got employed there?

[fol. 1353] A. Right at the moment, that business is being liquidated, because the gas company has shut off gas. It had in its employ on May 22 about 47 people.

The Court: That is a pretty good payroll right there. That is your own business?

A. Yes, sir. The company earned in excess of $90,000 in ten months.

The Court: Of which year?

A. Between August 1, 1949 and May 22, 1950.

The Court: And you are liquidating it?

A. Yes, sir.

The Court: You don't like prosperity, do you?

A. I don't like losses, your Honor.

The Court: You don't like losses?

A. No, sir.

The Court: You anticipate a loss?

A. With gas shut off and chances of gas being turned on very much a variable, to maintain an organization such as we had would be a constant cash outlay and not sufficient returns to justify maintaining it.

The Court: You are not an auditor, are you?

A. Not an auditor, but I know books and figures, your Honor.

The Court: You can read a——

A. (Interposing) A statement. Very well.

The Court (Continuing): ——a statement. How old a [fol. 1354] man are you?

A. Forty-three in September.

The Court: How long have you lived in Detroit?

A. Since February, 1945.

The Court: Do you know there is an unusual provision in that contract? You can get out of this deal any time you want to, can't you?

A. Yes, sir.

The Court: Didn't that strike you as being unusual in this situation?

A. I insisted on that stipulation, and Miller, Canfield had it inserted.

The Court: Well, if you do get out, though, it may cost you $10,000, if you get out too quick, may it not? Of course, the contract speaks for itself, but I am——

A. (Interposing) It looked to me like it was a good business investment, and the loss commensurate with the gain would be rather insignificant.

The Court: Did you expect to go in there and pay yourself a pretty good salary? Is that the idea?

A. On the contrary.

The Court: No salary?

A. I have never paid myself high salaries.

The Court: How do you make your money so that you have a $80,000 bank balance?

[fol. 1355] A. Well, my——

The Court (Interposing): I am not saying that you make it illegally, but if you don't get a salary there certainly would have to be a tremendous year to make anything like that on your dividends, wouldn't there?

A. Well, your Honor, I have no hesitation in giving you figures, because I have them audited by the Internal Revenue Department from 1942 through 1948.

The Court: I am not going into that. I haven't any thought about that. I am trying to find out——

A. (Interposing) My average earnings in the past five years have been in excess of $80,000 a year.

The Court: I haven't any question about that. I am not going into your income tax. But I am trying to understand this contract that you have drawn, or that you have gone into. You paid $10,000 down?

A. Yes, sir.

The Court: You can get out any time you want?

A. Yes, sir.

The Court: If you do get out, let's say in six months, don't you lose the $10,000 you put in?

A. Yes, sir.

The Court: Now, you say you don't take a salary yourself?

A. A nominal salary.

[fol. 1356] The Court: What is that?

A. A nominal salary. Not an excessive salary.

The Court: Now, you know, there may be a big difference on that. Let's get your idea of a nominal salary.

A. $15,000 a year.

The Court: All right, $15,000 a year salary. At the end of six months you would have $7,500 salary that you would have made. But if you decide to get out you lose $10,000, don't you?

A. Yes, sir.

The Court: How long would you have to be there at $15,000 a year in order to not lose anything by losing the $10,000?

A. I would have to be there under my tax bracket about 21 months.

The Court: All right, 21 months.

A. Yes.

The Court: And you would take this $10,000 as a loss, wouldn't you?

A. Um-hum.

The Court: All right. I will not challenge those figures. I see what you have in mind. Well, let us see: As I remember this contract, before 21 months is over you would have had to pay another $25,000 in?

A. Yes, sir.

The Court: So you would have $35,000 in?

[fol. 1357] A. Yes, sir, um-hum.

The Court: You know you laid great stress upon the fact yesterday that these people were honorable men.

A. Yes, sir.

The Court: You still found it necessary to have an attorney there to take care of your interests, didn't you?

A. Yes, sir.

The Court: I am not questioning that. So that this "honorable men" business does not mean anything in business other than you do not like to do business with crooks, do you?

A. No, sir.

The Court: You knew that they were honorable men like you knew that probably 90 per cent or more of the people in business are honorable gentlemen?

A. Yes, sir.

The Court: So you were not taking anything because these men were honorable men, were you? You were going into this because you thought it was a good business venture. Isn't that it?

A. Yes, sir.

The Court: So far, you have been deprived of the right of sitting on the board?

A. Yes, sir.

The Court: But in the meantime you have done a lot of investigating, I take it?

[fol. 1358] A. Yes, sir.

The Court: You did not know anything about sintering plants for cinders before, did you?

A. No, sir.

The Court: That is a new departure. That is far apart from tools, isn't it?

A. Yes, sir.

The Court: Tools and stampings. You knew that Mr. Besser owned practically 90,000 shares of this institution?

A. Yes, sir.

The Court: And you evidently are a good business man, and Mr. Besser is a good business man, don't you think that he gave the benefit of his knowledge to the board of directors of the Stearns Manufacturing Company during those years?

A. I don't know.

The Court: I did not ask if you knew. I am talking with reference to common sense.

A. Frankly, I don't know.

The Court: I didn't ask you if you knew, but don't you suppose that Mr. Besser gave the benefit of his knowledge, his business knowledge, to the institution that he owned 90,000 shares in? Do you or do you not, as a business man?

A. As a business man looking at that statement.

[fol. 1359] The Court: I didn't ask you about looking at the statement; as a business man.

A. I would say that if he did, he is not a good business man.

The Court: I see. So you thought that you could make money with that institution owning 45,000 shares, that had only made $19,000 on a $100,000 gross business?

A. A million.

The Court: A million dollars gross business?

A. Yes, sir.

The Court: And it had not made money although a man who has concrete block machines across the entire coast of North Africa and up into Iceland and all over, you figure you could make money on it even if he had not made a great deal. Is that it?

A. Yes, sir.

The Court: All right, that is what business is made out of, confidence. You have confidence in yourself, haven't you?

A. Yes, sir.

The Court: Because of your business experience?

A. Yes, sir.

The Court: All right. Is this money that is over in the bank, is that in your personal account and has it been, or is it in the account of the Gas Company?

A. In the Detroit Bank, the account is a joint account [fol. 1360] between my wife and myself.

The Court: Checking account?

A. A checking account. You see National Bank, the Leland Gas Heating Company, which is a D.B.A., is a Leland Gas Heating account. It is Ben Stone doing——

The Court: That is you?

A. Yes, sir.

The Court: You are not a corporation?

A. No, sir.

The Court: Doing business as——

A. As Ben Stone.

The Court: All right. What is the situation you are in now about this contract? You have $10,000 in it and you are trying to learn what you can about sintering. Have you been up at the Alpena plant?

A. Yes, sir, twice.

The Court: And have you gotten so that you know a concrete machine or concrete block machine when you see it?

A. Yes, sir.

* * * * * * * * *

[fol. 1361] JESSE H. BESSER, called as a witness by the plaintiff for cross-examination under the statute, being first duly sworn by the Clerk, testified as follows:

Cross-examination

By Mr. Neville:

Q. Will you please state your full name?

A. Jesse H. Besser, J-e-s-s-e.

Q. You are the president of the Besser Manufacturing Company, are you not, Mr. Besser?

A. Yes.

Q. And you are familiar, I take it, with the so-called Stone contract identified as Exhibit No. 159?

A. Yes.

Q. You signed the contract, of course?

A. Yes.

Q. After reading it?

A. Yes.

Q. And you understand the contract?

A. Yes.

[fol. 1362] Q. The contract contemplates, does it not, Mr. Besser, that the Besser Manufacturing Company, upon granting non exclusive licenses to the Stearns Manufacturing Company, would be confining the activities of the Stearns Manufacturing Company insofar as plain pallet machines are concerned to the manufacture of one-at-a-time and two-at-a-time plain pallet machines?

Mr. Babcock: I object, if your Honor please, because the question assumes facts which are not in the record and are not correct. In the first place, the contract would not confine the activities of the Stearns Manufacturing Company in any way. The Besser Manufacturing Company would not confine the Stearns Manufacturing Company in any

way. If it were proper to speak of confinement at all, such confinement would be restricted to the licenses if, as and when, and that would be something for negotiation between Stearns and Besser.

Secondly, the Stearns Concern would not be confined in any way except in an effort to duplicate the Besser product or to use the essential features of the Besser product. They would not be confined if they wanted to make one-at-a-[fols. 1363-1369] time, two-at-a-time, three-at-a-time, six-at-a-time, machines that were different from the Besser product.

* * * * * * * *

[fol. 1370] The Court: He may answer the question; if that is the only objection you have, he may answer the question.

By Mr. Neville:

Q. Do you remember the question, Mr. Besser?

A. Yes, sir. The Stearns would be limited to the two-at-a-time plain pallet, only in connection with the points in the Besser patents.

The Court: Does Besser have any patents at all, as Besser?

A. I am referring to the——

[fol. 1371] The Court (Interposing): The patents you control?

A. Yes.

The Court: That is Scott?

A. Yes, sir.

The Court: And Gelbman?

A. I am not referring to Gelbman in this case, because Stearns already has Gelbman.

The Court: They have the use of the Gelbman patents?

A. Yes.

The Court: But, as far as you are concerned, you are limiting the use of any machines that they may have to a two pallet—to a two concrete block machine, are you not, Mr. Besser?

A. Yes. In the case of the plain pallet only.

The Court: Well, wait a minute. Haven't you said to me time and time again that the plain pallet is the one they use now, the machine they use now for the turning out of 600 blocks per hour? Do you know of any cored pallet machine that is turning out 600 blocks an hour?

A. The plain pallet machine is in the lead, but still the Stearns Jolterete makes 600 blocks an hour using a cored pallet machine, and the Stearns Company just started to make these plain pallet machines three years ago.

The Court: Well, that is——

[fol. 1372] A. (Interposing) Their basic line has always been a cored pallet machine.

The Court: That is what they started out with?

A. Yes, sir.

The Court: All right. What is the name of this machine, this cored pallet machine that makes 600?

A. The Stearns Jolterete machine.

The Court: Jolterete. That is the one we talked about yesterday?

A. Yes.

The Court: Why isn't that as good? Is that more expensive to make, or does it not get out as good a block as the plain pallet machine?

A. The main difference is that it costs a little more for the pallets, because with the cored pallet you have to have a set of pallets of each different sized unit.

The Court: Oh, yes.

A. Whereas the plain pallet, you use the one set of pallets for all the different sizes and shapes of units.

The Court: I see. As a matter of fact, wasn't it advanced in the patent suit that one of the great advantages of the Gelbman patent, and the high production of concrete blocks, one of the patentable features, is that it reduced the cost?

A. Yes, sir.

[fol. 1373] The Court: All right.

A. Of course, may I say this: Of course, the Gelbman patents actually were in connection with the cored pallet machine entirely.

The Court: The Gelbman patent originally, yes.

A. Of course, some of those points apply equally to the plain pallet machines.

The Court: Yes.

A. But basically Gelbman was entirely a cored pallet.

The Court: Is the word "cored" pallet—I don't remember, but somebody can tell me this—is the word "cored" pallet mentioned in the patent of the Gelbman apparatus that you remember? I won't hold you to it.

A. No, I don't think that it is mentioned. I think it would show on the drawings, though, that it is a cored pallet.

The Court: I see.

Mr. DeGree: I think Mr. Stark so stated a few days ago.

The Court: What is that?

Mr. DeGree: That the drawings represent a cored pallet.

Mr. Stark: I don't believe I mentioned that

Mr. DeGree: I may be mistaken.

The Court: I am not holding you to that, Mr. Stark. I would be interested in knowing that, however, without [fol. 1374] looking into it myself.

All right, you may proceed.

By Mr. Neville:

Q. Mr. Besser——

Mr. Henry (Interposing): Your Honor, may I interrupt?

The Court: Yes.

Mr. Henry: I wonder if your Honor recalls that that is a cored pallet?

The Court: Yes. But there are two of those, aren't there, required in the case of the making of a block?

A. There would be two in a two-at-a-time machine, and three in a three-at-a-time.

The Court: Yes.

A. Of course, actually, the machines would be two-at-a-time of those 12 inch, that is, the 12 inch width block. Therefore, that would equal three at a time of the 8 inch. It would occupy the same total length mold.

The Court: Well, yes.

A. With these three-at-a-time machines, 24 inch working space, that is an even multiple of all of these different units. Three of the 8 inch, and two of the 12 inch that way.

The Court: All right.

By Mr. Neville:

Q. Mr. Besser, you have just stated that the Stearns Jolterete machine is capable of producing 600 blocks per hour. Is that correct?

A. Yes, sir.

[fol. 1375] Q. On what do you base that statement?

A. On a thorough acquaintance with the machine the country over.

The Court: He says they make 600 blocks an hour, under oath. I will believe it makes 600 blocks an hour. Is there any reason for doubting that statement?

Mr. Neville: We have a statement from the Stearns Manufacturing Company that the production capacity of the machine is approximately 400 blocks per hour.

The Court: All right.

A. Well, that would be the two-at-a-time, Mr. Neville.

The Court: Yes.

A. Everyone knows in the industry that the Stearns makes both two-at-a-time and three-at-a-time. Of course, the two-at-a-time is used in the smaller plants. But the machine that is used mostly is the three-at-a-time. So it only has to make three and one-third cycles a minute, to make ten blocks a minute, and three and a third is a little slow these days. They are running up to four cycles a minute on those machines, which would be 12 blocks a minute, or 720 an hour.

By Mr. Neville:

Q. All right. Now, referring to paragraph 8 of the agreement, and I quote now:

"Besser will grant Stearns, in consideration of Stone's undertakings as aforesaid but without limitation to the life of this agreement, non exclusive licenses as follows:

[fol. 1376] "1. To manufacture and sell cored pallet concrete block machines without limitation as to size of block produced or number of blocks produced simultaneously, so long as said machines are adaptable exclusively to manufacture a block on cored pallet, and

"2. To manufacture and sell plain pallet concrete block machines provided that such machines will produce not more than one or two blocks simultaneously."

Now, centering our attention for the moment on that part of the paragraph which provides for non exclusive licenses to manufacture and sell plain pallet concrete block machines which will produce not more than one or two blocks simultaneously, that implies, does it not, Mr. Besser, that the Besser Manufacturing Company, or you, Mr. Besser, have patents which are susceptible of being licensed, does it not?

A. Yes, sir.

Q. What are those patents?

A. Several of the main ones are the Scott patent and the Wellnitz patent.

Q. Now, do those two patents relate to the pallet?

A. Not directly to the pallet. They make no reference to the pallet. They apply to any kind of a pallet.

Q. And I will ask you, what patents does the Besser Manufacturing Company have control of, or what patents do you, Mr. Besser, have to plain pallets, plain pallet machines? As such?

[fol. 1377] A. We have none.

The Court: Do you mean exclusively for plain pallet machines?

Mr. Neville: Yes, your Honor.

The Court: Are there any machines out at all that exclusively are for plain pallet, that you know of?

A. Yes, sir.

Mr. Babcock: Any patents your Honor means, on any machines?

A. The Besser machines are exclusively plain pallet machines.

The Court: I know that. I mean the patents. Did I misspeak?

Mr. Babcock: Yes.

A. Patents.

The Court: Patents.

A. Oh, patents, no, sir. There never have been any patents on, as you said, plain pallet. But, in the past, now expired in the past there have been certain patents which made it convenient and made it successful to use the plain pallet.

The Court: I see. All right.

A. But that has expired.

By Mr. Neville:

Q. Well, the paragraph, in any event, implies that the Besser Manufacturing Company has a right to license others to manufacture and sell plain pallet machines, does it not?

Mr. Babcock: If that question intends to convey or to [fol. 1378] ask the witness to answer whether the paragraph implies a limitation to the question of plain pallet, then I don't think it is a fair question. Nobody contends such.

Mr. Neville: The question does not state any such thing, your Honor.

The Court: He says it doesn't, so you may go ahead.

A. Yes.

By Mr. Neville:

Q. And by the same token, to refuse to license others to make and sell plain pallet machines?

A. That would apply to all kinds of machines, the right to refuse.

Q. Yes. No, I am speaking of plain pallet machines right now, as the expression is used in paragraph 8.

A. Certainly the right to refuse, I would say.

Q. On what, Mr. Besser, does the Besser Manufacturing Company, or you predicate your right to license or refuse to license others to make and sell plain pallet machines?

A. On these various patents mentioned.

Q. You have mentioned patents only. But you also qualified that by saying that the patents did not apply to plain pallet machines as such.

A. That is true. Of course, that would be a matter of negotiation in giving the license. Certain parties might

desire, or might take a license one way, and someone some other way. That would be a matter——

Q. (Interposing) License for what?

[fols. 1379-1382] A. The matter of license fee would enter into that, of course.

Q. A license to what, Mr. Besser?

A. A license to use these various patents.

* * * * * * * *

[fol. 1383] By Mr. Neville:

Q. Now I am going to read, Mr. Besser, from paragraph 8 as follows:

"The license agreements to implement this undertaking by Besser will provide for full use by both Stearns and Besser of all inventions, improvements and developments now or hereafter owned, controlled, licensed or developed either by Besser or by Stearns, whether or not patented or patentable, and full disclosure by Besser or by Stearns, each to the other of all techniques, methods, processes and [fol. 1384] know-how which are or may be useful in the manufacture, operation, maintenance and repair of the machines covered by this agreement."

That details, does it not, Mr. Besser, some of the things that Besser will grant to Stearns to implement the first portion of the paragraph, dealing with the granting of non exclusive licenses?

A. Yes.

Q. Will you state, please, what inventions the Besser Manufacturing Company is able to license to Stearns for the manufacture of plain pallet machines?

Mr. Babcock: Just a minute. I object to the question as asked because the word "license" carries with it the implication that there has been a patent and granting an official license under a patent. Besser could have an invention and agree with Stearns on the full use of the invention without there ever being a patent or a license under a patent.

The Court: Oh, I do not think that is important. He may answer.

A. The details are stated quite well in the paragraph which you just read. And that just about covers everything there. I do not know that I could go any farther than that.

The Court: I guess he asked you the names of them. I don't know. That is what I took from the question. Read the question again, please.

[fol. 1385] (Whereupon the reporter read the last question.)

The Court: That is not any question. Are you through?

Mr. Neville: Yes, your Honor. I asked him to state the inventions.

The Court: All right.

A. This clause which you just read includes all of the activities and knowledge of the Besser Company, and it would be a little hard to state it in a sentence.

The Court: Well, I can almost answer that question for you. You control the Scott patent. You have a right to control part, with Gelbman, of the Gelbman patent. There was another one you mentioned this morning that I hope does not mean any more work for me.

A. The Wellnitz patent.

The Court: Is there anything you care to add to that? Does that answer your question?

Mr. Neville: No, your Honor, because those particular patents do not relate to plain pallet machines.

The Court: What do they relate to? You say they do not relate——

Mr. Neville: While I can say they do not relate to plain pallet machines, your Honor, I am not able to say what they do relate to.

The Court: What other kind of machines is there that [fol. 1386] they make? Cored pallet?

Mr. Neville: The patents which have just been mentioned relate to the vibration and such other principles that have been mentioned in the course of this trial.

The Court: Then your question is, "Do you know of any machine that does relate to a plain pallet, Mr. District Attorney"?

Mr. Neville: No, your Honor.

Mr. DeGree: Do you mean any patent?

The Court: Any patent that relates to a plain pallet.

Mr. Neville? Yes.

The Court: What is it?

Mr. Neville: Mr. Besser had a patent on plain pallets which has expired.

The Court: What was it?

By Mr. Neville:

Q. Will you kindly tell us, Mr. Besser, what that patent was?

The Court: I mean on plain pallets that we are interested in now. I am not going into ancient history.

Mr. Neville: That is what the government is interested in, your Honor, because in this paragraph the non-exclusive licenses applied to the manufacture and sale of plain pallet machines without reference to the principle of vibration or the principle of tamping, and so forth.

[fol. 1387] The Court: The others have all expired. None of these machines, as I understand it, even mention the kind of pallet that is used. There is not any such thing that I know of.

Mr. Babcock: Your Honor meant none of the patents.

The Court: None of the patents, I am sorry, none of the patents that are of vital interest today, that are alive today, mention the words "cored pallet" or "plain pallet," do they, Mr. Besser, to the best of your knowledge?

A. No, sir.

Mr. Neville: But the point is, your Honor, that while once upon a time there was a patent held by Mr. Besser on plain pallet machines that patent has expired, and this agreement purports to continue the monopoly which Mr. Besser might have had under a patent which granted him——

The Court: I do not think so at all. If you read that in there, I do not. I do not at all. This contract is entered into or is written in the light of the present-day use of machines and the make of machines. He says in this contract you can use cored pallet machines, and you can make

7,000 a minute if necessary, but if you are using plain pallet machines you are limited, that is a machine, not the patent, but a machine that uses the plain pallet, you cannot make more than——

A. The two.

The Court: The two. If you read into that some mon- [fol. 1388] opoly on a patent that has expired, you are reading something that is not in there, and you might as well continue with your examination.

Mr. Neville: May I suggest this thought, your Honor: Suppose somebody invented a machine which neither used the vibrating principle nor the tamping principle, something entirely new, which could be used with a plain pallet?

The Court: Yes.

Mr. Neville: Wouldn't this agreement preclude the Stearns Manufacturing Company from manufacturing that machine?

The Court: It might, but that is an entirely different lawsuit. That is not in here. If the government hasn't anything more to fasten its teeth into than that, gentlemen, there is no use of wasting my time any more. If that is what you have—I do not say that that is all there is, but that is not the purpose of this contract at all and not the intent of the contract I know it is not.

Mr. Neville: Well, the government, of course, your Honor, feels otherwise, and has been attempting to influence you otherwise.

The Court: Well, what evidence have you? What they are trying to do is this: They are trying to limit these people to the use of a pallet machine for two blocks.

Mr. Neville: Correct.

The Court: That is what they are trying to do because [fol. 1389] they have the three block machine. Now I think that perhaps if somebody tomorrow invented a machine that is entirely different and that makes three, that Stearns might go ahead and start making them. They might try to stop them on this contract but I do not think they would get anywhere, because this is made in the light of the present development of the block business.

Mr. Neville: The government concedes that, of course, your Honor, but nevertheless——

The Court: All right, then why bother about something that is not in here? There is plenty in here without bothering about that, if your interpretation is correct. In this contract they say they cannot go ahead and make more than two blocks on a plain pallet machine.

Mr. Neville: At a time.

The Court: All right?

Mr. Neville: Your Honor, before proceeding further, I would like to state this for the record, that it is the government's position that this agreement on its face purports to limit the Stearns Manufacturing Company under these non exclusive licenses to manufacture machines, plain pallet machines that are confined to one-at-a-time and two-at-a-time plain pallet machines.

By Mr. Neville:

Q. You have heard Mr. Wright's testimony, have you not, Mr. Besser, relating the negotiations for the purchase [fol. 1390] of Stearns stock in 1946 and the ultimate aquisition of this stock in 1946 and 1948?

A. Yes.

Q. When did you first become interested in acquiring this stock?

A. In '46.

The Court: Now, wait a minute. I have in mind your position. You have to read the contract from its four corners. You cannot just take out one paragraph and say this, that and the other thing. Paragraph 8 says this: Besser will grant Stearns in consideration of Stone's undertakings as aforesaid, but without limitation to the life of this contract, non exclusive licenses as follows: One is the cored pallet, two, plain pallet concrete block machines.

Now, how could the government possibly contend that they were anticipating a monopoly in the future on some machine that is not made on some plain pallet that has expired where they themselves might not ever have the license or any rights to the license? How could it be possible?

Mr. Neville: Well that perhaps was an unfortunate suggestion that I made by way of illustration. But I did not purport to say, your Honor, that the government's case

contemplated future developments in the industry which would present the situation that I stated. I merely stated that by way of illustration to show that the contract was [fol. 1391] broad enough to cover even that situation.

The Court: It is not broad enough to cover that situation and no court would interpret it as such. The court will interpret it—the court cannot help but interpret this contract, in my opinion, in only one way; they are talking about the present interest of Besser in certain patents. They have been talking about infringement over here. They have been talking about—and it says in plain every-day English: "non-exclusive licenses as follows." If the license has expired, if the seventeen years are up, Besser has no control. If the genius is not born yet, or has not been struck by the spark that is necessary to get a patent now-days, he has not had that spark of genius, it cannot refer to that. It can only refer to those *contracts* which they have now. That is all it can refer to.

By Mr. Neville:

Q. Did I ask you, Mr. Besser, whether or not you had a patent on plain pallet machines?

A. We had one, yes, sir.

Q. And that has expired, has it not?

A. Yes, sir.

Q. When did that expire?

A. That expired in 1946.

Mr. Neville: Mr. Reporter, I have forgotten the last question. Will you read it, please?

(Whereupon the question was read by the reporter as follows:

"When did you first become interested in acquiring this [fol. 1392] stock?

"A. In '46.")

. . . . . .

By Mr. Neville:

Q. What prompted you to acquire the Stearns stock, Mr. Besser?

A. Its availability, in the first place. The fact that it was being sold to the public.

Q. Isn't it a fact, Mr. Besser, that——

The Court (Interposing): Do you mean by that, was it on the market? Was it on the market?

A. Yes, sir.

The Court: And in what year was this? 1946?

A. 1946.

The Court: Was it on the board, either board?

A. I don't think they were.

* * * * * * * *

By Mr. Neville:

Q. You knew, of course, Mr. Besser, that in 1946 the Stearns Manufacturing Company was manufacturing plain [fols. 1393-1394] pallet machines?

A. They started that year.

Q. As a matter of fact, wasn't the reason that you became interested in the purchase of the Stearns stock the fact that Stearns contemplated or, at least,—or, perhaps, was even manufacturing or starting the manufacture of the plain pallet machines?

A. Yes, sir. That had something to do with it.

Q. Wasn't that the main reason?

A. That was an important reason.

Q. You remember speaking to Mr. Adams about the reason for acquiring the Stearns stock?

A. I remember speaking to Mr. Adams about it. I don't remember giving any reason to Mr. Adams.

Q. You did not state to Mr. Adams that the reason you wanted to acquire the Stearns stock was because Stearns was about to go into production of plain pallet machines?

A. I couldn't say that I did not say that.

Q. You wouldn't deny it, then?

A. No, sir.

* * * * * * * *

[fol. 1395] By Mr. Neville:

Q. In your negotiations, Mr. Besser, preceding the execu-
[fol. 1396] tion of the Stone contract, did you discuss with Mr. Stone as one of the conditions upon which the agreement would be contingent, that Mr. Stone use his best efforts to get the Stearns Manufacturing Company to buy out Gocorp?

A. The matter of the Stearns Company buying out Gocorp was discussed, but it was not a condition of the agreement with Stone.

* * * * * * * * *

[fol. 1397] By Mr. Neville:

Q. Did you discuss, Mr. Besser, with Mr. Stone, the
[fol. 1398] acquisition of—or Mr. Stone using his best efforts to get the Stearns Manufacturing Company to buy out Gocorp, as one of the conditions of the Stone contract?

A. No, sir.

Q. Did you discuss with Mr. Stone, Mr. Stone's using his best efforts to get Stearns to buy out Gocorp?

A. Yes.

Q. When?

A. In February and March of 1950.

Q. How did that happen to come up as a subject of conversation?

A. Because it became common knowledge that the Gocorp Company was for sale, or the assets of the Gocorp Company were for sale, and Mr. Stone became aware of that, and that entered into his consideration of taking over the Stearns stock from Besser.

Q. Now, you say that it was common knowledge that the Gocorp Corporation was for sale. On what do you base that statement, Mr. Besser?

A. Well, the offering of it by the owner, the chief owner of the Gocorp Company.

Q. Who would that be?

A. Mr. Olsen. Particularly at the Cement Show in Chicago in February. There were those two things for sale, at least, Stearns stock which Besser had, and then the

Gocorp Company assets which Olsen had. And Mr. Stone considered both of them. But Stone's contract, of course, [fol. 1399] with Besser, is only on Stearns stock.

Q. But you say that the execution of the contract had nothing to do with your conversation with Mr. Stone to the effect that Mr. Stone would use his best efforts to get Stearns Company to buy out Gocorp?

A. Yes, sir.

Q. You knew, of course, at the time, Mr. Besser, that Gocorp was manufacturing a three-at-a-time plain pallet machine, did you not?

A. Yes.

Q. Wasn't that the real reason why you became interested in having Stearns buy out Gocorp?

A. The assets of the Gocorp Company were offered, as I mentioned, in——

Q. (Interposing) Just a minute, Mr. Besser, please answer the question.

A. That was an important reason.

Q. Did you at any time have any conversations with anyone looking to the acquisition by Besser of the Lith-I-Bar Company?

A. No.

Q. Did you have any conversations with anybody looking to the granting of a license to the Lith-I-Bar Company to manufacture and sell one-at-a-time or two-at-a-time plain pallet machines?

A. Yes.

Q. With whom?

[fol. 1400] A. With Mr. Milewski.

Q. When was that?

A. That was in January of 1950.

Q. Was anything said at the time about a license to manufacture and sell a three-at-a-time plain pallet machine?

A. Yes.

Q. What was said on that subject?

A. The various numbers at a time were considered.

Q. Did Mr. Milewski ask you for a license to manufacture a three-at-a-time plain pallet machine?

A. Yes, sir.

Q. What was your answer?

A. The answer was an offer of a license on the two-at-a-time.

. . . . . .

[fol. 1401] By Mr. Neville:

Q. Well, I will ask you the question again with reference to the three-at-a-time plain pallet machines. Did Mr. Milewski ask you for a license to manufacture and sell three-at-a-time plain pallet machines?

A. Yes.

Q. And what was your answer, Mr. Besser, yes or no?

. . . . . .

A. The effect of my answer was "no," although I did not say "no."

. . . . . .

[fol. 1402] By Mr. Neville:

Q. Is it not a fact, Mr. Besser, that in your counter offer to grant a license to make a one-at-a-time or two-at-a-time plain pallet machine, you were eliminating any thought of Lith-I-Bar getting a license to manufacture a three-at-a-time plain pallet machine?

A. Yes, sir.

Q. Would you please give us the names of the companies, to your knowledge, which today, outside of your company, are manufacturing three-at-a-time plain pallet machines?

The Court: You mean by license? Being licensed by them?

Mr. Neville: No, your Honor.

The Court: Then you had better make it explicit.

By Mr. Neville:

Q. I will restate the question. Would you give us the names of the companies in production today, outside of [fol. 1403] your own company, Mr. Besser, which are manufacturing plain pallet machines?

The Court: I could probably, if I had a list, I could prob-

ably name a thousand myself. Now, will you ask the question that I know you are eventually getting to?

Mr. Neville: Well, first of all, your Honor, I have referred to the three-at-a-time plain pallet machines.

• • • • • • • •

A. The companies that are manufacturing three-at-a-time plain pallet machines?

By Mr. Neville:

Q. Right.

A. The Stearns Company, the Gocorp Company, the Lith-I-Block Company, the Pierson Company.

The Court: Pierson, that is a new one?

A. Yes.

The Court: Where is that?

A. That is in Seattle.

[fol. 1404] By Mr. Neville:

Q. Would that be the Scripps-Pierson Company, Mr. Besser?

A. Yes.

Q. Do you have any more to add to that list?

The Court: How about the Warren Company:

Mr. De Gree: The Warren 800.

The Court: That company that the man from Alabama had.

Mr. Babcock: They just developed a machine for their own use. They are a block company. They built a couple or three machines for use in their own block producing.

The Court: Well, he said any company that is manufacturing a three block machine. He did not limit it to those who were selling the machine to others.

Mr. Neville: Then at this point, your Honor, I would like to limit it to those who manufacture for sale to others.

The Court: All right. But a man may infringe whether he is building it for himself or building it for sale.

By Mr. Neville:

Q. Does that complete the list, Mr. Besser?

The Court: Do you think you have named them all?

A. Yes.

The Court: Do you gentlemen think of any other that you might help him out on that he may have overlooked?

Mr. Babcock: I have here these names and I will submit them to Mr. Besser. He may have a reason for not [fol. 1405] including them in his answer. The Darden and the LaGarde.

The Court: How about the Darden?

A. They would not come under this.

The Court: And the LaGarde?

A. No, they would not come under this.

The Court: Are these limited to a plain pallet?

Mr. Neville: Three-at-a-time plain pallet.

Mr. Babcock: That is the way the question was asked.

The Court: All right.

A. And limited to those that were being sold to others.

The Court: Yes, not just being used by themselves. All right.

By Mr. Neville:

Q. Now, is it not a fact, Mr. Besser, that at some time or other you have either attempted to buy these companies out or have attempted to confine their activities to the manufacture of machines which would fall out of the classification or which would be below the classification of a three-at-a-time plain pallet machine?

A. We have not attempted to buy out all of those companies.

Q. Well, either buy them out or attempt to have them discontinue their manufacture of three-at-a-time plain pallet machines?

The Court: Why don't you come out and ask the question here that really covers the thing?

Mr. Neville: I think the question, your Honor, I submit it does cover it.

[fol. 1406] The Court: It covers it but you will have to ask a half a dozen before you get to the answer. Go ahead, if you can answer, Mr. Besser.

A. And we have negotiated with the most of those parties in connection with the patents that were held by Besser, not to keep them from making those machines, but only to use those particular features in those patents.

The Court: You mean not to?

A. Yes, sir, to keep them from using, yes, sir.

The Court: Doesn't that bring it down to this, that you either tried to buy them or you have warned each and every one of these companies at one time that they are violating the patents that you held?

A. Yes, sir.

The Court: That is what you intended, isn't it?

A. Yes, sir.

The Court: I mean Mr. Neville?

Mr. Neville: Yes, I intended to have an answer from Mr. Besser as to whether or not he had done one of two things perhaps to these different companies that he has named.

The Court: What were the two things?

Mr. Neville: One, that either Besser tried to buy out the companies, or two, that they tried to have them curtail their activities to the manufacture of machines less than a three-at-a-time plain pallet machine.

[fol. 1407] The Court: Or three, why don't you make it, stop manufacturing those machines because the Besser people claim that they violated the patents they had? That is more important than either one of the other two that you have asked.

Mr. Neville: Well, my question, your Honor, did not contemplate——

The Court: All right, I am anxious to get on here, and if you do not ask the question I am going to ask it anyway, because I want to get to the bottom of this.

Mr. Neville: Yes, but for the record, your Honor, I want to state that my question did not contemplate the question of patents as your Honor has injected it into the question.

The Court: All right, ask any question you want to. If you do not want the question that the court suggested, strike it out, but I will tell you I am going to ask it afterwards anyway. So you might as well get it in there.

By Mr. Neville:

Q. Has the Besser Manufacturing Company——

The Court: Have you got an answer to that, to any of these questions at all, or are you going to reframe your question?

Mr. Neville: Yes, your Honor, I will reframe it.

The Court: Have you got an answer?

Mr. Neville: I am going to reframe the question and get a new answer if I may.

[fol. 1408] The Court: All right.

By Mr. Neville:

Q. Is it not a fact, Mr. Besser, that at one time or another the Besser Manufacturing Company has either attempted to buy out these different companies that you have just named, or attempted to have them confine their activities to the production of one-at-a-time or two-at-a-time plain pallet machines?

A. That has been done in a number of cases, not with each one of them, not with each one that was on that list though.

Q. Well, I wonder if you understood my question.

The Court: I think he understood it and he has answered it properly. If you had put in the suggestion of the court then you would have got the answer that Mr. Besser is willing to give you, and properly so, but he cannot answer your question as given in any other manner than he has answered it.

Mr. Neville: All right, your Honor, I will do it, I believe, as your Honor is trying to put the idea across to me.

By Mr. Neville:

Q. Is it not a fact, Mr. Besser, that at some time or another with reference to these different companies you have either—or the Besser Company has either attempted to buy them out or attempted by way of enforcing its patents to have them discontinue the manufacture of three-at-a-time plain pallet machines?

[fol. 1409] The Court: Now, I will ask the question, gentlemen. It is going to be that way anyway. Isn't it true,

Mr. Besser, or is it true—I don't know whether it is true or not—that in all of these companies that you mentioned that had three block pallet machines, that you have either tried to buy them out or you have tried to get them to desist from making the three concrete block machine, or you have insisted that they were violating your patents and therefore must desist?

A. With this condition, that this notification was not on the plain pallet three-at-a-time as a whole, but in connection with these patents.

The Court: Yes, whether it was one or two, that would be true.

A. Yes, sir, they could still make plain pallet machines in other ways.

The Court: Yes, I mean as far as your patent is concerned.

A. Yes, sir.

The Court: That is true, and all of these people you claim are violating your patents; isn't that true?

A. Yes, sir.

The Court: That has not been a secret at all at any time.

By Mr. Neville:

Q. Now, I believe you heard testimony, Mr. Besser, to [fol. 1410] the effect that it was the policy of the Besser Manufacturing Company to lease its vibrapac machines. Did you hear that testimony?

A. Yes, sir.

Q. Now, was that a true statement of the Besser policy?

A. Yes.

Q. Do you know offhand, or to your knowledge now without referring to your records, the number of vibrapac machines which were leased in 1948?

* * * * * * * *

A. It was about 80 in 1948.

The Court: That you leased?

A. Yes, sir.

The Court: This is the three block?

A. Yes.

By Mr. Neville:

Q. You did not sell any during that period, did you?

[fol. 1411] A. Yes, we sold some, too.

Q. How many?

A. About twenty.

Q. What was the sales price of those that you sold?

A. It was about $25,000.

Q. You are speaking, of course, of the three-at-a-time so-called vibrapac machine. Do you have a machine called the Super Vibrapac?

A. Yes.

Q. Did you sell any of those in 1948?

A. Yes, that is what I was referring to.

The Court: Well, wait a minute. Now that was not the question. You may have misunderstood. He asked you first about the big machine, what you call—the vibrapac? And you said you had leased about 80 of those in 1948?

A. That is right.

The Court: As to the number that you had sold, I think you said 20 of the vibrapac. Did you have reference to some other machine when you said 20?

A. No, sir, the term "super vibrapac" applies to both of those lots.

The Court: Two and three?

A. It applies to the ones that were leased, and the ones that were sold, super vibrapac does.

By Mr. Neville:

Q. So we have been speaking of the super vibrapac all along?

[fol. 1412] A. Yes, sir.

The Court: The super, is that the three block?

A. Yes, sir.

The Court: You leased 80 of those?

A. Yes, sir.

The Court: And how many of those did you sell?

A. Twenty.

The Court: About 20?

A. Yes.

The Court: Did you get down to the two-block?

Mr. Neville: No, your Honor, I am not interested particularly right now in the two-block machine.

The Court: All right, I think we understand each other and the witness did not misspeak himself.

By Mr. Neville:

Q. Now, did you sell any super vibrapac machines in 1948, Mr. Besser—I mean 1949, rather?

A. Yes, we did.

Q. How many?

A. As near as I have it, it was just about the same in both years.

Q. And what was the sales price in 1949?

A. That ran up from $25,000 to $28,000.

Q. Do you have any knowledge of the type of machine which was leased to Mr. Longenecker?

A. Yes.

Q. What type of machine was that?

[fol. 1413] A. That was the Super Vibrapac which we referred to here, three-at-a-time plain pallet machine.

Q. The same machine that you sold in 1948 for $25,000, and in 1949 for $28,000?

A. No, there was a difference there. The machine that Mr. Longenecker got on the lease was the front pallet feed machine with a number of other features and a faster running machine. That machine, as the contract shows here, ran at a speed of four and one-third cycles per minute while the ones that were sold ran at three and one-third cycles per minute without the front pallet feed.

Q. Did you sell any——

The Court: The ones that were leased, how many cycles per minute?

A. Four and one-third.

The Court: Four and one-third?

A. Four and one-third cycles, yes, sir.

The Court: That means more than twelve concrete blocks a second?

A. A minute.

The Court: A minute, coming out of there?

A. Yes.

By Mr. Neville:

Q. Did you sell any front pallet feed machines in 1948, Mr. Besser?

A. No, no, sir.

[fol. 1414] Q. Did you sell any in 1949?

A. No.

Q. Have you ever sold any?

A. No.

Q. Did you sell any other type of machine in 1948?

Mr. Babcock: Was the question referring to some machine other than the block machine? He has already testified and has already been asked and answered the question that he sold about 20 block machines in 1948.

Mr. Neville: He testified that he has sold 20 Super Vibrapac machines in 1948. The question now is, has he sold any other type of machine in 1948.

The Court: You mean concrete block machine?

Mr. Neville: Yes, of course, your Honor.

The Court: How about the others, the singles and the doubles?

A. There may have been several sold of the one-at-a-time. I am not sure about that. If so, there probably were about four of them.

By Mr. Neville:

Q. Four. Could you give us the figures for 1947, Mr. Besser?

Mr. Babcock: Does that question refer to these——

By Mr. Neville:

Q. The sale of the Super Vibrapac machines and the sale of others than the Super Vibrapac machines.

A. The number was larger in 1947.

The Court: Number sold, or number leased?

[fol. 1415] A. Mostly sold in 1947. The leasing started in the fall of 1947.

The Court: Is the tendency toward leasing rather than selling?

A. Yes, sir, it is.

The Court: I see . . . That is a policy that you have adopted?

A. Yes.

• • • • • • • •

By Mr. Neville:

Q. Can you answer the question?

A. There would be about 100 sold in 1947, and 10 leased.

Q. That is to the best of your recollection, Mr. Besser?

A. Yes, sir. But it might be a little more than that.

• • • • • • • •

[fols. 1416-1417] By Mr. Neville:

Q. I will ask you to look at Exhibit No. 1, which is a list of the machine sales prepared by Mr. Burnett, assistant secretary of the Besser Manufacturing Company, for the year 1947. And number of automatic machines sold reads 208?

A. Yes, that is right.

Q. And the total of all machines manufactured, as I read that—is that correct?

A. Yes.

Q. ——is 208?

A. Yes.

Q. And the number of machines leased is 7?

A. Yes. That is right. That is 1947.

• • • • • • • •

[fol. 1418] By Mr. Neville:

Q. Will you please state again the difference between the Super Vibrapac machines, some of which have been sold, and the Super Vibrapac machine with the front pallet feed, such as the one that was leased to Mr. Longenecker?

The Court: Which had not been sold.

By Mr. Neville:

Q. Which has not been sold, yes.

The Court: All right.

A. On the front pallet feed machine, the empty pallets are [fol. 1419] fed in from the front, whereas on the other machine they are fed in from the back of the machine.

By Mr. Neville:

Q. Is there a special appliance on the front pallet feed as distinguished from the back pallet feed?

A. Yes, there is. There is a different machine there. A different frame and a different style of handling the pallets. And, incidentally, the machine is a higher speed machine.

Q. Yes. What is the cost of manufacture of the front pallet feed Super Vibrapac machine?——

Mr. Babcock: I object, if your Honor please.

The Court: Is this the one that is not sold?

Mr. Neville: The one that is not sold.

Mr. Babcock: I object.

The Court: Don't you want to know what he would have to sell that machine for to make a profit, a fair profit? Isn't that ultimately what you are trying to get at?

Mr. Neville: No, your Honor. What I am trying to get at is this: Your Honor will perhaps remember that Mr. Longenecker said he had leased a machine, and that during the course of the lease he attempted to negotiate to buy the machine. He was not successful, because the ultimate result of those negotiations was an offer of sale of the machine at $60,000, which Mr. Longenecker said was prohibitive, and, therefore, Mr. Longenecker said he couldn't buy it. [fols. 1420-1421] Therefore, I would like to know what the real sales price of that machine is.

The Court: He has no retail price on it, as I understand. Have you sold any of those machines?

A. No, sir.

. . . . . .

[fol. 1422] By Mr. Neville:

Q. What would be the sales price of the front pallet feed [fol. 1423] Super Vibrapac Machine, if you sold it?

The Court: What would you have to get for it in order to pay the cost of manufacturing, and so forth, and a fair profit?

A. That would be $40,000.00.

The Court: All right.

By Mr. Neville:

Q. $40,000.00?

A. Yes, sir.

Q. Would you describe, Mr. Besser, the types of machine which your company leases aside from the front pallet feed Super Vibrapac machine?

A. The other things that we lease are those things that go with and are used with that Super Vibrapac machine, the most important being the mixer.

Q. In other words, the only machines leased are the Super Vibrapac machines?

A. And the things that go with it and are used with it.

Q. I show you Exhibit No. 1, and for the year 1947 it appears that the Besser Manufacturing Company leased seven machines; what type of machines were leased that year?

A. The Besser machines, they would all be Super Vibrapac machines, but of course there would be some difference when we speak of them as a whole.

Q. What would be the sales price on the most expensive Super Vibrapac machine leased that year?

[fol. 142f] A. That would be a machine for making silo staves, larger units, and the sales price on that would be $60,000.00.

The Court: What did you call them?

A. Making silo staves, concrete silo staves.

The Court: Is that a block of some kind?

A. Yes, it is a large block, a long block.

The Court: Eighteen inches?

A. It is thirty inches long and they stand them up on end to make the silo. That is being used a good deal in that way now.

The Court: How many do you get of those?

A. We get——

The Court: Three of them?

A. We get four to six at a time depending on the size.

By Mr. Neville:

Q. Would you call that machine a concrete block machine, Mr. Besser?

A. Well it is—yes, or we call it perhaps—it is sold specifically for making silo staves and we might call it a concrete silo stave machine.

The Court: What is it,—thirty inches by eight?

A. Thirty inches by ten.

The Court: By ten in depth?

A. In width. Something like this: thirty inches high, ten inches wide, and then four inches thick.

The Court: That is why they call it a stave; it looks like a great big concrete block stave.

A. Yes, and they are put up like this, making a circle (indicating).

[fol. 1425] The Court: Well the joints don't meet, do they?

A. The joints are tongued and grooved joints; there is no mortar used; they fit together with that tongued and grooved joint and they are held in place by the steel hooks around the outside. Most silos are held that way.

The Court: How big a silo would that make?

A. That makes in diameter—these are ten inches in width; these make a flat surface that is not circular in the width but it works out nicely that way, especially anything from twelve feet diameter up.

The Court: They are not circular?

A. The individual stave is not circular, but they are assembled so that it makes a circular structure, and that is the most convenient way because in that case the same identical shaped stave can be used for any diameter silo.

The Court: Do they fit into each other on the side?

A. They do; they are tongued and grooved.

The Court: And I suppose that is where you get the benefit of the thing swinging——

A. Yes, the same as a person's knee joint; you can swing it back and forth a little and get whatever diameters by swinging it on that tongued and grooved joint there.

The Court: All right.

By Mr. Neville:

Q. How many machines have been manufactured by the Besser Manufacturing Company capable of producing silo [fol. 1426] staves?

A. About ten.

Q. Is that in the whole history of the Besser Manufacturing Company?

A. Well referring now to the vibrating machines.

Q. Yes.

A. Before that we used to have the tamping machines; we are not referring to that though.

The Court: This is a recent step, isn't it, anyway?

A. Yes.

By Mr. Neville:

Q. How recent is this silo stave machine?

A. Well doing it by vibration now it has been done about four years; before that tamping was used.

Q. Leaving out the machine which is capable of producing silo staves, what would be the sales price of the most expensive Super Vibrapac machine?

A. That would be $40,000.00; you are speaking now of the machine and not some other items that would go with it to use with it?

Q. I am speaking of the machine so that it can be operated.

A. Well we would have to take in more territory then.

Q. All right.

A. There would be the mixer in the first place; I thought we did say, though, a while ago that we were going to confine it to the machine.

Q. Yes.

[fol. 1427] A. For comparison.

Q. Yes, but you injected yourself the thought of the additions.

A. Yes.

The Court: That silo block or stave interests me. Did anybody else ever do that before? Is that a development of your company?

A. It has been done on hand machines by other people over quite a number of years.

The Court: You must have some recommendation that you make on that; how high is that silo, usually?

A. Well thirty to fifty feet high.

The Court: And about ten feet in diameter?

A. Ordinarily about sixteen feet in diameter.

The Court: I was going to say ten; that would not be enough. Sixteen feet; do you know of anybody else making that kind of a block or stave?

A. Making the machines for them?

The Court: Yes:

A. A number of hand operated machines.

The Court: Just hand operated?

A. Yes, made in Minnesota and Iowa.

The Court: That is very interesting and shows how this development has led on, doesn't it, to one thing after another.

[fol. 1428] A. Yes, sir; the Marietta Company that is making the Aglite, they are the leader on making the silo staves too, Marietta, Ohio.

Mr. Babcock: Just as a matter of interest, I might mention, your Honor, that another recent development is a concrete tile for replacing old roofs on buildings. One locks in the other so that there is no mortar needed, and so forth.

The Court: The only trouble with that, Mr. Babcock, is that when a good wind comes along and takes one of those it usually takes the whole roof. Are they heavy?

Mr. Babcock: Heavy enough to withstand——

The Court: Have you ever had any of these block colored artificially?

A. Yes, that is done considerably, too.

The Court: I am sorry I got you off the track.

Mr. Neville: Not at all, your Honor.

By Mr. Neville:

Q. Referring again to Exhibit 1——

The Court: But I just want to cover another thing. You have no interest in the Marietta company any more, or have you? Do they still owe you something?

A. No, they do not.

The Court: They are free and clear from you entirely?

A. Except just current month to month items, your Honor. [fol. 1429] They are getting parts and things like that and getting machines from time to time, but everything is current.

The Court: They are getting machines?

A. Yes.

The Court: Are they licensed under you? They do not make any machines, do they?

A. No; they do not have any leased machines there at this time; they never have had.

The Court: But they make concrete blocks down there?

A. They do.

The Court: And they also furnish you by some arrangement part of the raw material for the manufacturing of certain blocks, or do they?

A. Well they would furnish it to the users of our machines.

The Court: I was just going to say, the users of your machines, perhaps, as part of the license and part of the contract and arrangement with Marietta; is that right?

A. Well no, there is not anything on that in any contract or license; that is entirely their own doing.

The Court: Are there other places in the country besides Marietta that have the same product as Marietta?

A. You are referring now to the Aglite?

The Court: Yes. I don't mean the trade name but I mean——

A. Yes, of course there is this one in Detroit here that was [fol. 1430] mentioned.

The Court: That has nothing to do with Marietta?

A. No but it has the same equipment, though.

The Court: Same process?

A. Yes, same process.

The Court: What is his name?

A. Leftwich.

The Court: Any others in the country that are not on this process?

A. Yes there are; there are others that have similar results with a little different method. What we are referring to now is a manufactured light weight aggregate. There are

three kinds of light weight aggregate; there is light weight cinders in the first place, and then light weight slag. And in the second place we have the manufactured light weight aggregate where we make it.

The Court: Clay for example?

A. Clay and shale; that is this Aglite; and then the Haydite is the oldest one of that, in the manufacture of light weight aggregate.

The Court: What is that of?

A. That is clay also.

The Court: One is sintering and the other is——

[fol. 1431] A. It is burned out in a cylindrical kiln. And then the third kind—I must finish that little reference there—the third kind of light weight aggregate is the natural light weight aggregate we have out in the west, the pumice and the volcanic cinders which we referred to before.

There is getting to be a scarcity of cinders because so many of the big plants have gone to powdered fuel and they do not produce any. Detroit Edison doesn't produce very much cinders any more. They powder their coal and just get a little dust. And then the railroads have gotten away from the steam burning—coal burning locomotives so much.

Mr. Goreff: I might mention to the court that there is a Gelbman sintering plant in operation in Denver.

The Court: You didn't have to mention that to me. I took it for granted there was one. All right, you may proceed.

Mr. Goreff: And another in New York, your Honor.

The Court: All right.

By Mr. Neville:

Q. Looking at Exhibit 1, Mr. Besser, and reading the figures which apply to the year 1947, they read that the number of machines leased for that year was seven?

A. Yes.

. . . . . .

[fol. 1432] By Mr. Neville:

Q. Would you care to state what the sales price would have been for the seven machines leased that year?

A. That would be $40,000 for five out of the seven. I

think that the other two would be, perhaps, the one-at-a-time machines, and about $20,000 for those.

Q. Looking at Exhibit 1, and reading the figures which apply to the year 1948, we note that sixty-three machines were leased that year. Would you state what the sales price would have been for those machines?

A. That would be the same as the previous, $40,000.

Mr. Neville: No further questions.

[fol. 1433] Cross-examination

By Mr. DeGree:

Q. Mr. Besser, you heard Mr. Wright's testimony and took some notes with reference to that, did you not?

A. Yes, sir.

Q. I merely mentioned that because I say you are free to look at your notes, if you wish to, with respect to the questions I am about to ask you. Did you at some time offer Mr. Wright an opportunity to purchase the stock which you, in reality, owned in the Stearns Manufacturing Company?

A. Yes, sir.

Q. When was the first time that you offered him such an opportunity?

A. The first time I remember—the first definite time was in February.

[fol. 1434] Q. I see.

A. Of 1950.

Q. Now, did you state at that time or any subsequent time to Mr. Wright, when that same subject matter was under discussion with him, that he could purchase that stock if, first, he would require Stearns Manufacturing Company to recognize patents controlled or owned by you and the Besser Manufacturing Company?

A. That matter was discussed; yes, sir.

Q. Yes. Well, let me put the question this way, and then we will have it all: Add to what I have said to you, did you also state that he should cause Stearns Manufacturing Company to buy the Gene Olsen Company, and that he should cause the Stearns Manufacturing Company to limit itself to a two-at-a-time plain pallet machine, specifically not to manufacture a three-at-a-time plain pallet machine?

A. The first part of the question is "No". The latter part of the question, that was discussed, as you said there.

Q. Well, I am afraid I do not fully understand the situation from your view-point. So let's go back to the first one, then. The first one was whether or not, as a condition of your offer to Mr. Wright, you proposed that he cause Stearns Manufacturing Company to recognize the Besser patents. Now, as I understand you to say, it was discussed?

A. Yes.

[fol. 1435] Q. Can you answer whether or not that was a condition for Mr. Wright to assume, if he took advantage of your proposal to buy your stock in Stearns?

A. That was discussed, but I don't think that there was any particular point, or that the discussion got into definite negotiations on that at all. That is the reason that I answered that it was discussed.

Q. But your position——

A. (Interposing) But it wasn't a condition. We didn't get far enough along with negotiations to call it a condition, exactly.

Q. I see. Now, calling attention to the first question I asked you, Mr. Besser, I didn't confine it to this first time. I said at that time, which you say to your best recollection was some time in February—I asked you whether at that meeting or any subsequent meeting between you and Mr. Wright when that question came up, whether you imposed this condition, or this recognition of the Besser patents as a condition for his availing himself of your offer to purchase your stock in Stearns? So would your answer be the same?

A. Yes.

Q. That it had never gotten to the point where it was a condition—where there was a condition of that sort imposed?

A. That is right. Although it was discussed, though, as I said.

Q. It was discussed?

A. Yes.

[fol. 1436] Q. Well, before going into just what was discussed, let me ask you about the other conditions, or the other things that have been mentioned here as conditions by other testimony. The question, then, of having Stearns

Manufacturing Company to buy out the Olsen Company, was that imposed or proposed as a condition for Mr. Wright to buy your stock in Stearns?

A. No, it wasn't.

Q. And is it fair to say, then, that it had been discussed?

A. I don't recall that that was even discussed.

Q. I see. Now, with reference to the taking over of the accounts of Marrietta Concrete Products Company, if that name is correct, and the Light Weight Aggregate Company, was it a condition you imposed upon Mr. Wright to have Stearns take over those accounts as part of the obligation of Mr. Wright in purchasing your stock in Stearns?

A. There was no discussion about that with Mr. Wright.

Q. No discussion with him about that?

A. No, sir.

Q. That is, in February, as you say, or any other time?

A. No. No, sir.

Q. All right. Then the further one, was it imposed by you as a condition upon Mr. Wright, if he could or would avail himself of your offer to purchase your stock in Stearns, that he cause Stearns to limit itself to a two-at-a-time plain pallet machine? Stated otherwise, that Stearns could not [fol. 1437] manufacture more than a two-at-a-time plain pallet machine?

A. That was discussed that way, but it did not get to the point where it was considered as a condition, because we didn't get that far on it.

Q. That is, do I understand you to say that you did not consider it as a condition?

A. I said we did not get that far in the discussions about it.

Q. Well, suppose, Mr. Besser, in order that the matter might be cleared up entirely, you tell us what your discussion was, then, between you and Mr. Wright, with respect to those items?

A. I mentioned to Mr. Wright that the Besser Company would be glad to give a license on the Besser patents, or the patents held by Besser. And whether we got to the point that it would be limited to a two-at-a-time, I am not sure. I wouldn't say that we didn't. Certainly it was understood that the cored pallet was to be without limitation.

Q. Yes. I didn't make the inquiry on the cored pallet at all.

A. And I would say that it was during that time—that it was discussed that in the case of the plain pallet that the license would be there up to two-at-a-time.

Q. All right. Do you recall any other pertinent discussion between you and Mr. Wright which would be necessary for the court to have a clear understanding as to what was [fol. 1438] said by each of you on that point, and what, if anything, each of you did with respect to those conversations or discussions?

A. Only that nothing came of the discussion.

Q. I see. Then will you pass to the next topic, namely—correct me if I am wrong—I believe you said you did not discuss with Mr. Wright the proposition of Stearns purchasing the Olsen Corporation?

A. That is right.

Q. You did not?

A. No.

Q. What discussion was there between you and Mr. Wright then on the subject of taking over the accounts of Marietta and Light Weight Aggregate by Stearns?

A. There was no discussion on that.

Q. What discussion was there between you and Mr. Wright on Stearns Manufacturing Company recognizing the Besser patents?

A. Only as previously stated here in question and answer, that that was discussed without reaching the point of conditions being imposed.

Q. I see. So that by my breaking it down into four different topics, your answer with respect to recognizing the Besser patents is just the same as the answer you have given with respect to the excluding Stearns from manufacturing a three-at-a-time plain pallet machine?

[fols. 1439-1446] A. Yes; that is, all together.

Q. I see. Now you are familiar with the terms of the Besser-Stone contract; we have referred to that as such here?

A. Yes.

Q. With respect to the paragraph which has been read here several times—I won't read it again, but I am referring

to Paragraph Eight, Subdivision Two, "To manufacture and sell plain pallet concrete block machines provided that such machine will produce not more than one or two blocks simultaneously." Now isn't it fair to say, Mr. Besser, that putting this contract into effect under that language Stearns Manufacturing Company could not make a plain pallet three-at-a-time machine?

A. They could not and use the points in these patents.

Q. All right, now——

A. Otherwise they could.

Q. All right. Is it fair to state that you and the Besser Manufacturing Company desired under this contract to exclude Stearns from manufacturing a three-at-a-time plain pallet machine which would violate these patents you have reference to?

A. Yes, sir.

* * * * * * * * *

[fols. 1447-1448] The Court: I think that the contract, other than the cored pallet—I think that the contract, by its limitations and by its language, just prevents the Stearns people from manufacturing and selling plain pallet concrete block machines of more than two blocks simultaneously, using—using any or all of the patents that are being used by the Besser people at the present time that they have a control over.

Because, right at the top of the second line, it says "non-exclusive licenses as follows". That does not affect, in my opinion—there is no hidden meaning to this at all—that you can't in the future, perhaps, manufacture a plain pallet machine that manufactures twenty-five blocks at a time on some other patent. Right now it may have the effect of doing what you claim, but that is not in the contract, and if you people are reading that in there you are reading something that this court cannot find in the contract and that never was within the intention of the people that made the contract. Was it, Mr. Besser?

A. No, sir.

The Court: No. All right. Now you have it on record that it wasn't within the intention, and they will have a fine time trying to claim that it was.

* * * * * * * * *

[fol. 1449] Mr. Neville: Since this has been raised, I may state that the Government's position on that remains unchanged, as it was stated a while ago.

The Court: That is not very illuminating to this court, because you have been on both sides of it, and I don't know which one remains unchanged.

Mr. Neville: Well, if your Honor desires, I will state it.

The Court: What I want to know, whether you claim something that if that is the basis of the Government's claim, then certainly—or any part of the basis of the Gov-[fol. 1450] ernment's claim, well I don't see how it could be, because this contract was not in existence when you started this case.

Mr. Neville: That is perfectly true, that the Government's case does not rest on this contract, your Honor.

The Court: You may weaken the rest of it, by resting it on this, if it hasn't any more foundation than I can see for the Government's position on this now. But go ahead. I would be very happy. I do want—I want the court that reviews this to have a complete opportunity to see whether or not the court arrived at a wrong conclusion.

Mr. Neville: The Government's position is that this contract in its performance, restrains the Stearns Manufacturing Company from manufacturing three-at-a-time plain pallet machines, irrespective of any patents or any other rights.

The position of the Government is that Mr. Besser and the Besser Manufacturing Company do not have the right, they don't have what it takes, to give a license or to refuse a license to manufacture three-at-a-time plain pallet machines.

The Court: I said that, if you listened, I said that in its performance it may have that effect, but in its provisions it does not. But if the Government takes that position, that [fol. 1451] that is your case, gentlemen, you might as well fold up right now, because I don't believe that that is the provision at all of this contract. I can't see it in there. In fact, I can see that it is not in there.

This merely affects the three pallet machine that the Besser Company has been making for I don't know how many years. How many years have you been making it? Two or three years now? Can't be much more than that.

A. Somewhat longer than that.

The Court: Probably 1946, '45. All right, gentlemen, you may proceed, but on that point there is no question in my mind, and not only that, one of the men who has signed the contract has denied that ever was intended, and he didn't have to deny it to me. Common sense would tell me you were correct in so interpreting it.

By Mr. DeGree:

Q. I believe, Mr. Besser, you did previously testify that it was the intention to limit Stearns or prevent Stearns from making the three-at-a-time machine which would violate the patents of Besser?

A. Yes, sir.

Q. Isn't that right?

A. Yes, sir.

Q. Now, what patents of Besser or Besser Manufacturing Company would the Stearns Manufacturing Company be [fols. 1452-1453] violating, or what have they violated up to now, in manufacturing the three-at-a-time machine?

* * * * * * * *

[fol. 1454] A. Particularly the Scott patent and the Wellnitz patent.

The Court: What is this Wellnitz patent? That has expired, hasn't it?

Mr. Babcock: No.

Mr. DeGree: No.

Mr. Babcock: No.

The Court: Why haven't I heard of that fellow before? I have heard of everybody else.

[fol. 1455] Mr. Stark: If the court please, the Wellnitz patent does not relate to the manufacture of machines or the machine itself, but to a control, a height control.

The Court: A pipe control?

Mr. Stark: Height, h-e-i-g-h-t-.

The Court: Height. Yes.

Mr. Stark: It has nothing to do with vibration.

The Court: Nothing was said about that in the patent suit?

Mr. Stark: No. There was no reason to.

The Court: All right. Well, he says it violates the Scott patent and the——

Mr. DeGree (Interposing): Wellnitz.

Mr. Babcock: Wellnitz.

The Court (Continuing): —and Wellnitz. And, of course, he says the Scott patent also, because evidently you had no contract or license between Stearns and yourself as the controller of the Scott patent?

A. That is right.

The Court: But nothing has been done about it, because you own almost all—forty some per cent of the shares?

A. Yes.

The Court: Of the stock of Stearns Manufacturing Company, and you aren't going to jump on a company that you—would I say control, or would I be jumping upon myself—[fol. 1456] that you had a great deal of influence with?

A. That is right.

The Court: All right.

By Mr. DeGree:

Q. All right. You say particularly the Scott patent and the Wellnitz patent. Now, I shall ask you, Mr. Besser, whether or not there is any claim in the Scott patent with reference to the pallet?

A. No, sir.

Q. And I take it from the statement of Mr. Stark, if you agree with that, that there was no reference in the Wellnitz patent to the pallet?

A. That is right.

Q. Further, you at no time did have a patent, Mr. Besser, which had a claim which did cover the plain pallet, is that correct?

A. It covered specifically the machine to use the plain pallet.

Q. To use the plain pallet?

A. Yes.

Q. Is it fair to say that there was a claim in that patent which did refer to the pallet, to the plain pallet?

A. I would say not to cover the plain pallet, but claims on a machine which made it convenient to use the plain pallet.

Q. I see. Now, that patent expired, I think you said, in 1946?

A. Yes.

Q. All right. So that there is no patent that you know of [fol. 1457] at the present time which covers a plain pallet machine?

[fol. 1458] A. The answer would be this way, that there is not any patent of that kind covering the plain pallet feature of it.

By Mr. DeGree:

Q. That's right.

The Court: You mean limiting it to the plain pallet feature?

A. Yes, sir.

By Mr. DeGree:

Q. I then want to ask you whether or not the Scott patent covers a machine with a plain pallet three-at-a-time feature?

A. It has——

* * * * * * * *

[fol. 1459] The Court: Now when you say that, do you mean, is it mentioned in the claims or in the patent itself? Is that what you mean?

Mr. DeGree: Yes, your Honor.

The Court: Well you better put it that way, because as I understand it there is not a live patent today that mentions the words "plain" or "cored patent". Is that true?

A. That's right.

The Court: There you are. Some machines are more adapted to cored pallets and some to plain pallets. Your machines are more adapted, the way they are constructed, to plain pallets?

A. Yes, sir.

The Court: All right. Does that take care of some of your questions?

Mr. DeGree: Yes, your Honor, that is what we have contended.

The Court: All right.

By Mr. DeGree:

Q. In excluding Stearns from making a three-at-a-time [fol. 1460] machine under the conditions you have mentioned, what particular features of the Scott patent has Stearns violated in manufacturing its three-at-a-time plain pallet machine?

A. Of course that is the resiliently mounted mold with vibration and with means for ejecting the finished block.

The Court: Wait a minute now.

A. There are the three points——

The Court: I take it for granted that you claim that—you don't use the means of ejection of the Scott patent, do you? Neither does Stearns, does it?

A. We use means for ejection as stated in the Scott claims.

The Court: You do?

A. Yes, sir.

The Court: I thought you told me you did not?

A. Not necessarily exactly the same as shown in the drawings.

The Court: The drawings show the ejection to be at the top, pushed up. Isn't that true?

A. Yes, sir.

The Court: As a matter of fact, you use it and so does Stearns by pressing them down through the bottom?

A. Yes, sir.

The Court: But in the manner of the *Bonne* and maybe the Taylor patent; I don't know.

[fol. 1461] A. Yes, sir. The claims read very plainly on both methods, however.

By Mr. DeGree:

Q. So I take it then, Mr. Besser, that under this Stone-Besser agreement Besser Manufacturing Company was satisfied to permit Stearns to make the one-at-a-time and two-at-a-time plain pallet machines, the same as they have been making in the past, and that would not be a violation of any patent whatsoever other than the Scott patent?

A. Also the Wellnitz patent.

Q. In other words, that would be permissible under the

authority that Besser feels it has under the Scott patent, and that is the license talked about here,——

The Court: You better read that question again, because I want the witness to understand it. Read it out loud.

(Last question read by the reporter.)

Mr. DeGree: I had not finished the question. I will reframe it.

The Court: All right.

By Mr. DeGree:

Q. Under the Besser-Stone contract, it would be permissible for the Stearns Manufacturing Company, as licensee, to build a plain pallet one-at-a-time and a plain pallet two-at-a-time machine?

A. Yes, sir.

Q. The same as Stearns Manufacturing Company has been manufacturing in the past?

[fol. 1462] A. Yes, sir.

Q. It would not, however, be permissible for Stearns to manufacture further——

A. That's right.

Q. A plain pallet three-at-a-time machine once this license as contemplated by the Besser-Stone contract——

A. Yes, sir.

Q. Were entered into?

A. That's right.

The Court: Now do you get that question? It may be interpreted in two or three different ways, and I want you to have it re-read, because of interpretation that may be given later on. Re-read it to the witness so that he knows and I know that he knows what he is saying. Read the last question please.

(Whereupon the last two questions and answers were read by the reporter)

The Court: You said "license"; do you mean "license"?

Mr. DeGree: The license agreement as contemplated by the Besser-Stone agreement.

The Court: Is there any license agreement that is con-

templated by this Besser-Stone agreement, or is that the license itself?

Mr. DeGree: No, it is contemplated that there be a license agreement embodying certain specific terms and apparently [fol. 1463] leaving other terms of a general nature to go into it.

The Court: I took it for granted that this was the right, itself. Do you gentlemen agree that that is in there, that they have to give another license later on?

Mr. Babcock: Oh, yes, Stearns will make application for the license.

The Court: You mean to Gelbman?

Mr. Babcock: Oh no; to Besser.

The Court: Do you get it from Besser and do not get it from Gelbman? If so, then where are you?

Mr. DeGree: Gelbman has nothing to do with the Scott patent.

The Court: Oh, just for the Scott patent.

Mr. DeGree: Yes.

The Court: The question was so broad I thought you were taking in all of them. All right, if that is what you are talking about, then the court is wrong.

Mr. DeGree: Yes, your Honor, because predicated on the proposition that the reason for this is the Scott patent, Stearns enjoying all other privileges under the Gelbman patent, then the Besser Manufacturing Company would have only the Scott patent to license us under.

The Court: All they are using out of the Scott patent is [fol. 1464] the resiliently mounted mold.

Mr. DeGree: That's right.

The Court: And you could not manufacture enough of that kind of blocks to make any money on at all,—not at any time. The only thing the Scott patent does and the only thing they utilize is the resiliently mounted mold that keeps it away from the rest of the machine and permits the vibration of the mold. There is no resiliently mounted mold provided for in the Gelbman patents, none at all, and in order to make the machine that they want, if these claims are good, Stearns never really having had a license from the Besser, the controllers of the Scott patent, they are now going to get one, and that will permit them to make the

machines the way they have been permitting them, without any question of infringement. Is that correct?

A. Yes, sir.

The Court: You could not make a three-concrete block machine out of the Scott patent that would answer the needs of today at all, could you, just out of the Scott patent? Could you, Mr. Besser?

A. You would have to go further.

The Court: That is what I say; you could not out of that. All you have got there is a shaking machine that shakes it down and ejects it?

A. Yes.

[fol. 1465] The Court: There is no tamping provided for in the Scott machine?

A. No.

The Court: There is no pressing provided for in the Scott machine?

A. No.

The Court: All right.

By Mr. DeGree:

Q. Mr. Besser, you stated that it was common knowledge at one time that the Gocorp, Mr. Gene Olsen's company, was for sale, did you not?

A. Yes, sir.

Q. And that was at the Chicago convention at what time?

A. In February of this year.

Q. What year?

A. This year.

Q. 1950.

A. Yes.

Q. Had you authorized any representatives of your company at an earlier time in 1948 or 1949 to purchase the Gene Olsen Company?

A. No, sir.

Q. Had you ever authorized Mr. Bailey to contact Mr. Olsen whereby Besser would purchase the Gene Olson Company?

A. No, sir.

Q. Did you ever authorize Mr. Rosenthaler——

[fol. 1466] A. No, sir.

Q. To make overtures to Mr. Olsen so that your company would purchase his company?

A. No, sir.

Q. In 1946, did Mr. Gene Olsen, who was then with the Stearns Manufacturing Company, tell you that "Now that your patent on the plain pallet machine has expired, I am now going to make a three-at-a-time machine in the Stearns Manufacturing Company"?

A. He said words to that effect, yes sir.

The Court: Back in 1946?

By Mr. DeGree:

Q. In 1946?

A. Yes, sir.

The Court: That was before you had acquired——

A. Yes, sir.

The Court: As a matter of fact, that led to the acquirement of it, didn't it?

Mr. DeGree: That is what I am coming to.

The Court: All right.

Mr. Babcock: He has already testified that that was one of the reasons.

The Court: Yes, one of the reasons. All right.

[fol. 1467] Q. I will ask you this: Wasn't that the primary reason for your wanting to acquire stock in the Stearns Manufacturing Company, because Mr. Olsen was going to have Stearns Manufacturing Company make a three-at-a-time plain pallet machine?

A. I stated before that that was an important reason.

Q. Could you classify it as the primary reason or not?

A. No, I wouldn't—I would leave it that way. That it was a very important reason.

Q. You would leave it just the way you stated it?

A. Yes.

Q. Without any embellishment whatsoever?

A. Yes.

Q. I see. Did you authorize Mr. Rosenthaler to make a proposal to the Gene Olsen Company for the Gene Olsen Company to go into the manufacture of Aglite machinery?

A. There was discussion authorized with Mr. Olsen. Now,

whether that would be with the Gene Olsen Company or Mr. Olsen personally, I am not sure.

The Court: Well, that has the same distinction, evidently, as the conversation with Mr. Besser and Besser Manufacturing Company, so you can rule on your own definition on that one. Olsen owns most of the stock, does he not, of the Olsen Manufacturing Company?

A. Yes, sir.

[fols. 1468-1471] Mr. DeGree: He so testified.

The Court: You own most of the stock in the Besser Company?

A. Yes, sir.

The Court: All right. I guess when you talk about somebody like Olsen or somebody like Besser, you are talking about the company. But it is well to differentiate.

By Mr. DeGree:

Q. Well, then, was the authorization to Mr. Rosenthaler or Mr. Bailey to have Gene Olsen go into the manufacture of machinery for the production of Aglite?

A. Yes.

Q. As a matter of fact, Mr. Besser, wasn't it the intention of the Besser Manufacturing Company to shunt the Gene Olsen Company, who manufactured the Gocorp machine, three-at-a-time, plain pallet, into the Aglite business, so that it would cease manufacturing the three-at-a-time machine?

A. That would have been convenient, if it worked out that way.

Q. I know. But was that the intention?

The Court: Can you answer that, Mr. Besser?

A. It is pretty hard to improve on my answer which I already gave there.

. . . . . .

[fol. 1472] By Mr. DeGree:

Q. Mr. Besser, referring to the last paragraph of the Stone-Besser agreement, what was the sales price of aglite equipment which was furnished by Besser to the Marietta Concrete Products Company? Would it be $100,000 as Mr. Stone stated?

A. It was $80,000.

Q. $80,000.

A. The part that was specifically furnished by Besser.

Q. I see. Now the sales price of aglite equipment furnished by Besser to the Lightweight Aggregate Corporation would be $248,000 as Mr. Stone stated?

A. The definite aglite equipment was the same. It was $80,000.

Q. I see.

A. The other items were additional auxiliary equipment, conveyors, and so forth.

[fol. 1473] Q. And would the whole thing come to approximately $248,000?

A. Yes.

Q. Then going back to the Marietta Concrete Products Company, the value would be $100,000 with the auxiliary equipment, or $80,000?

A. The auxiliary equipment was not furnished by Besser in that case.

Q. I see.

A. But the grand total would be about the same, though.

Q. And then the inventory at Alpena for aglite equipment, would that be $150,000 as Mr. Stone stated?

A. No. That wouldn't be that much.

Q. What would you say?

A. About $15,000.

Q. About $15,000?

A. Yes.

Q. Will you state whether or not the Marietta Concrete Products Company and the Lightweight Aggregate Corporation gave to the Besser Company any evidence of their respective indebtednesses, such as notes?

A. No. No, they did not. It was just a contract, originally.

Q. Just a contract?

A. Right.

Q. Was the receivable assigned as security in any manner in the——

A. (Interposing) No, no.

[fol. 1474] Q. No bank. Under the last paragraph, the Stearns Manufacturing Company, if the Besser-Stone

agreement were put into effect, would be called upon to pay to the Besser Manufacturing Company these sums of money representing the accounts receivable from Lightweight Aggregate Corporation and Marietta Concrete Products?

A. Only when and if collected from Marietta.

Q. I see.

A. And Lightweight Aggregate.

Q. But payment to Besser would be as and when collected from these people?

A. Yes, sir.

Q. How much would payment to Besser be for the inventory at Alpena?

A. That was one of the assets of the Besser Company there, which they were turning over to Stone.

Q. To Stearns?

A. To Stearns.

Q. As I understand it, Stearns was to pay Besser for the inventory?

A. Yes, any time when the deal was consummated.

Q. Now, do you know what the capitalization of the Lightweight Aggregate Corporation was on March 30, 1950?

A. No, I do not.

Q. What is the amount outstanding and unpaid by the Lightweight Aggregate Corporation to Besser?

A. That would be the amount stated, two hundred forty.

Q. Two hundred forty-eight is the figure I have.

* * * * * * * *

[fol. 1475] Cross-examination

By Mr. Goreff:

Q. Mr. Besser, with respect to the license agreement of December, 1942, plaintiff's Exhibit 10, that provided, did it not, that royalties were to be paid to the licensors, Gelbman and Andrus, on the following basis: $75 for each single block machine; $150 for each two-block machine; and $225 for each three-block machine sold or leased?

A. Yes.

Q. Is that correct?

A. Yes, sir.

Q. And that agreement, Plaintiff's Exhibit 10, contained no provision for sublicensing without the written consent of Gelbman and Andrus?

A. That is right.

Q. And that agreement is still in force and effect?

A. Yes.

Q. Did you consult with either Mr. Andrus or Mr. Gelb-
[fol. 1476] man with respect to the Stone agreement, Plaintiff's Exhibit 159?

A. No, we did not.

Q. Did you advise them of it?

A. I do not remember; we might have advised them afterwards.

Q. You mean after it was signed?

A. Yes, I cannot say though that we did.

Q. Was that advice in writing?

A. No.

Q. If you remember.

A. No, it was not. I would say that we did not advise them.

Q. This Plaintiff's Exhibit 159, the Stone agreement, do I understand that you were endeavoring here by this agreement to deal with Stearns on the patents which were the subject of the license agreement, Plaintiff's Exhibit 10, or were you attempting to deal only with your own patents, the Scott and Wellnitz patents?

A. Only with our own patents.

Q. The Scott and Wellnitz patents?

A. Yes.

Mr. Goreff: That is all.

The Court: Mr. Besser, you do not desire the court to understand, do you, that this Stone deal comes as a complete surprise to Gelbman? Did you or somebody from your office or your attorneys, or somebody tell him what you had in mind?

A. I do not have any knowledge of them being informed;
[fol. 1477] they may have known about it during the negotiations but I——

The Court: Well, aren't you pretty sure that they knew about it?

A. No.

The Court: Your relationship with them is very close, isn't it?

A. No, sir. My opinion would be that they did not know about it until it was over.

The Court: But they knew about it before they came into this courtroom, or before the Government knew about it, didn't they?

Mr. Babcock: Well, if your Honor please, in connection with the last part of your Honor's question, I think your Honor will recall that it has been undisputedly stated upon this record that before the agreement was executed and right after the final document was prepared, a copy of it was submitted to the government representatives.

The Court: I am aware of that, but if only five minutes intervened, I still believe that the Gelbman people could have been notified or were notified, or told something about it. Your relationship is close with Gelbman, isn't it, and has been satisfactory?

A. Yes, sir.

The Court: I have never seen your contract with Gelbman but you knew that you could not go through with this con- [fol. 1478] tract if Gelbman refused to go through with it, didn't you?

Mr. Babcock: Oh, pardon me, your Honor; oh your Honor is making an erroneous conclusion there.

The Court: I am not making any erroneous conclusion. I don't think they could have gone through with it, if Gelbman didn't permit it. If you read the contract, you will see that Gelbman has to—although he doesn't have to consent, that if he doesn't consent he could make a lot of trouble for them.

Now, that is my impression of this contract; and it is evidently—the attorney for Mr. Gelbman has said so in this court two or three times already. Let's not be naive about this, gentlemen.

A. May I make a statement on that?

The Court: Yes, certainly.

A. The negotiations with Stone went on from the middle of February to the last of March.

The Court: Yes.

A. And I did not personally inform Gelbman about those negotiations.

The Court: I don't say that you personally did.

A. I do not know of anyone else doing so. I did not advise anyone else to do so. And I did not consider that there was anything in the Stone arrangement that made it necessary for Besser to consult with Gelbman on it.

The Court: Well, in that contract, as I remember, you [fol. 1479] arranged so that Gelbman get so much on certain machines, don't you?

A. That was merely a confirmation, for Stone's information, of the already existing arrangement with Gelbman.

The Court: That doesn't say so in there, in the contract, does it? You say he shall pay to Gelbman.

A. They already were paying that.

The Court: I know.

A. And that did not change the presently—the old contract between Stearns and Gelbman.

The Court: They already had a contract with Gelbman. Would that permit them to make a three-block machine? It did, didn't it?

A. Yes, sir.

The Court: All right. You were shutting that off from Gelbman, weren't you? This contract shut that right off from Gelbman, didn't it, as far as Stearns is concerned? Stearns could no longer make the three-block machine, isn't that true?

A. Yes.

The Court: They could before?

A. That is right.

The Court: They were licensed by Gelbman?

A. Only in the case of the plain pallet machine.

The Court: That is the main machine that is made, [fol. 1480] isn't it?

A. The main machine of the Stearns Company was the cored pallet.

The Court: That is what it used to be, but the main machine—what do you call it, high powered or what? High production?

Mr. Speer: High production.

The Court: Is the plain pallet, isn't that true?

A. Yes.

The Court: Now, Mr. Babcock, do you insist that there was nothing that affected Gelbman in this contract?

Mr. Babcock: No, your Honor, because the Gelbman contract—the Gelbman patents had no relationship whatsoever to the Scott and the Wellnitz patents, and because——

The Court (Interposing): No one has claimed that.

Mr. Babcock: That is true. But going back to 1942——

The Court (Interposing): Can't you just answer my question without giving me a talk on it?

Mr. Babcock: Yes, sir.

The Court: Do you still insist?

Mr. Babcock: I do, your Honor.

The Court: That this contract does not affect the Gelbman people at all?

Mr. Babcock: Yes, your Honor.

The Court: To me, that is being as obstinate as the government was yesterday on its interpretation of the con- [fol. 1481] tract. Mr. Babcock, by this contract, the Gelbman people lose a client as far as the three-block plain pallet machine is concerned?

Mr. Babcock: I respectfully——

The Court (Interposing): Do they not?

Mr. Babcock: I respectfully disagree with your Honor. I would be glad to state my reason.

The Court: Do you disagree with Mr. Besser?

Mr. Babcock: I would be glad to state my reasons.

The Court: Do you disagree with Mr. Besser also?

Mr. Babcock: If that is your conclusion.

The Court: Isn't it your own conclusion?

Mr. Babcock: No, your Honor.

The Court: He has just said that.

Mr. Babcock: I understand.

The Court: Do I misunderstand that? Is that the way you understand that, counsel for the government?

Mr. Speer: Yes, sir.

The Court: And you?

Mr. DeGree: Yes, your Honor.

Mr. Babcock: I submit, if the court please, the court's questions of Mr. Besser have not brought out the whole picture.

The Court: You may bring out the whole picture, but when you try to tell me, and rise up here and try to say that

[fols. 1482-1484] this contract does not affect Gelbman, the court doesn't follow you at all.

Mr. Babcock: I appreciate that.

The Court: Your own witness says it does. Mr. Gelbman's attorney says it does. And I don't know about Mr. Henry, whether he says it does or not. But you are the only one I know of that says that it does not.

Mr. Babcock: I appreciate that.

The Court: All right.

Mr. Babcock: I would be glad to state my reasons for saying so.

The Court: It is immaterial what the reasons are now. I don't think it is that important, to have an extended argument on the record. But it hasn't changed the court's opinion any at all.

Now, I merely wanted to find out whether or not they were aware of it. He says they were not aware of it at that time. Do you know whether they were aware of it before they came into court, or not, Mr. Besser?

The Court: You don't know about that. All right. If you don't know, you don't know.

A. I don't know.

Any other questions?

Mr. Neville: Yes, your Honor.

* * * * * * * * *

[fol. 1485] By Mr. Neville:

Q. Do you not know, Mr. Besser, that Mr. Stark had prepared a letter for signature by Mr. Gelbman, a letter which was to be directed to the Stearns Manufacturing Company dealing with a change in the original 1942 license agreement to both Stearns and Besser?

A. Yes.

Q. You knew that?

A. Yes.

The Court: May I have that letter?

(A paper handed to the court.)

The Court: What is Mr. Stark's official connection with the company?

A. Patent attorney.

The Court: All right.

Mr. Babcock: I am sure that your Honor has in mind that the testimony also is that prior to this Mr. Gelbman had submitted through his own brother and counsel an agreement to the same effect for the consideration of Stearns Manufacturing Company.

[fol. 1486] The Court: I think there is some evidence on that. That is all the more reason for the court to believe that ordinarily, Mr. Gelbman would have been immediately apprized of this change in his financial set-up or his resources, or possible resources.

. . . . . .

Mr. Neville: I would like to refer if I may for just a moment to Mr. Besser's testimony yesterday which appears on page 1337 and page 1338 of the transcript:

"Q. I see. Did you authorize Mr. Rosenthaler to make a proposal to the Gene Olsen Company for the Gene Olsen Company to go into the manufacture of aglite machinery?

"A. There was discussion authorized with Mr. Olsen. Now, whether that would be with the Gene Olsen Company or Mr. Olsen personally, I am not sure."

At this point there was a colloquy between the court and Mr. DeGree, and questions were renewed again as follows:

"Q. (By Mr. DeGree) Well then, was the authorization to Mr. Rosenthaler or Mr. Bailey to have Gene Olsen go into the manufacture of machinery for the production of aglite?

[fol. 1487] "A. Yes.

"Q. As a matter of fact, Mr. Besser, wasn't it the intention of the Besser Manufacturing Company to shut the Gene Olsen Company, who manufactured the Gocorp machine, three-at-a-time, plain pallet, into the aglite business, so that it would cease manufacturing the three-at-a-time machine?

"A. That would have been convenient, if it worked out that way."

"Q. I know. But was that the intention?

"The Court: Can you answer that, Mr. Besser?"

And then, after a considerable pause, did you not answer,

Mr. Besser:

"It is pretty hard to improve on my answer which I already gave there."

I will ask you now, Mr. Besser, can you improve on that answer today?

A. Yes, I could add to it that we had no expectation that that would be the result.

Q. Was that not the intent of having Mr. Rosenthaler contact Mr. Olsen?

A. No, it was not.

Q. You are positive of that?

A. Yes, sir.

Q. Then what did you mean by, "that would have been [fol. 1488] convenient if it worked out that way"?

A. Just what I said there.

Q. Doesn't that imply, Mr. Besser, that that was the whole idea back of the proposals made?

A. No.

* * * * * * * *

By Mr. Neville:

Q. As a matter of fact, Mr. Besser, doesn't that answer imply that that was the whole purpose and intent of having Mr. Rosenthaler contact Mr. Olsen?

Mr. Babcock: I submit this is getting argumentative.

The Court: He may answer.

A. No, it does not.

By Mr. Neville:

Q. What does it imply then?

A. That Mr. Olsen was interested in getting a source of lightweight aggregate.

Q. Let me put it to you this way, and I quote again from your answer:

"That would have been convenient."

It would have been convenient to whom?

A. The reference there is to some additional or other result which was not contemplated or expected.

[fol. 1489] Q. Please answer my question, Mr. Besser; it would have been convenient to whom?

A. To the other manufacturers of block machines.

A. Well, of course, to the Besser Company?

A. To everyone else who was making machinery.

Q. In the sense that it would have eliminated a competitor?

A. Everyone else in the industry, it would have been convenient for them on account of that.

Q. Including the Besser Manufacturing Company?

A. Certainly.

. . . . . .

[fol. 1490] Recross-examination

By Mr. Goreff:

Q. Mr. Besser, this letter, Plaintiff's Exhibit 156, addressed to the Stearns Manufacturing Company by Mr. Gelbman, suggesting that the agreement of December, 1942, be modified so as to make it non exclusive instead of exclusive, were any discussions had with Mr. Gelbman and yourself with respect to that arrangement or change?

A. Yes.

Q. When did those discussions take place?

A. During the past year.

Q. And was it contemplated that the Besser Manufacturing Company likewise relinquish its exclusive license and make its license non exclusive?

The Court: Was it what, did you say?

Mr. Goreff: Contemplated.

The Court: Well contemplated by whom? By Besser?

Mr. Goreff: By Besser and Gelbman.

The Court: You mean, was it discussed between them?

Mr. Goreff: Yes, discussed.

The Court: Let us get the words as they are, because I see the court has to watch every word to see what is meant.

A. Perhaps not exactly as stated in the question.

[fol. 1491] The Court: Well, the question has been

changed to "discussed", Mr. Besser. Was it discussed?

A. It was not discussed to make the Besser license non inclusive.

By Mr. Goreff:

Q. Non exclusive?

. . . . . .

A. Non exclusive.

The Court: You were to still have the exclusive right, is that what you mean, or not? I did not quite understand you.

A. Yes, sir, but the point was to have an arrangement for the issuing of licenses to other machinery manufacturers as requested by the government.

. . . . . .

[fol. 1492] By Mr. Goreff:

Q. Mr. Besser, you had some discussions with Mr. Gelbman, the subject of which was a change in the license agreement, Plaintiff's Exhibit 10?

A. Yes.

Q. And that change dealt, did it not, with a modification of the license agreement, Plaintiff's Exhibit 10, so that the licensees, Stearns and Besser, would become non exclusive licensees instead of exclusive licensees; is that correct?

The Court: Was that discussed? Is that what you mean?

Mr. Goreff: Yes.

The Court: Was that discussed?

A. It was not exactly as stated in the question.

The Court: All right. I think the witness, if he has an objection, could be given an opportunity to say what was discussed between Gelbman and Besser.

By Mr. Goreff:

Q. Will you tell us then precisely what was discussed?

A. That the Besser Company would license the Besser patents to others and that Gelbman would also license his

patents to others if the Stearns Company would agree to that.

The Court: I see.

A. Thus conforming to the request by the government.

The Court: You would license your Scott patent to any-
[fol. 1493] body that wanted the license if Gelbman would, and of course Stearns being a party, Stearns would have to agree to the same thing; you discussed that?

A. Yes, sir.

The Court: And when was that discussion?

A. That was over the past year.

The Court: I see, all right. Since this lawsuit was started?

A. Yes.

The Court: All right. That is not an unnatural thing, Mr. Besser, at all, just because it happened after the lawsuit started.

A. That was one of the reasons that it went on, on account of the lawsuit.

The Court: Yes, I understand that is why you discussed it.

A. Yes, sir.

The Court: Now you may pursue your questioning.

By Mr. Goreff:

Q. Was it as part of those discussions, if you know, or as a result of those discussions that the letter, Plaintiff's Exhibit 156, was written?

The Court: Which one is that?

Mr. Goreff: That is the one to the Stearns Manufacturing Company suggesting that the license be made non exclusive because of loss of royalties and lack of royalties.
[fol. 1494] That is right, yes, sir.

The Court: Is it your point to impress upon the court that that is the fount of the origination of this letter and not the agreement that was made between Stone and the Besser Company?

Mr. Goreff: Yes, sir.

The Court: All right.

By Mr. Goreff:

Q. At the time these discussions took place, the ones you have related, with respect to the amendment of the agreement to make it non exclusive instead of exclusive, and at or about the time the letter of April 5, 1950 was written by Mr. Gelbman, or prior to that in the course of your discussions, had you at any time mentioned or discussed the Stone agreement with Mr. Gelbman?

A. I did not personally.

Q. Do you know of anyone who did?

A. Mr. Stark may have mentioned it to him.

Q. Do you know, Mr. Besser?

A. No, I do not know.

Mr. Goreff: That is all.

* * * * * * * *

[fols. 1495-1499] Mr. Speer: That is all that we have in our case.

The Court: All right.

Mr. Speer: But before we conclude, your Honor, there are certain exhibits which we intend to offer at this time.

The Court: All right.

Mr. Speer: If we may.

(Proposed license agreement with J. W. Appley Company was thereupon marked Government's Exhibit 162 for identification.)

Mr. Speer: At this time I offer Exhibit 162, which is a proposed patent agreement between Besser Company and the J. W. Appley Company of Orlando, Florida.

* * * * * * * *

[fols. 1500-1501] The Court: All right, it may be received.

[fols. 1502-1504] The Court: May I see that, please.

(Document handed to the court.)

The Court: All right. Is there anything more you are going to introduce about this?

Mr. Speer: No. That is all.

The Court: All right. The court strikes it from the record. What possible good is this, unless you follow it up with something else?

[fol. 1505] JOHN F. STARK, a witness called by the government for cross-examination, having been first duly sworn by the Clerk, testified as follows:

Cross-examination.

By Mr. Speer:

Mr. Neville: Mr. Stark is being called for cross-examination under the statute, your Honor.

By Mr. Speer:

Q. Mr. Stark, I show you Exhibit 162, and ask you if you have ever had that or a copy of that agreement in your possession?

A. I have.

Q. You have. Did you ever give that agreement, proposed agreement, to Mr. J. E. Appley?

A. It was presented to him.

The Court: What is that?

A. It was presented to him.

By Mr. Speer:

Q. And what was the purpose in presenting it to him?

A. He had made a request to us for a license, and he invited me down to his plant.

The Court: You have to talk louder. Please, now.

A. He had made a request——

The Court (Interposing): If you will talk as loud as [fol. 1506] you shook your head yesterday, we will hear you.

A. He had made a request for a license and invited me down to his office, and I went. I made the trip there and discussed it. The license was drawn up and then I returned it.

Q. Then, pursuant to his request, is this the purported agreement which you at that time offered him?

A. That is the agreement.

Q. Now, were you instructed by anyone from the Besser Company to confer with Mr. Appley on that topic?

A. No. Mr. Appley made the request of us.

Q. Of us?

A. Yes. Of the Besser Company.

Q. Of the Besser Company. Now, were you instructed by anyone in the Besser Company to go down to Florida and to discuss this matter with Appley?

A. I mentioned it to Mr. Besser before I left.

Q. And what did Mr. Besser have to say to you?

A. He agreed I should go down and discuss it with him.

Q. All right. After this proposed contract was prepared and offered to Mr. Appley, did he affix his signature to it?

A. He did.

Q. All right. Then after that was done, did you take this instrument back to Alpena?

A. I did.

[fol. 1507] Q. Was a copy of this agreement given to Mr. Besser?

A. No, sir.

Q. It was not. Was it placed in the files of the Besser Company?

A. No, sir. It has never been out of my briefcase.

Q. It has always been in your briefcase?

A. Yes.

Q. But, at the time you were in Florida, you were acting pursuant to instructions of the Besser Company?

A. Yes.

Q. And while the instrument was in your briefcase, it was in your custody as an agent of the Besser Manufacturing Company?

A. I believe you could say that.

Cross-examination.

By Mr. Goreff:

Q. Mr. Stark, was that agreement presented to Mr. Gelbman or Mr. Andrus?

A. No, sir.

Q. Were they consulted about it before it was prepared?

A. I talked to Mr. Gelbman about it on the phone.

Q. What was that conversation?

[fol. 1508] A. I called him long distance from Florida.

Q. Yes. Will you tell us the conversation?

A. And he had no objection to it.

Q. He had no objection to what?

A. To the agreement; actually he has never seen it but I mean just to the broad general terms of it.

Q. You mean he stated he had no objection to giving a license to Mr. Appley?

A. That is correct.

Q. Or Mr. Appley's company, is that correct?

A. That is right, yes.

Q. Referring now to the Stone agreement, did you ever discuss that with Mr. Gelbman?

A. I did not get your statement.

Q. Referring now to the Stone agreement, did you ever discuss that with Mr. Gelbman?

A. No, I did not.

Cross-examination.

By Mr. DeGree:

Q. I observe that Stearns Manufacturing Company is not an intended party to Exhibit 162; did you advise Stearns Manufacturing Company of this proposed contract with Appley?

A. Is Exhibit 162 the Appley exhibit?

Q. Yes, that is the exhibit.

A. I believe I mentioned that to Mr. Wright.

[fol. 1509] Q. When?

A. Some time in March.

Q. You have had previous talks to Mr. Wright, have you not?

A. Yes, sir.

Q. And hasn't Mr. Wright advised you if you had anything to take up with Stearns Manufacturing Company that you should take it up with its president, Mr. Hultmark, or the board of directors?

A. I do not recall that he ever made those remarks.

Q. Well, as a matter of fact when you came in to Mr.

Wright's office with a longhand letter, didn't you advise Mr. Wright that you desired Gelbman to send such a letter to the Stearns Manufacturing Company?

A. Yes, sir.

Q. Didn't Mr. Wright then tell you to take it up with the board of directors of the Stearns Manufacturing Company?

A. He did.

Q. All right then. Still later on, you did go into Mr. Wright's office and obtain some Stearns stationery, did you not?

A. No, sir, I did not.

Q. Did you ask for Stearns stationery?

A. No, sir.

Q. Did you dictate to Mr. Wright's stenographer the proposed answer of the Stearns Manufacturing Company to the letter which Stearns had received from Gelbman?

A. Yes, sir.

[fol. 1510] Q. Didn't Mr. Wright at the time tell you that "you take that up with the board of directors"?

A. Well, the letter was a letter that was to be signed by them.

Q. Yes, but didn't you ask Mr. Wright to have Stearns Manufacturing Company sign this letter that you had written for Stearns?

A. That is right, under authority of the board of directors.

Q. Then didn't Mr. Wright tell you to take it up with the board of directors?

A. No, sir.

Q. Why did you submit it to Mr. Wright?

A. He was an officer of the company.

Q. Was he the board of directors?

A. No.

Q. Did you take the matter up with the board of directors subsequent to that?

A. No, I did not. Mr. Wright said that he would present it to them.

Q. Did you ever receive it back signed by any officer of Stearns Manufacturing Company?

A. Not as yet, no.

The Court: May I see this contract, the one that you have there? That is, this Appley contract or whatever his name is.

(Paper handed to the court.)

Mr. DeGree: No further questions.

[fol. 1511] The Court: This is a contract that purported to run between Gelbman, Andrus and Gelbman, the patentees, and the Besser Manufacturing Company and Appley?

A. Yes, sir.

The Court: The Stearns Manufacturing Company had a license from Gelbman on the same basis that Besser had, didn't they?

A. That is right; it would be necessary for the Stearns Company to waive their exclusive feature of their license in order to permit this license to be enforced.

The Court: It would have been necessary for Stearns to have been a party to this in some way or other?

A. To waive their exclusive license from Gelbman.

The Court: Well, either a party to this license——

A. Yes, that is right.

The Court: And by this agreement you were retaining for the Besser Company the right to the three-block simple pallet machine?

A. May I explain the reason for that, sir?

The Court: No, you do not have to explain the reason, but I want to understand the contract. That is what you were going——

A. Well, the license only covered one or two at a time cored pallet machines.

The Court: Just cored pallet?

[fol. 1512] A. Yes.

The Court: No simple pallet at all?

A. No, sir. The licensee Appley only makes cored pallet machines and he made a request for only one-at-a-time, or two-at-a-time and we were complying with his request.

The Court: That is something that emanated from him and not from you?

A. That is correct.

The Court: This is the cored pallet only?

A. Yes, sir.

The Court: Did you know that this was a cored pallet only?

Mr. Speer: Yes, your Honor.

The Court: What do you claim this document proves?

Mr. Speer: Again we claim, your Honor, that it is in restraint of trade, whether or not the contract was a proposed contract that emanated with Appley or Besser; it is in restraint of trade in that it dictates the type of pallet which can be used on a patented concrete block machine. It goes beyond the scope of the patent grant.

The Court: Now, wait a minute. This gives them the right to make cored pallets even if covered by your patent?

A. That is correct, your Honor.

Mr. Speer: As covered by the patent.

The Court: Covered by the patent.

[fol. 1513] Mr. Speer: But is there anything in those patent claims that has anything to do with a plain pallet or a cored pallet? I don't know of anything.

The Court: I do not know that it has to. Is there anything about an automobile that says the wheels have to be round?

Mr. Speer: I don't know, your Honor, whether there is or not.

The Court: They have a right to make that kind of an agreement so far as this court is concerned—at least I cannot see anything wrong with it. They say, "We have certain patent rights here," and it goes to the cored pallet. Does he say in there, "You cannot use the plain pallets?" Is there any restriction on plain pallets at all in the contract?

A. It just covers cored pallets.

Mr. Babcock: There is no reason for mentioning plain pallets as Mr. Appley does not make a plain pallet machine.

A. He only asked for one-at-a-time, as a matter of fact, and it was increased to two-at-a-time as he said he might make it some time in the future.

Mr. Speer: I will again quote from this exhibit where it refers to plain pallets.

The Court: What does it say about a plain pallet?

Mr. Speer (Reading):

> "This agreement may be opened for negotiation on [fol. 1514] comparable plain pallet machines one year from date hereof by mutual consent of the parties."

The Court: Well, you see some of those machines by their very structure run to cored pallets and others to plain pallets; isn't that true?

A. That is right. They are not interchangeable.

Mr. Speer: That is true, your Honor. We do not have any quarrel with that.

The Court: All right. I do not see anything wrong with that at all.

Mr. Speer: All right, we won't discuss that at all.

And then paragraph 5 we claim is in restraint of trade:

> "Any improvements developed by any of the parties hereto relating to the machinery, devices and apparatus licensed hereunder, whether patentable or not, are to fall within the scope of this agreement and to be licensed to the other parties without further compensation."

A. May I explain that?

Mr. Speer: Well, on its face——

The Court: Yes, I would like to know about "whether patentable or not."

A. The general meaning of that is, any new development, the men will get the benefit of it. They are interchangeable between his firm and——

[fols. 1515-1517] The Court: As a matter of fact, isn't that an ordinary provision in all patent agreements?

A. Yes, sir.

[fols. 1518-1521] Mr. Speer: That is all we have, your Honor.

(Witness excused.)

The Court: All right, anybody else?

Mr. Speer: Your Honor, at this time I would like to offer again Exhibit 162.

The Court: Why again? I let it in once.

Mr. Speer: I misunderstood you.

The Court: You meant that the court ordered it out?

Mr. Speer: Yes, your Honor.

The Court: Any objection? If there is no objection it is received in evidence.

* * * * * * *

[fol. 1522] Mr. Speer: All right, your Honor. I will proceed then.

I offer Exhibit No. 3.

The Court: What does it purport to be? Can't you say what it purports to be?

Mr. Speer: All right.

The Court: Then he will tell you whether or not there is any objection to it, and what the objection is.

Mr. Speer: It is interoffice correspondence of the Besser [fols. 1523-1524] Manufacturing Company, and it purports to describe the Super Vibrapac machine and what its block production is.

The Court: Any objection?

Mr. Goreff: In behalf of the defendants Gelbman and Andrus, it is not material, competent or binding upon them.

The Court: On behalf of the Besser Manufacturing Company?

Mr. Babcock: I object, because it is immaterial and irrelevant to the issues presented in this case.

The Court: Overruled. Next exhibit. It may be admitted.

[fol. 1525] Mr. Babcock (Interposing): I have no objection to Exhibits 4 and 5.

The Court: Tell me what they are.

Mr. Babcock: Exhibit 4 is a list of the shareholders of

the Besser Manufacturing Company, and its officers and directors from year to year.

The Court: I hope you have these in order, gentlemen, so that you won't have to look for every one of them as you are now.

Mr. Speer: All right.

The Court: What is the next one that hasn't been introduced?

Mr. Speer: I offer Exhibit No. 6.

The Court: Where are 4 and 5?

Mr. Speer: They are right here, your Honor.

The Court: Well, you haven't offered them, have you?

Mr. Speer: I offered them, your Honor.

The Court: No objection?

Mr. Speer: Exhibits 4 and 5.

The Court: What does 4 purport to be?

Mr. Speer: 4 is a list of shareholders, officers and directors of the Besser Manufacturing Company.

The Court: All right. It may be admitted. Exhibit 5?

Mr. Speer: Exhibit 5 is the Besser home office sales [fol. 1526] and service organization. The purpose of it is to show the various employees whose names have been discussed from the stand are employees of this company.

The Court: No objection. It may be admitted.

Mr. Speer: I offer Exhibit No. 6, which is a graph that came from the files of the company, which shows sales comparisons, in the years 1939, 1940 and '41, of the tamping machines and the vibrating machines.

The Court: Any objection?

Mr. Babcock: I object to it, if your Honor please. It shows nothing on its face. I submit it to the court for examination. (Handing document to the court.) Without some evidence or testimony identifying its purpose and its materiality and relevancy; it has no materiality and relevancy alone.

The Court: Well, have you looked at this?

Mr. Babcock: Yes, your Honor.

The Court: It tells me a lot.

Mr. Babcock: If your Honor please——

The Court (Interposing): Not that it isn't something that I probably should have known in this lawsuit before,

but it is just one of those graphs that you can find in any well run corporation in the United States. All it says here is get after them. We are doing very well. And keep up the good work, boys, and that is all that is.

[fol. 1527] But it does show that the vibrapac sales in 1941 were 120 per cent ahead of the tamper sales, for that year, and that vibrapac is——

[fol. 1528] The Court: I think it is material. It may be received.

Mr. Speer: I offer Exhibit 8, which is a photostatic copy from the files of the Besser Company of the bill of sale and agreement between the Industrial Brownhoist Company and the Besser Company, under date [fol. 1529] of——

The Court (Interposing): Any objection?

Mr. Speer (Continuing): —the 8th day of November, 1935.

The Court: Any objection?

Mr. Babcock: No. I have no objection. I invite your Honor's attention that this appears to be all the proof the government is offering of the allegation in the complaint about the Brownhoist transaction.

The Court: I haven't heard anything about that since the first day.

Mr. Speer: I don't think so.

[fols. 1530-1533] Mr. Speer: I offer Exhibit 9, which is the agreement between Stephen Flam and the Besser Company, dated the 29th day of October, 1938.

The Court: Is that the inventor?

Mr. Speer: Yes, your Honor. He is the inventor, and also was in the concrete block machine industry.

The Court: All right.

Mr. Speer: Until 1946.

The Court: Any objection?

Mr. Babcock: I object, your Honor please, without some supporting testimony or other evidence indicating the purpose and intent. It is not established to be material and relevant to the case.

The Court: Denied. It may be admitted.

Next number.

[fol. 1534] Mr. Speer: No. 11, which is the correspondence

addressed to Mr. Louis Gelbman under date of June 30, 1947, from J. W. Appley and Son, Inc.

The Court: What does it have to do with?

Mr. Speer: The purpose of this is to show that the defendants, all the defendants here have acted in concert, that is they have, after the patent agreement of 1942 has been entered into they have acted as a combination, have corresponded with each other with respect to their competitors in the field.

The Court: Any objection? May I see it?

(Exhibit handed to the court.)

Mr. Goreff: Yes, your Honor, if I may, I would like to say this——

The Court: Are there any of these that go together?

Mr. Goreff: That is what I was going to suggest, put them together where they all fall with the same——

The Court: How many are there?

Mr. Goreff: With respect to Appley, we have the following——

The Court: Is this the same Appley that we have had before?

Mr. Speer: Yes, your Honor.

[fol. 1535] Mr. Babcock: Yes, your Honor.

The Court: This is back in 1947. That contract was 1950, wasn't it?

Mr. Babcock: Yes, your Honor.

The Court: Is there any objection?

Mr. Goreff: Exhibits 11, 12, 13 and 15 relate to Appley, your Honor.

Mr. Babcock: 14 and 16 too.

The Court: Exhibits 11, 12, 13, 14 and 15?

Mr. Babcock: And 16.

Mr. Goreff: The government was not offering 16, according to the letter I got. The letter indicated they would offer 11, 12, 13 and 15 only, with respect to Appley.

The Court: All right. Have you any objection to their going in?

Mr. Goreff: Your Honor, I have this objection, that I should be given an opportunity to confront Mr. Appley

and examine him with respect to these letters and the background.

The Court: Have you any objection to the letters?

Mr. Goreff: I have, as such.

The Court: What is it?

Mr. Goreff: That they are immaterial, irrelevant and incompetent, and not binding on the defendants.

The Court: Where did you get them?

[fol. 1536] Mr. Speer: They came from the files of Louis Gelbman.

The Court: They may be admitted, all of them. If you want to interrogate Mr. Appley, you can bring him in.

Mr. Speer: Mr. Goreff, which of these ones do you want entered at one time, to save time?

Mr. Goreff: I think that I would save everyone's time——

Mr. Speer: Yes.

Mr. Goreff: 17, 18, and 23 apparently relate to LaGaard, and I think 93——

Mr. Speer: Well, I think I will introduce those after a while, if the court please.

The Court: Why don't you save time as much as you can? If somebody has one that he is willing to have go in, why not put it in?

Mr. Neville: The other one is Exhibit 93, Mr. Goreff.

Mr. Goreff: Yes, a telegram.

Mr. Speer: All right.

The Court: What is the difference?

Mr. Speer: Well, I had a certain planned order, your Honor, but it is unimportant.

Mr. Goreff: I merely grouped these according——

The Court: And they should have been grouped and it is all right to have them in. They may be admitted.

[fol. 1537] Mr. Goreff: The same objections, your Honor.

The Court: Overruled.

Mr. Speer: One way that can be straightened out, then, all of these have been admitted, and if I am wrong, will you correct me?

The Court: You better call them out and put them in the record.

Mr. Speer: I am going to, your Honor. No. 12——

Mr. Goreff: 11, 12, 13 and 15 were offered and his Honor ruled on them.

The Court: Relating to Appley?

Mr. Goreff: Relating to Appley.

Mr. Speer: I offer Exhibit 14.

The Court: And does that concern Appley too?

Mr. Speer: That is correspondence from Gelbman to Besser and it pertains to Appley.

The Court: It may be admitted. What about 15?

Mr. Speer: 15 is in.

Mr. Goreff: 11, 12, 13 and 15 are in, your Honor.

The Court: And 14 is admitted. What is the next one?

Mr. Speer: No. 16, that is correspondence to the Besser Company pertaining to Appley, from one of the Besser employees. It pertains to the same.

The Court: What is he asking? To go on a vacation [fol. 1538] or what?

Mr. Speer: No, he said he called on Mr. Appley down in Florida and they were asking whether Appley could get a patent.

The Court: It is relating to the business?

Mr. Speer: It is all under the same.

The Court: All right, it may be admitted. Any objection?

Mr. Goreff: The objection that it is not binding on these defendants.

The Court: How far are you now?

Mr. Speer: I am up to No. 17, your Honor.

The Court: All right, how about 18?

Mr. Goreff: 17, 18, 23 and 93, I think all relate to LaGaard.

Mr. Speer: No, that is not true. Exhibits 23 and 93 pertain to John LaGarde; Exhibits 17, and 18 pertain to Caswell and LaGaard.

The Court: Are they different people?

Mr. Speer: They are different people.

The Court: Or are they different stenographers?

Mr. Speer: No, they are not different stenographers. One is in St. Paul.

The Court: All right.

Mr. Speer: Then as I understand it, Exhibits 23 and [fol. 1539] 93 are admitted?

Mr. Goreff: That is LaGarde?

Mr. Speer: Yes.

The Court: If a man says, "I have no objection," get it in before he can change his mind. Read them all. What are they?

Mr. Speer: I offer No. 17, correspondence from the firm of attorneys of Caswell and LaGaard, to Gelbman and Andrus.

The Court: Any objection?

Mr. Goreff: Your Honor, that is merely an inquiry addressed to Gelbman and Andrus by these attorneys who say they have a client who is interested.

The Court: Is there any reason for that being in?

Mr. Speer: Yes, your Honor.

The Court: I want to give you all the leeway possible so you will not say afterward that the court kept out half of the government's evidence, but why do you select that letter?

Mr. Speer: Well, I will tell you.

The Court: Do you want it in?

Mr. Speer: Yes, your Honor.

The Court: Admitted.

Mr. Speer: For the fact that——

The Court: Admitted, you may tell me the fact and [fol. 1540] I might disagree with you so violently that I would take it out.

Mr. Speer: I offer Exhibit 20, correspondence from Gelbman to Besser under date of January 15, 1947, concerning Roy Darden.

Mr. Goreff: Well, there are probably twenty exhibits relating to Darden.

The Court: Can you not get them all together?

Mr. Goreff: I have them together, your Honor.

The Court: Have you got them all together, Mr. Speer? If you have, all right; if you have not, all right.

Mr. Speer: Here is what I have done: I have taken these exhibits and put them into two categories because there are some from which I intended to quote.

The Court: All right. Go ahead. Do it the way you want to.

Mr. Speer: Then I again offer Exhibit No. 20.

The Court: Any objection? What does it purport to be?

Mr. Speer: Correspondence between Besser and Gelbman concerning Roy Darden.

The Court: Any objection?

Mr. Babcock: I have no objection.

The Court: It may be received.

Mr. Speer: I offer Exhibit 21, correspondence between [fol. 1541] Gelbman and Stearns pertaining to Roy Darden.

Mr. Goreff: That is a letter from Gelbman, your Honor, to Stearns, in which he says somebody had inquired about a license.

Mr. Speer: Precisely.

Mr. Goreff: And to see if arrangements could be made to give him a license. "Kindly advise your pleasure."

The Court: What is the importance of that?

Mr. Speer: I was going to explain to your Honor.

The Court: All right.

Mr. Speer: We have evidence here that with the exception of one or two very restricted patent licenses the defendants have refused in every instance to grant a patent license to those who have applied.

The Court: Do you follow that letter up with something else?

Mr. Speer: Yes, your Honor.

The Court: All right. All right. If you complete it, very well. All right. But if you leave a lapse in the circle, like you did with this contract, as the court said this morning, it is of no avail. You can understand that.

Mr. Speer: He was in this case. This, as I said, pertains to Roy Darden. He was here on the stand.

The Court: All right.

Mr. Babcock: He says he was here, your Honor. I think [fol. 1542] he should have been interrogated with respect to this.

The Court: I should think so, too.

Mr. Speer: It isn't his correspondence, your Honor.

It is not his correspondence. It is correspondence pending between the defendants. We have charged a conspiracy here.

The Court: Between the defendant and——

Mr. Speer (Interposing): Between Gelbman and Stearns.

The Court: All right.

Mr. Babcock: Yes, but Mr. Gene Olsen was a correspondent, and he was on the stand and he was not interrogated,——

The Court (Interposing): At this time he was connected with Stearns and Stearns was——

Mr. Babcock (Interposing): This - a Stearns letter.

The Court: I know it.

Mr. Speer: It is addressed to Olsen.

The Court: He was connected with Stearns at that time. Stearns, according to the government, was part and parcel of Besser.

Mr. Babcock: Oh. Pardon me. It was prior to this. It was prior to the purchase of the stock.

The Court: Was it? Wait a minute, now.

Mr. Speer: What is that, your Honor?

The Court: When was this correspondence?

Mr. Speer: It was before Olsen sold his stock.

The Court: When is the correspondence?

[fol. 1543] Mr. Goreff: 1946 and '47, your Honor.

The Court: At that time Stearns—wait a minute. Was it after Besser had gotten the stock from Stearns?

Mr. Speer: No, your Honor.

Mr. Henry: No. It was before.

The Court: Well, all right, then. The court is wrong. The court stands corrected on that. It may be admitted.

Mr. Speer. It is admitted.

I offer Exhibit 22, correspondence from Stearns to Gelbman, pertaining to Roy Darden.

The Court: The Stearns Manufacturing Company is a defendant, or was a defendant here?

Mr. Speer: Is a defendant.

The Court: Is a defendant.

Mr. DeGree: Is a defendant.

The Court: All right. Which one was that?

Mr. Speer: This is Exhibit No. 22, your Honor.

The Court: Any objection?

Mr. DeGree: I have none. I have told counsel that speaks for Stearns, as far as Stearns are concerned, there is no objection to these documents.

The Court: Is that the stock list?

Mr. Speer: No, this isn't the stock list.

Mr. DeGree: Letter of Stearns.

Mr. Speer: All right.

[fol. 1544] The Court: All right. It may be received.

Mr. Speer: I offer Exhibit No. 27, which is a conditional sales agreement under date of the 21st of November, 1946, between Stephen Flam Incorporated, and the Besser Manufacturing Company.

The Court: Any objection?

Mr. Babcock: I wish to state on the record the objection that without some proof relating to the document, some other testimony or evidence or proof of some kind other than the document itself, it is immaterial and irrelevant, it is incompetent to establish anything by itself.

Mr. Speer: I submit, your Honor, the authenticity of the document has been stipulated to. It has been signed by both of the parties.

The Court: It may be admitted. The document speaks for itself.

Mr. Speer: I offer Exhibit 28, an agreement for the sale of inventory between Stephen Flam Incorporated and Besser Manufacturing Company.

Mr. Babcock: Same objection.

The Court: Same ruling.

Mr. Speer: I offer Exhibit 29, an agreement for the sale of real estate between Stephen Flam and Besser Manufacturing Company.

Mr. Babcock: Same objection.

[fols. 1545-1546] The Court: Same ruling.

Mr. Speer: I offer Exhibit No. 30, a photostatic copy of the balance sheet, December 31, 1946, Besser Manufacturing Company.

Mr. Babcock: I have no objection.

The Court: It may be received.

Mr. Speer: I offer 32, Exhibit 32, correspondence signed

J. H. Besser, to Mr. Henry Selz and Mr. Hal H. Smith, dated February 11, 1948, authorizing the addressees to purchase 87,000 shares of the common stock of the Stearns Company.

The Court: Any objection?

Mr. Babcock: I have no objection.

The Court: It may be received.

Mr. Speer: I offer Exhibit 33, which is a list of stockholders of the Stearns Manufacturing Company as of December 17, 1947.

[fol. 1547] The Court: It may be admitted.

[fol. 1548] Mr. Speer:

I offer Exhibit No. 36, correspondence from the Besser Manufacturing Company to Mr. Edward Adams, Junior, vice president of the National Bank, enclosing a check for $813,750, upon which the bank is to issue its check to the Smith-Hague Company, to pay for the Stearns stock.

Mr. Babcock: Has the photostatic copy of the check been identified by exhibit number?

Mr. Speer: Yes. It is inside there.

Mr. Babcock: Are you offering 36 and 37?

Mr. Speer: I will offer them together, Exhibits 36 and 37.

Mr. Babcock: I have no objection.

The Court: They may be received.

Mr. Speer: I offer Exhibit 38, correspondence from the Besser Manufacturing Company to the Department of Justice, stating that the company is in possession of certain stock certificates endorsed in blank, that is, of the Stearns Company.

Mr. Babcock: I have no objection.

[fol. 1549] The Court: It may be received.

Mr. Speer: I offer Exhibit 39, a list of stockholders of the Stearns Company as of November 16, 1948.

Mr. DeGree: No objection.

The Court: It may be received.

Mr. Speer: I offer Exhibit 40, balance sheet, Besser Manufacturing Company, as of December 31, 1948.

Mr. Babcock: I have no objection.

The Court: It may be received.

Mr. Speer: I offer Exhibit 51, correspondence, June 12,

1946, from Gelbman to Besser, pertaining to Besser's trip to Georgia to confer with Roy Darden.

Mr. Babcock. I have no objection.

The Court: It may be received.

Mr. Speer: I offer Exhibit 53 from Gelbman to Stearns, again referring to Mr. Besser's trip to Atlanta and Roy Darden.

The Court: Any objection?

Mr. DeGree: I think it is Stearns to Gelbman, rather than from Gelbman to Stearns, is it not?

Mr. Speer: No, Mr. DeGree.

Mr. DeGree: 52?

Mr. Speer: This is 53. This is from Gelbman to Stearns.

Mr. DeGree: No objection.

[fol. 1550] Mr. Speer: I offer Exhibit 55, correspondence——

Mr. Babcock (Interposing): What about 52? Pardon me.

Mr. Speer: That is one from which I wish to quote, or one that has already been in evidence.

Mr. Babcock: 52?

Mr. Speer: Yes. Yes, 52 is one I will offer after these. I offer Exhibit 55, correspondence, July 23, 1946, from Gelbman to Besser, referring to the Darden machine.

The Court: Any objection?

Mr. Babcock: None on my part.

The Court: Beg pardon?

Mr. Babcock: None on my part.

The Court: It may be received.

Mr. Speer: I offer Exhibit 57, correspondence between the patentees Gelbman and Andrus, August 7, 1946.

The Court: Any objection?

Mr. Speer: I don't know, your Honor; I am still making the offer of this, of this exhibit.

Mr. Babcock: I haven't any objection.

The Court: It may be received.

Mr. Speer: I offer Exhibit 58, correspondence August 8, 1946, from Gelbman to Stearns, re Darden.

The Court: Any objection?

[fols. 1551-1553] Mr. DeGree: No objection on our part.

The Court: It may be received.

Mr. Speer: I offer Exhibit 59, correspondence dated August 8, 1946, from Gelbman to Mr. Haakon Paulson, in care of the Besser Manufacturing Company, pertaining to the Darden infringement suit.

Mr. Babcock: I have no objection.

The Court: It may be received.

[fol. 1554] Mr. Speer: I offer Exhibit 63, correspondence, October 21, 1946, from the Besser Manufacturing Company to Louis Gelbman, pertaining to Roy Darden.

Mr. Babcock: If your Honor please, I haven't any strenuous objection except, as your Honor said, why encumber the record? These are matters that led up to the filing of that lawsuit in New Jersey that Darden testified about, that there was an infringement suit started, and subsequently he went to Chicago and compromised the matter.

Mr. Speer: Your Honor, the defendants have denied a conspiracy in this case.

The Court: Will you let me see it, please?

(Letter handed to the court.)

The Court: Well, on the conspiracy, I think perhaps it would be admissible. It may be admitted.

[fol. 1555] Mr. Speer: I offer Exhibit 67, correspondence of November 4, 1946, between Gelbman and the Besser Company, pertaining to this attorney's opinion, and also the report of the detective agency. This is between Gelb-

[fol. 1556] man and Besser, your Honor.

The Court: And it refers to the attorney's report?

Mr. Speer: To the attorney's report, and also the report of the detective agency.

The Court: Is there any objection?

Mr. Babcock: Well, it is simply a letter of transmittal of what your Honor has already excluded.

The Court: It may show a relationship that I think maybe is important and I can see the distinction. May be admitted.

Mr. Goreff: May I point out to you Honor that under our license agree*net* the defendants, Besser and Stearns, are each required to share one-third of the cost of any litigation and naturally they were kept apprized of what developed.

The Court: That is all right. That may be an argument in defense, but without that information it still may be a link in the chain of conspiracy. I do not say that it is, but I say it may be.

Mr. Speer: I offer Exhibit 68, correspondence between Stearns and Gelbman, from Stearns to Gelbman, under date of November 29, 1946, concerning an ad to be placed—well, concerning ads; it pertains to two or three things; as Mr. Goreff stated this pertains to the expense of this attorney and also some advertising in which Stearns states that: "I think you should state emphatically in the ad [fol. 1557] that only the Stearns Company and the Besser Company are licensed under your patents."

The Court: It may be admitted.

Mr. Speer: I offer Exhibit 69, from Louis Gelbman to Besser Company, December 16, 1946, showing a statement of expenses incurred in retaining attorneys in the Darden suit, from Gelbman to Besser.

The Court: Any objection?

Mr. Babcock: We have the understanding that, although the document on its face does not show, we have the understanding, do we, that this refers to the Darden suit in New Jersey?

Mr. Speer: Yes.

Mr. Babcock: With that understanding, I have no objection, but it proves nothing.

The Court: All right, it does not add anything to the case but it encumbers the record.

Mr. Babcock: We concede that we expected a one-third contribution toward the expenses of the litigation.

Mr. Speer: I offer Exhibit No. 70, correspondence December 17, 1946, from Stearns to Gelbman, attaching a check as part of the expenses, and also approving the idea of his advertising, to the effect that only Besser and Stearns can manufacture under the Gelbman patents. [fols. 1558-1559] The Court: Any objection?

Mr. DeGree: No.

The Court: It may be received.

Mr. Speer: I offer Exhibit No. 72, from Gelbman to Roberts B. Larsen, who is the attorney in Washington, authorizing him to send notice of infringement to Landis

Concrete Products, Roy Darden, or the F. C. George Machine Company, and it states that carbon copies were sent to Eugene Olsen and Jesse H. Besser.

The Court: Any objection?

Mr. Henry: No objection.

Mr. Babcock: I have none.

The Court: It may be received.

[fol. 1560] Mr. Speer: I offer Exhibit No. 75, which is a sheet of paper dated March 3, 1947, entitled, "Cost of Advertising in Trade Papers on Darden Patent Suit," and in the various trade journals, and also the expenses to be shared between Besser, Stearns, Andrus and Gelbman.

I don't believe there has been anything on that particular point up to this point.

The Court: Any objection?

Mr. Goreff: The same objection. It is still on the question of infringement, and the cost of prosecuting any infringement suit.

Mr. Speer: No. I don't quite agree with that, your Honor. This is the cost of advertising in trade papers.

The Court: It may be received.

Mr. Speer: I offer Exhibit No. 78, correspondence under date of February 24, 1947, from Gelbman to John Stark, care of the Besser Company, in which Mr. Stark is thanked for his assistance in the Darden matter, and also discussing the ads to be placed in the journals.

The Court: Any objection?

Mr. Henry: No objection.

[fol. 1561] Mr. Babcock: I don't see see that it serves any purpose, but I haven't any serious objection.

The Court: All right. It may be received.

Mr. Speer: 79.

Mr. Babcock: Mr. Stark appreciates the expression of thanks.

Mr. Speer: I offer Exhibit No. 79, a Western Union telegram, under date of March 12, 1947, from J. H. Besser to Louis Gelbman, in which he, Mr. Besser, states his approval that these ads be placed in the trade journals.

The Court: Well, that probably might be covered by the contract, too, for all I know.

Mr. Goreff: That is all on the patent infringement, your Honor.

The Court: It may be received anyway.

Mr. Goreff: The notice is in the trade paper.

The Court: It may be received.

Mr. Speer: I offer Exhibit No. 80, correspondence from Gelbman to Besser, under date of April 14, 1947, asking Mr. Besser for his share of the expenses in the infringement suit and in the ads to be placed in the journals, after the suit was filed.

The Court: Any objection?

Mr. Goreff: Same objection.

The Court: That objection is overruled. It may be [fols. 1562-1563] received.

Mr. Speer: I offer Exhibit 81, correspondence from Stearns to Gelbman, under date of April 17, 1947, enclosing a check for expenses.

Mr. DeGree: No objection.

The Court: It may be received.

[fol. 1564] Mr. Speer: I offer Exhibit 84, correspondence from Stearns to Gelbman under date of November 20, 1946, [fol. 1565] discussing the Lith-I-Block machine.

The Court: Any objection?

Mr. DeGree: None.

The Court: It may be received.

Mr. Speer: I offer Exhibit 86, under date of March 12, 1948, from Stearns to Gelbman, discussing the Lith-I-Bar machine.

Mr. DeGree: No objection.

The Court: It may be received.

Mr. Speer: I offer Exhibit 89, correspondence from Gelbman to Besser, under date of November 10, 1947, discussing the infringement of patents by the F. C. George Company of Orlando, Florida.

The Court: Any objections? If none, it may be received.

Mr. Speer: I offer Exhibit No. 90, correspondence from Gelbman to F. C. George Machine Company, under date of November 11, 1947, stating that it had been brought to Gelbman's attention that the George Machine is an infringement of his patent.

The Court: Any objection?

Mr. Henry: No.

The Court: No objection. It may be received.

Mr. Speer: I offer Exhibit No. 91, correspondence from Gelbman to Harold Greenwald, counsel for Gelbman in [fol. 1566] New York, under date of November 24, 1947, discussing the F. C. George machine.

Mr. Goreff: This is correspondence between one of the defendants and his counsel, your Honor, and merely discussing the subject of infringement.

The Court: Who is that?

Mr. Goreff: George. That is the F. C. George.

The Court: Is that the man here?

Mr. Speer: We haven't had anyone from the F. C. George Company.

The Court: I think it may be admitted.

Mr. Speer: I offer Exhibit No. 97, correspondence from—strike that. Correspondence from the Besser Manufacturing Company, signed John F. Stark, patent counsel, to Mr. W. Elmer Ramsey, Esq., Portland, Oregon, October 23, 1948, pertaining to the possible infringement of the Gelbman patent by the Columbia Machine Works.

The Court: No objection. It may be received.

How many of these have you got? I thought you said you had 80.

Mr. Speer: Well, I thought I had about 85, your Honor, but that is 85 that hadn't been——

The Court: (Interposing) How many more have you?

Mr. Speer: (Continuing) —placed into evidence at this point.

[fol. 1567] The Court: All right.

Mr. Speer: We will be finished very shortly. I offer Exhibit No. 98, correspondence from the Besser Manufacturing Company, over the signature of John F. Stark, patent counsel, dated February 3, 1948, to the Scripps Pierson Machine Company, pertaining to possible infringement by that company of the Gelbman patents.

Mr. Babcock: You don't intend to limit that to the Gelbman patent, do you, Mr. Speer?

Mr. Speer: No, if there is any other. I was merely trying to give some kind of an identification to it.

The Court: No objection. It may be received.

Mr. Babcock: With the understanding——

The Court (Interposing): I am sorry.

Mr. Babcock: With the understanding that the letter refers not only to the Gelbman patents but to the Scott patent, as well.

The Court: All right.

Mr. Henry: That is also true of Exhibit 97. It refers to the Scott patent.

The Court: All right.

Mr. Speer: I understood the whole paper was in evidence.

The Court: Yes. It is all in evidence. It may be used in its entirety, whenever an exhibit is permitted to be [fol. 1568] introduced.

Mr. Speer: I offer Exhibit 101, which is a blank lease form of the Besser Manufacturing Company.

The Court: All right. I don't believe there is any objection.

Mr. Babcock: Is it any different from the Longenecker lease that has already been received in evidence?

Mr. Speer: Well, I can't state that at this time. This is one that was taken, supposed to have been a standard lease, as I understand it.

The Court: I don't believe there is any objection.

Mr. Babcock: No, except that it may be just duplication.

The Court: If it is a standard lease. Has it been identified as a standard lease of the company?

Mr. Babcock: No.

Mr. Speer: The only way it has been identified is that it has been taken from the files of the Besser Company, and its authenticity has been stipulated to.

The Court: Its authenticity and that it was in the file. That doesn't say that that is the lease that he usually made. You have Mr. Besser here. Why don't you ask him. He is still under oath.

Mr. Speer: Is this a standard lease form, Mr. Besser?

The Court: If he knows.

[fol. 1569] Mr. Besser: Yes, sir.

The Court: There you are. It is easy to get this in properly. No objection. It may be received.

[fols. 1570-1571] Mr. Speer: I offer exhibit 19, correspondence from the Besser Manufacturing Company over the sig-

nature of D. R. Fox, General Sales Manager, to the Besser Manufacturing Company, Alpena, attention Mr. Haakon Paulson, dated October 11, 1946.

Mr. Babcock: May I have that number again?

Mr. Speer: 19.

The Court: Any objection? If there is no objection, it may be received.

[fols. 1572-1575] Mr. Speer: I offer Exhibit 26 which is a patent agreement between Stephen Flam and Besser Manufacturing Company.

The Court: Any objection? It may be received.

[fol. 1576] Mr. Speer: I offer Exhibit No. 52, correspondence from Stearns to Gelbman under date of June 27, 1946, about Darden.

The Court: Any objection?

Mr. Goreff: None.

[fol. 1577] The Court: It may be received.

[fol. 1578] Mr. Speer: I offer exhibit 54, correspondence dated July 8, 1946, from Stearns, over Olsen's signature, to Mr. J. H. Besser, President.

The Court: That is still when Olsen was with Stearns?

Mr. DeGree: Before.

The Court: All right. If there is no objection, it may be received. The court hears no objection.

Mr. Speer: I offer Exhibit 56, correspondence from the Besser Manufacturing Company over the signature of Haakon Paulson, to Mr. Gelbman, dated July 31, 1946.

[fol. 1579] The Court: Any objection?

Mr. Babcock: I have no objection.

The Court: It may be received.

[fol. 1580] Mr. Speer: I offer Exhibit No. 71, correspondence from J. H. Besser to Louis Gelbman, dated December 21, 1946.

[fol. 1581] The Court: Any objections?

Mr. Babcock: I have none.

Mr. DeGree: None.

The Court: No objection: It may be received.

[fol. 1582] I offer Exhibit 85, correspondence from Louis Gelbman to Stearns Company dated November 23, 1946.

Mr. Henry: Just a moment.

The Court: Incidentally, what is the date of the Scott patent? 1937 or 1938, 1936—1938? What is it?

Mr. Stark: 1937.

Mr. Speer: But the Scott——

The Court (Interposing): You have three more years to run. Four more years to run. All right.

Mr. Speer: The Scott patent was not acquired by Mr. Besser, though, until November of 1947.

The Court: Yes. But I am just thinking about the limitation on the patent. That is all. Four years more.

Mr. Stark: January 25, 1938.

The Court: 1938. Five years more. Four and a half. Isn't that right? Yes.

Mr. Babcock: Yes, sir.

The Court: Surely. All right.

[fol. 1583] Mr. Babcock: 1955.

Mr. Speer: I don't believe your Honor has decided on Exhibit 85.

Mr. Babcock: No objection.

Mr. DeGree: We have none.

The Court: No objection: It may be received.

Mr. Speer: I offer Exhibit No. 87, correspondence from Gelbman to Besser, March 15, 1948.

The Court: Any objection?

[fol. 1584] Mr. Babcock: I have none.

Mr. DeGree: None.

Mr. Speer: I offer Exhibit 88, correspondence from Stearns to Gelbman under date of October 14, 1947.

The Court: Any objection?

Mr. DeGree: None.

Mr. Babcock: Just a moment.

The Court: Admitted.

[fols. 1585-1588] Mr. Speer: I offer Exhibit No. 92, an agreement between Besser Manufacturing Company and John B. Lagarde.

The Court: Any objection?

Mr. Speer: Dated April 1st, 1947.

The Court: No objection. It may be received.

[fol. 1589] Mr. Speer: I offer Exhibit 95, correspondence between Besser Manufacturing Company over the signature of John Stark, and the Columbia Machine Works, dated

February 3, 1948, concerning the Scott patent and the Geibman patent.

The Court: Any objection?

Mr. Babcock: I have none.

Mr. Goreff: None.

The Court: It may be received.

[fols. 1590-1591] Mr. Speer: I offer Exhibit No. 96, correspondence from W. Elmer Ramsey, Attorney at Law, Portland, Oregon, to J. F. Stark, Esq., with respect to Mr. Stark's earlier correspondence.

The Court: Any objection?

Mr. Babcock: None.

Mr. DeGree: None.

The Court: It may be received.

[fol. 1592] Mr. Speer: I offer Exhibit No. 99, which is an agreement between Besser Manufacturing Company and Bernard Flann.

The Court: Any objection?

Mr. Babcock: No, your Honor.

The Court: It may be received.

[fol. 1593] Mr. Speer: I offer Exhibit No. 100 which is a description of the Besser Vibrapac with use agreement, dated January 20, 1948.

The Court: Any objection?

Mr. Babcock: Well merely offering it, your honor—counsel I suppose claims for it that it is another document taken from the files of the Besser Manufacturing Company, but it is simply—it is not correspondence, it is not a signed document; it is just some typing. I don't know what it purports to establish.

The Court: Might I see it, please.

[fols. 1594-1604] (Document handed to the court)

The Court: What do you claim for this document?

Mr. Speer: Your Honor, I refer your Honor to page 2, paragraphs 3, 4, and 6.

The Court: Well there are two pages; the first page is a description of Besser Vibrapac with use agreement; and then on the back, "Advantages of Besser Vibrapac with Use Agreement,". That is number two.

Mr. Speer: I think, your Honor, they are both the same sheet. It says, "Page 1 of 2" up here in the corner.

The Court: That is what I said, page 1 and page 2.

Mr. Speer: Oh yes.

The Court: You found this among their papers?

Mr. Speer: Yes, your Honor.

Mr. Babcock: It seems to me, unless the control of it or the use of it or something of that kind is established, I don't know what it is for.

The Court: No, I think it would be incumbent upon the defendant, if it claims it knew nothing about this, to offer some proof, if it becomes important. As a matter of fact—2, 4, and 8—I cannot see how it is very material, even if it is admitted, but I can see that it may be admitted.

[fol. 1605] The Court: What else is there? Does that finish the case?

Mr. Speer: As far as we are concerned that does conclude the government's case.

[fol. 1606] Mr. Babcock: I am just a little confused. Counsel spoke of depositions and has not offered the depositions yet.

The Court: What are you going to do with the depositions?

[fols. 1607-1624] Mr. Babcock: I think, your Honor, that in the ultimate result both sides will probably use the depositions only to support a summary chart which will be offered in evidence, which will summarize all the figures in the depositions.

[fol. 1625] (A chart was thereupon marked Government's Exhibit 164 for identification.)

Mr. Speer: I now offer Exhibit 164, a chart compiled by the government, based on the depositions that have just been read into the record.

[fol. 1626] Mr. Henry: Before I look at Exhibit 164, I understood your Honor to say that depositions that have been taken by the government that are not offered, may be offered by the defendants.

The Court: That is right.

Mr. Henry: I presume that that offer should be made in the course of defendants' proofs?

The Court: I should think so.

Mr. Henry: Now, Exhibit 164, which is a statistical chart

has just been handed us and will require some consideration before we accept it.

However, the chart is not a consolidation of all of the information contained in the depositions, but merely dollar value of sales, not itemized except as to Besser, Stearns, Lith-I-Bar and Graveley.

Mr. Speer: Now, I beg your pardon, Mr. Henry. Up here it refers to "other block manufacturers". And those are the ones that were taken from the depositions, you see. And all the other figures were given in oral testimony on the stand. The figures we obtained from Stearns, we obtained from the offices of Messrs. Fildew & DeGree.

Mr. Henry: Well I think I object to the form of the question; the first item, "dollar value of all machines," under "Other manufacturers," $3,864,729 for the year 1946, is not broken down to show what items that figure consists of.

[fol. 1627] The Court: You may, if you so desire, attack the importance or the accuracy of the chart, if you care to object to it. Certainly if they have just presented me with the figures that reflect the government idea and have not given me the clear picture of the industry, it is not going to help the government any.

Mr. Henry: Of course, I make the further objection, your Honor, that there is no testimony as to by whom it was prepared or from what it was prepared.

The Court: That certainly is true.

Mr. Henry: And I therefore object to it.

The Court: Have they asked to introduce it?

Mr. Speer: Yes.

The Court: Do you object?

Mr. Henry: I object, your Honor.

The Court: The objection is sustained.

Mr. Speer: Even though the chart was not introduced in evidence, if your Honor wishes to keep a copy of it, for your own convenience——

The Court: Why should I have a copy of something that is not in evidence? Aren't you going to put somebody on the stand who made the chart and have him tell what he took to make it? You cannot use that chart, you know, to influence the court in any way, unless somebody swears to it.

Mr. Neville: The chart was prepared merely as a matter

[fol. 1628] of convenience in interpreting the depositions.

The Court: By whom?

Mr. Neville: By Mr. Speer.

The Court: Why doesn't he take the stand and say so?

Mr. Speer: I will take the stand, if I can.

The Court: Don't you see, you give me a piece of paper and they object to it as a chart; they should have a chance to cross-examine the man who made that chart.

Mr. Speer: I anticipate that they will offer a chart, your Honor, and we will have the same objection then, if that is the case.

Mr. Babcock: Except for the fact that we have the man who made the chart ready to take the stand as a witness and testify as to how he did it.

The Court: Well I supposed that you had somebody, possibly a public accountant, make this chart.

Mr. Neville: No, we did it ourselves.

The Court: I supposed you were going to have someone swear to it.

Mr. Neville: Then I suggest Mr. Speer be sworn.

The Court: You can handle it any way you want to. Right now I rule it out.

[fol. 1629] William E. Speer, called as a witness on behalf of the plaintiff, being first duly sworn, by the Clerk, testified as follows:

The Witness: If the court please, my name is William E. Speer. I am attorney for the Antitrust Division, United States Department of Justice. In the course of this case, the Antitrust Division took the depositions from all of the known concrete block machine manufacturers in the country, and the chart that I have in my hand was prepared by me on the depositions which have been received and were offered in the court here this morning.

The Court: He is not my witness, gentlemen.

Mr. Neville: You may cross-examine, Mr. Babcock.

Mr. Henry: Your Honor, in view of the testimony of this witness, there still is no evidence of the correctness or accuracy of the chart, and I defer examining him until I renew

the motion that the chart be not admitted under the proof submitted.

The Court: Is there any evidence that it is inaccurate?

Mr. Henry: No, your Honor. There is no evidence that it is accurate.

Mr. Neville: Well isn't it possible to make such a statement with reference to any document that is offered? The witness is on the stand for cross-examination.

[fol. 1630] The Court: Well you have a way of cross-examining your own witness to show that it is an accurate document. There is not any evidence right now that it is accurate. I will sustain the objection.

By Mr. Neville:

Q. How did you prepare this chart, Mr. Speer?

A. I added from the depositions that I just referred to, I added the total sales of concrete block machines of the various manufacturers; to that total I added the information supplied in court in evidence from the Besser Company; to that I added the same information from the Stearns Company which I received from their attorneys, Messrs. Fildew & DeGree; and to that I added the same information from the Lith-I-Bar Company which was given from the stand here; and I also added the same information on behalf of the R. L. Graveley Company, which was given here in court upon the stand.

I added the figures up on an adding machine here in this court, upstairs on the eighth floor, and the chart is the final outcome of those calculations.

Q. How much time did you spend in the preparation of this chart, Mr. Speer?

A. Well, I would state that I spent at least eight hours on the chart.

Q. Did you recheck your figures?

A. Yes, I did.

Q. Now, are you satisfied that the chart as it is now presented, reflects a true compilation of the figures that ap-
[fol. 1631] peared in the depositions and in the other documents you just referred to?

A. I am.

Mr. Neville: At this time, your Honor, I reoffer the chart.

The Court: Any objection?

Mr. Neville: In evidence.

Mr. Henry: May I examine the witness before making an objection?

The Court: Yes. May I ask something before you do here, Mr. Henry?

It says "dollar value of all machines." Does that mean machines of every type, even those that are admittedly restricted to the cored pallet?

A. Yes, your Honor. It includes all machines.

The Court: I see. The "dollar value of vibrators." You get down to vibrators. Is there any distinction made here between the three-block machine and the two and the one?

A. No, no, your Honor. There is no distinction.

The Court: Well, isn't it the claim of the government, so far as Stearns is concerned, that that Stone contract is evidence of a conspiracy—or, not a conspiracy, but an attempt to control the three-block market of the country?

[fol. 1632] Mr. Neville: Yes, your Honor.

The Court: There are no figures on that?

A. No, your Honor.

The Court: I see. All right.

Now, is it your claim now that they are trying to control or have monopolized the concrete block business, the making of machines for concrete blocks of all types, cored and plain pallet, and so forth?

Mr. Neville: The position of the government, your Honor, is that the Besser Manufacturing Company has monopolized the concrete block machinery business by getting control of the high production—by getting control of the production of high production machines in the industry.

The Court: Does that chart represent only the high production? Or all machines? That is why I asked you the question in the first place, because I anticipated that you were claiming the high production.

What does this chart show me?

If the government is claiming—I want to get this clear—if the government is claiming that they control the high

production machines, that is one thing. But the chart presented to me that shows what control they may have of all of the other machines, of all of the concrete block machine business, is of no help, is it?

A. Well——

[fol. 1633] The Court (Interposing): Just a minute, now. Is it?

Mr. Neville: It is incomplete, your Honor, yes.

The Court: Well, I am giving you that, because later on you might say, if the court should rule against you, "We gave him a chart that showed—look what it shows here." It might show that and I have no objection to its showing it, but it might not be the point at issue at all.

Mr. Neville: Yes. I am in agreement with your Honor on the fact that——

The Court (Interposing): Do you care to withdraw the chart, then?

Mr. Neville: No. I would prefer to leave the chart in, your Honor, and perhaps supplement it later on by additional figures.

The Court: All right. All right.

You know, there is a place upstairs here that they have got, called the F. B. I. You may have heard of it before. They have some very fine accountants up there.

I would suggest that the government give this evidence to them, if you care to. I wouldn't be able to tell right now, from these figures, without probably going through all the testimony myself—and this is no criticism of the government or anybody—I wouldn't be able to tell how much of the high production machinery these people control.

[fol. 1634] It may be even a greater proportion, for all I know.

Mr. Neville: I dare say that it would be.

The Court: Well, if that is your point, if your point is the concrete block making machine business, that is another thing.

You may cross-examine. I am just trying to get clear what the government's position is.

Now, I interrupted you, Mr. Speer, and I did not intend to. What was it that you wished to say?

A. I would like to add something there, if I may, your Honor.

The Court: Certainly.

A. As I have stated, the chart is based on the information taken from the depositions. Now, in the depositions there is no information as to the dollar value of high production block machines. Perhaps at the time we took the depositions that information ought to have been obtained. I don't say it should. But I call your Honor's attention to this chart, in which it shows the percentage of dollar value of all machines which is represented by the dollar value of machines of the vibrating type, and I believe your Honor will recall that these gentlemen who were on the stand in the industry, had so testified, that the only high production machines in the country today are machines of the vibrating type.

The Court: Well, but all of the machine- of the vibrating type are not of the high production.

[fol. 1635] A. That is very true, your Honor.

The Court: Well, then——

A. But if we can show, in this chart, that these defendants have controlled a certain percent of all vibrating machines, that is high production, and, of course, if we had only the high production, this percentage we had here would undoubtedly be much higher.

The Court: Well, now, wait a minute. That is a statement made without present facts, at the present time, up to now, and the court will pay no attention to it. It could have been objected to by the defense, and I will rule it out. You can appreciate that.

I might be inclined to agree with your conclusion, but it might be possible the percentage that they have named was in the most competitive part of the vibrating machine business that there is, for all I know, or the cored pallet machine that they had no control of at all. That might be possible.

But I can't anticipate what is going to be shown. I must follow what has been shown.

Mr. Babcock: Perhaps I am being too technical—I hope not—but in order to clarify one phase of the matter, it was my understanding that what Mr. Speer has had to say since

your Honor last invited him to say whatever he had in mind, was not being given as a witness under oath, but he was [fol. 1636] then discussing the document as an attorney.

The Court: And that is the way the court will take it.

Mr. Babcock: I did not want that to be considered as evidence.

The Court: No, but his being up there sort of places the statement on the record in an unorthodox fashion, but I understand it. Do you care to have any other questions?

Mr. Henry: I would like to ask a few questions regarding the exhibit number——

A. It is 164, Mr. Henry.

Mr. Henry: 164.

Cross-examination.

By Mr. Henry:

Q. This is a computation based on your own arithmetic?

A. Yes, it is.

The Court: Arithmetic is the same all over. You know that. There is no claim on that, is there, Mr. Henry?

Mr. Henry: I think not, your Honor.

By Mr. Henry:

Q. Do you have the work sheets from which this exhibit was prepared?

A. I think I do, Mr. Henry.

Q. And will you make them available to the defendant to check?

Mr. Neville: Now, the government is going to object to making them available to the defendant, first of all that [fol. 1637] at this juncture I do not think either Mr. Speer or myself know what else is on the work sheets.

Mr. Henry: Well, your Honor——

The Court: Just a minute.

Mr. Neville: And for the additional reason that the chart is being offered as the result of work effort on the part of government counsel, which work effort I submit is not susceptible of being produced in evidence.

The Court: Have you any case on that?

Mr. Neville: I believe there are cases on that, on work effort.

The Court: Do you know of any case on it?

Mr. Neville: Offhand I do not.

The Court: I would be very interested in one.

Mr. Neville: Offhand I do not, but I think there are cases on it.

The Court: Well, if you get me a case, I will strike it out, but this man is a witness and if he has work sheets showing how he arrived at his conclusion, the fact that he happens to be an attorney for the government does not make any difference at all. He will have to produce them. If the work sheets contain anything on there which you find that you think should not be made known to the defendant, submit them to the court. For example, any private statement made about some other phase of the case; but I anticipate that everything that is on those work sheets should be [fol. 1638] available to them if they so desire.

Mr. Neville: With the proviso, your Honor, that I may show the work sheets to you in the event that there is something on there that does not pertain to the issue.

The Court: Yes. Let us suppose that this appears on there—it does not, I know; I have not seen the work sheets but I am taking an exceptional case;—an instruction from you to Speer, "Get this percentage up higher" or "Get this percentage down lower." Suppose that is on there. That is going to be available for them. The court is going to make it available to them.

Mr. Neville: Yes, your Honor.

The Court: But if you have something on some case that says on there, "Read 127 so-and-so, page so-and-so; that case seems to be against us"—I will strike that out as it has nothing to do with the work sheets. But anything that pertains to the work sheets must be made available to them, if they so desire.

Mr. Neville: Very well, your Honor.

The Court: I would, however, be very interested in knowing if you find a case on that other point.

Mr. Neville: I will try to find it during recess, your Honor.

By Mr. Henry:

Q. In your computation, Mr. Speer, you used as a source [fol. 1639] of a part of the figures you used, certain of the depositions that you have offered this morning in evidence. Is that correct?

A. That is correct, Mr. Henry. I have used all of the depositions which were offered this morning.

Q. Did you use the deposition of Airtamp Corporation?

A. No, I do not believe that one was offered, Mr. Henry.

Q. You mean you used those that you offered?

A. Yes.

Q. But you did not offer them all?

A. That is true.

Q. Although some of the manufacturers whose testimony you took did manufacture machines and showed a dollar value?

A. No, I am of the opinion that all of the persons from whom we took depositions who manufactured and sold machines, are included in the depositions which I offered this morning.

Q. Do you know whether or not the figures that you have used for machinery sales are the figures of machinery only and do not include parts?

A. That is the way the question is asked in the deposition. It asks only for the sale of concrete block machines which is exclusive of repair parts and attachments, and so forth.

Q. Did you frame the questions in the questionnaires?

A. I did.

Q. And you are not proposing to offer from that, in this exhibit, anything except dollar values as shown on the [fol. 1640] exhibit?

A. That is true.

Q. Take for example, F. C. George and Van Ornum, about which we spoke this morning; do your figures include the deposition figures as to each of them?

A. No, it only includes the figures given by the George Company.

Q. And as to the Dunn Manufacturing Company and Concrete Equipment Company, that is in confusion at present, did you use both of those?

A. No, I did not.

Q. What did you use there?

A. Only those of the Dunn Company.

Q. Do you have with you the detailed figures from which these totals are made?

A. I do not believe I completely understand your question.

Q. Let me take the item of dollar value of all machines opposite "Other manufacturers" for 1946, totaling upwards of $3,800,000; is that figure taken exclusively from the testimony taken on deposition in the depositions that have been offered?

A. Yes.

Q. You do not include in that figure anything from the Graveley deposition?

A. No, I do not.

Q. And you have not offered the Graveley deposition?

A. No, I have not offered the Graveley deposition.

[fol. 1641] The Court: That name Graveley escapes me. Did anybody from that company testify here?

A. Yes, your Honor.

Mr. Babcock: Mr. Graveley himself.

The Court: That is what I thought. Where is that located?

Mr. Babcock: In Florida.

Mr. Henry: Orlando, Florida.

The Court: Oh, yes. What does the bill of complaint allege? Does it allege that they have a monopoly of the high production machines, or have a monopoly on the block business?

Mr. Neville: It alleges a monopoly on the block business, your Honor.

The Court: Of the block machine business?

A. The block machine business.

The Court: That is what I mean.

Mr. Babcock: It alleges a monopoly of the whole business.

The Court: All right.

Mr. Henry: I think your Honor, I will now object to the receiving of the exhibit under the group offered as being incomplete and inaccurate, and not supported by the detailed——

The Court: What is incomplete about it?

[fol. 1642] Mr. Henry: It is incomplete in that it does not reflect all of the manufacturers listed in all of the depositions that were taken.

The Court: It does not purport to do that. It purports to be the addition of all the manufacturers—the depositions of all the manufacturers that were presented by the government. Is that true?

A. That is right.

Mr. Henry: All that were offered by the government.

The Court: Yes.

Mr. Henry: Yes, your Honor.

The Court: Now the other may go to the value or weight of the evidence, but not to the materiality. What else did you say? It was incomplete and inaccurate. Where is it inaccurate?

Mr. Henry: Perhaps I should not say inaccurate. I should say that until we have the opportunity to check its accuracy against the detailed figures that were used, we can not accept it as accurate.

The Court: All right, the court will permit it, the court will admit it in evidence and if——

Mr. Babcock: Oh, pardon me——

The Court: Later on if you can show that it is inaccurate the court will strike it from the record, but the court cannot presume that it is inaccurate, the witness having testified [fol. 1643] that it is a true reflection of the figures as shown by the depositions.

Mr. Babcock: I would like, in behalf of the Besser Manufacturing Company, to state an objection to the exhibit, because it is incompetent, in the sense that it does not reflect accurately the condition of the whole industry, or any of the portions of the condition of the whole industry which is the thing in issue under the pleadings in the case, and it is immaterial and irrelevant in view of the fact that it does not, therefore, bear upon or even contribute towards proof of the conditions in the industry.

The Court: Well, I think that there has been some proof here as to the whole industry. I think that some government references were made before. Isn't that true?

How about his suggestion that it doesn't show the whole industry? And while I am asking about it, I thought I asked you a little while ago whether you were claiming a monopoly in all of the block building machines of the country by Besser, or whether you had the high production, and you said the high production.

And, now, my attention is directed to the fact that the bill of complaint is aimed at the block business, the block machine business of the whole country, of all kinds, and not the high production. Which one is the government claiming?

Mr. Neville: The government claims, your Honor, that [fol. 1644] the defendants have attempted to monopolize interstate trade and commerce in the concrete block machines, by their control of the production of the high production machines.

The Court: Where does it say that in the bill of complaint?

Mr. Neville: Well——

The Court (Interposing): Your bill of complaint, gentlemen, is what I am going by. You come in here and they are charged with something. What are you charging them with? That is what I want to know.

Mr. Neville: The government still charges that the defendants have attempted to monopolize the concrete block machine industry. Now, how they have done it and how they accomplish that is something else.

The Court: All right. It is the concrete block machine business?

Mr. Neville: Yes, your Honor.

The Court: It is not the high powered alone—or what do you call it?

Mr. Neville: High production.

The Court: High production. Yes. All right.

Mr. Neville: No, your Honor. The government contends that that is the way they did it.

The Court: Now you are back, you have taken—the position of the government is different now than it was before, [fol. 1645] isn't that true?

Mr. Neville: I don't believe so, your Honor.

The Court: Oh, Mr. Neville, please. Didn't you just get

through telling me on the record you claim that they controlled high powered, the high production machines?

Mr. Neville: Yes.

The Court: And you looked at the chart, and you shook your head and said, "Well, this is inaccurate." And now you claim that you didn't take that position?

Mr. Neville: No, your Honor. I would like to make a correction of my comment on the chart. I said it was incomplete, a while ago. Not inaccurate.

The Court: Incomplete?

Mr. Nevile: And secondly——

The Court (Interposing): Well, if your claim is the entire block machine business, it is complete, that is, if his testimony amounts to anything. I wish that the government would—the court wants to be fair with the government, but you keep putting me in the position where I have to act almost as counsel for the government. I don't like it.

Mr. Neville: Your Honor——

The Court: I endeavor, on my part, to be fair to the government, because in being fair to the government I am also fair to the defendant. But I wish that the government would let me know what it intends to prove, or, I mean, what [fol. 1646] it thinks it has proven. I don't say you haven't, but——

Mr. Neville: I understood your Honor's question to be, "What does the government claim in its bill of complaint?" I have read almost—I have read, as a matter of fact, verbatim one or two lines from the complaint.

The Court: You ought to know what the bill of complaint says.

Mr. Neville: Yes. And the bill of complaint alleges and charges that there is a conspiracy and a monopoly of the entire industry.

The Court: Of the industry.

Mr. Neville: Yes.

The Court: Now, you understand that that means all block machines, all concrete block building machines.

Mr. Neville: Yes, your Honor.

The Court: Cored pallet, simple—whatever you call them—plain pallets, low powered, high powered, all the rest of them.

Mr. Goreff: Even tampers.

Mr. Babcock: Hand operated.

The Court: Yes, hand operated.

Mr. Neville: I will attempt——

The Court (Interposing): All right, gentlemen, if that is it, let's please get on one platform and stick there. There is this that can be said, there is some proof here that the [fol. 1647] most important part of the block building machine—concrete block building machine industry, is the plain pallet high production machine. But is there any evidence to show me what proportion of the entire industry that is?

Mr. Neville: Now, I believe the chart does throw some light on that, your Honor, because the chart has figures on vibrators. I believe the government has singled out the vibrator as being important.

The Court: If it is, the evidence should show it. A vibrating machine can be a little hand machine over here, where two men take something, put in the mix, and then shake it like that (indicating), and pound it. And you have got a concrete block.

Now, unless there is some evidence on that, it isn't going to help me any.

Mr. Neville: As a matter of fact, your Honor, there is evidence of the fact that today the high powered vibrating machine is the machine that counts in the industry.

The Court: Certainly. Certainly it is. But that doesn't mean that it has a certain percentage, unless it is testified to.

Well, all right, gentlemen. I think I have done enough here to try to get at the facts. I am not going to do any more. Go ahead, gentlemen.

Mr. Neville: As it now stands, your Honor, I believe the [fol. 1648] document has been offered in evidence, and objections have been stated, and we are awaiting your Honor's ruling.

The Court: Well, I think if those are the objections, as stated, I am going to permit the document to be introduced and accepted as an exhibit.

Mr. Neville: Thank you, your Honor.

The Court: May I not suggest, though—go ahead.

Mr. Neville: I would like to state this, your Honor, that I believe we can get the figures which perhaps will break

down the compilation as it now stands into figures on the high production machines. When we have those figures compiled, the government will submit those figures in the form of a chart, and perhaps at that time we might have something of more interest to your Honor.

Mr. Speer: If the court please, may I say a few words on this chart, as an attorney, now?

The Court: Are you reading it now? The chart is in. I have accepted it. I am not going to listen to an argument now on the chart. You are subject to cross-examination. Any further cross-examination?

Mr. Babcock: I have none.

The Court: What is that?

Mr. Babcock: No, I have none, your Honor.

The Court: Any other cross-examination?

Mr. DeGree: None, your Honor.

[fol. 1649] The Court: Any further direct examination?

Mr. Neville: No further direct testimony.

The Court: All right.

(Witness excused.)

The Court: Call your next witness.

Mr. Speer: If the court please, I would like to add that this isn't in the sense of any kind of an argument, but we did not attempt to show in the chart the percentage of block machines manufactured by the defendants. It is probably a small percent, but when it comes——

The Court: Now, no, no. I think that the defense ought to object to that. Statements made here on the record that should be in the form of testimony.

Mr. Speer: No, your Honor. I am not. I am trying to explain what the government's attitude in this particular case is.

The Court: When you say it is a small percentage, that amounts to testimony, the way you stated it. Now you can give, as a reason, that you believed it was a small percentage. That is one thing. But when you specifically state——

Mr. Speer (Interposing): I see.

The Court (Continuing): —that it is a small per cent, that, unchallenged, will be accepted by the court.

Mr. Henry: I think, your Honor, when counsel tells the court what is not in the chart, he is going beyond a proper [fol. 1650] statement to the court.

The Court: Well, gentlemen——

Mr. Henry (Interposing): I do object on that ground.

The Court: All right. Go ahead.

Mr. Speer: Well, your Honor, then I will withhold any other remarks until we have an opportunity to argue the case.

The Court: Well, are we ready to proceed here with the next witness?

Mr. Speer: That is the end of the government's case, your Honor. We have now concluded.

The Court: Now, the government has concluded its case? Is that right?

Mr. Speer: Yes, your Honor.

Mr. Neville: Yes, your Honor.

The Court: All right. You know you can't put testimony in afterwards. You know that?

Mr. Neville: We have put in all the testimony that we know of right now, your Honor.

The Court: You can't put any charts in after a while either, you know.

Mr. Speer: That is right.

The Court: Unless you get permission from the court, now.

[fol. 1651] Mr. Neville: We have done everything that we think can be done to present the government's case as of now.

The Court: All right. Call the—what are you——

Mr. DeGree (Interposing): If the government has rested, I desire to make a motion.

The Court: What is your motion?

Mr. DeGree: A motion to dismiss as to Stearns Manufacturing Company. Does your Honor wish to hear me on it now?

The Court: I don't want to hear an argument. I want to know why I should dismiss as to the Stearns Manufacturing Company. That is, on what grounds?

Mr. DeGree: All right. Stearns Manufacturing Company, as I take it, is charged with conspiracy, one of the

conspirators, under this bill of complaint. There has been no testimony, in my opinion, as to the conspiracy of Stearns with anyone.

Mr. Neville: We can't hear back here, your Honor.

Mr. DeGree: I am sorry. I will get over here.

I stated that Stearns was charged in the bill of complaint as being a conspirator, and there is no evidence in the case that Stearns conspired with anyone to restrain trade or to stifle competition. Now, that is the complete charge in the bill of complaint, so far as Stearns is concerned, that there was a conspiracy.

[fol. 1652] Now, we have been in court for approximately five weeks, at a great deal of expense to Stearns Manufacturing Company, but yet I say there is no evidence, as the case shapes up now, of any conspiracy whatsoever between Stearns and anyone else.

The Court: All right.

Do you care to make a motion, somebody else here?

Mr. Goreff: Yes, your Honor.

The Court: All right.

Defendants' Motions to Dismiss and to Strike Certain Testimony

Mr. Goreff: On behalf of the defendants, Gelbman and Andrus, I would like to move to dismiss, and I do so move on the ground that there has been no evidence whatever that these defendants have been engaged or participated in a combination and conspiracy, or a conspiracy to restrain and to monopolize trade and commerce, which is the charge made.

Now, these defendants are patentees; within the scope and purview of the patent monopoly, they have a right to do what they have done in order to protect that patent monopoly.

Now, if your Honor will hear me, I would like to summarize the evidence against them.

The Court: All right.

Mr. Goreff: We have an agreement made in December, 1942, which is an exclusive license agreement. I may say at the outset that there has been some claim by the government that an exclusive license agreement between the

[fol. 1653] patentee as licensor, and manufacturers as licensees, is illegal. I have been unable to find any authority to that effect.

The texts and the cases state flatly that the patentee is a monopolist and a legal monopolist and has a right to license whom he sees fit to license and as he sees fit to license, so long as he does not do it for the purpose of restraining trade.

This agreement provided for two licensees, the defendants Stearns and Besser. They were competitive. They manufactured a different type of machine. They used not only the Gelbman patents but other patents of their own belonging respectively to Besser and Stearns. The price ranges of the machines were different. We operated under that license for a number of years and still continue to operate under it.

Now, what have we done under these licenses. The evidence as it shapes up is about as follows:

The witness Graveley got on the stand and said that he had heard from a customer of his——

The Court: I want to give you the chance to state your position but not to go into a complete argument on it at this time. How long do you think it will take you to state your position?

Mr. Goreff: Well, I did want to take about 15 minutes, your Honor.

[fol. 1654] The Court: I think that is too long. If I want further argument I will ask for it, but can you not state your position very briefly?

Mr. Goreff: Well I will try to——

The Court: It has been at least five minutes now and I will give you five minutes more.

Mr. Goreff: All right, your Honor. What we have done, in sum and substance, is in three or four instances we have directly contacted alleged infringers. We have written them and said, "You are infringing."

In 1947, we sued one infringer, Darden, a customer of Darden's.

From time to time we engaged in correspondence with our licensees, the defendants Stearns and Besser, as alleged infringers, and I submit, your Honor, that is quite proper and natural, and the logical thing for us to do when an-

infringer arises, whether there is one licensee or two licensees, or half a dozen; if it is brought to our attention or the attention of a licensee of ours, naturally we correspond and investigate the matter in furtherance of and protection of our patent rights.

The Court: Are you willing to grant your Gelbman patents to anybody?

Mr. Goreff: With certain reservations, yes.

The Court: Well, let us hear what the reservations are.

[fol. 1655] Mr. Goreff: Well, depending, of course, on the responsibility. We do not want anyone to come along and say——

The Court: I mean any responsible party.

Mr. Goreff: I think so, your Honor.

The Court: Do you say that you will?

Mr. Goreff: Yes.

The Court: That is what the government wants from Gelbman, isn't it?

Mr. Speer: Yes, your Honor.

The Court: All you do want?

Mr. Speer: Yes, your Honor, that is all we want from these patentees.

The Court: All right.

Mr. Goreff: On one occasion we have inserted advertisements in trade papers——

The Court: Let me ask you, are you restricted in any way from doing that by any agreement that you have with Besser or anybody else?

Mr. Goreff: We are today, yes.

The Court: You are today?

Mr. Goreff: Yes, sir.

The Court: All right. I think I have your position.

Mr. Goreff: If I just may add this, first, that we did advertise in trade papers on one occasion stating that Stearns and Besser were the sole licensees under the Gelbman patents, and there has been a lot of hearsay tes-[fol. 1656] timony which I do not think is evidence, to the effect that a certain manufacturer heard from a customer of his that, from a representative of Besser, not from Gelbman or Andrus, that Gelbman wanted suit brought.

I think that is all there is in the case against us and

I submit to your Honor that whatever we have done here has been in furtherance and protection of our patent rights, and wholly permissible within the patent monopoly.

The Court: You mean the monopoly that was granted to you by the very patent itself?

Mr. Goreff: Yes, sir.

The Court: All right, I will hear from you gentlemen, if you care to make a motion.

Mr. Babcock: I desire, if your Honor please, to move to dismiss; I also desire to make a motion to strike certain items of evidence; and I also desire, if the court should not grant the motion to dismiss the entire complaint, to move to strike from the complaint and strike from the issues certain unproved items, so that in proceeding with the proofs of the defense, we may be so guided ourselves to check the issues.

The Court: All right. Take them up one at a time.

Mr. Babcock: Very well. I move that the bill of complaint of the plaintiff be dismissed, first, because there [fol. 1657] are in the general classification two charges made against the Besser Manufacturing Company and Mr. Besser, namely, one of conspiring and combining with the other defendants in restraint of trade, and the other general classification an attempt to monopolize and a monopolizing of the entire industry.

The reason I move to dismiss the complaint is that because the government has failed to prove a prima facie case, and even if for a moment that cannot be conceded, at least it has failed to prove that there was any unreasonable restraint of trade, or any unreasonable monopoly which was not and only an indirect result from a proper and legitimate activity to protect against infringement of patent rights.

Ever since—excuse me, I do not want to get into the argument but state my position.

The Court: All right.

Mr. Babcock: This last is important under the decisions of the Supreme Court.

If the court after careful consideration of that motion feels that motion cannot be granted in its entirety, then I move——

The Court: Before you go on, will you make certain that

I get your position on that. You say that even if they did control or actually did have a greater dollar value and volume and all that, that comes about because they had certain patent rights and utilized those rights to protect their patents and they believed as they had a right to do, and [fol. 1658] as the court has indicated right from the beginning they had a right to do, inform people who were using their patent rights not to do it; that that was a legitimate result of lawful efforts without any attempt to monopolize the business?

Mr. Babcock: That is right, your Honor.

The Court: All right.

Mr. Babcock: But any control, if any, which the evidence indicates is only an indirect result from the essentially necessary activity to protect, legally to protect patent rights.

The Court: All right.

Mr. Babcock: Now, if the court feels, after consideration, that that is not a proper motion so far as the monopoly or attempt to monopolize is concerned, at least then I join very definitely with the defendants Stearns and Gelbman in saying that in my judgment their motion should be granted, but in addition to that even in behalf of the Besser Manufacturing Company and Mr. Besser, there should be eliminated now the question of conspiracy and combination, because there has been no proof of anything directly relating or indirectly relating to a conspiracy or a combination.

The only proof there has been of a concert of action, of a meeting of the minds, of anything which goes to make up a conspiracy or a combination of this type, has been the [fol. 1659] agreement of 1942, which is a perfectly proper and lawful document,—a concert of action, yes, when the concert of action was necessary to prevent infringement and to protect the patent rights. No evidence whatsoever of anything else that indicates concert of action, a meeting of the minds, a joint progressive venture activity, not another thing. Nor if it be claimed by the government that Mr. Besser had attempted or determined upon an attempt to monopolize the industry, absolutely no evidence of any kind that the other defendants had any knowledge of such a state of mind on his part, such a plan or a program, and that they are joining with him in the concert of action to

protect rights was not a knowing contribution toward forwarding a combination.

The Court: All right. You are getting into the argument. No conspiracy or evidence of conspiracy—that is your second point.

Mr. Babcock: That is right, your Honor.

The Court: And what is your third point? I am not suggesting that you have a third point but anticipating that you might have.

Mr. Babcock: In order to have the record clear, I am asking the court to enter an order striking that from consideration so that we can confine our activity directly toward the question of a monopoly.

The Court: All right.

[fol. 1660] Mr. Babcock: Now I come to the motion to strike the evidence. I am prepared to do that rather in detail if it becomes necessary, but I will hurry through a statement of it on the record. I am referring first to the testimony of Gene Olsen. I move to strike all of his testimony which begins on page 26 of the transcript of the record that makes reference to the so-called Wisconsin reports. He gave some testimony of a test that was made over in Wisconsin.

The Court: By some professor?

Mr. Babcock: By some professor or university laboratory or something.

The Court: How many of these have you there?

Mr. Babcock: How many of these instances of testimony?

The Court: Yes.

Mr. Babcock: About 24.

The Court: All right, go ahead.

Mr. Babcock: I move to strike from the record the government's Exhibit No. 108, which is one of the government publications of the Department of Commerce, the Fifteenth Census of the United States for the Year 1929.

I move to strike from the evidence Exhibits 102, 104 and 106, which are the income tax returns of the Consolidated Concrete Machinery Corporation, and Exhibits 103, 105 and 107, which are the income tax returns of the Besser Manu-

[fol. 1661] facturing Company.

I move to strike Exhibit 109, which is another of the Department of Commerce census reports.

I move to strike the testimony of Mr. Eugene F. Olsen in which he purported to testify to comments made by Mr. Stanley Fildew at the time of the conference in the office of the stock brokers, Mr. Smith and Mr. Hague, since it does not appear anywhere at any time that Mr. Fildew has been representing or was representing or has been representing or speaking for the defendants Besser and Besser Manufacturing Company, and since that particular transaction was not in any sense a corporate transaction of the Stearns Manufacturing Company.

Mr. Speer: Excuse me a moment, Mr. Babcock. Will you tell us whereabouts that occured in the transcript?

Mr. Babcock: Pages 121 to 125 of the transcript.

Mr. Speer: Thank you.

Mr. Babcock: I move to strike the testimony of Mr. Olsen, pages 134 to 137 of the transcript, being his testimony of his meeting in Chicago with certain concrete block manufacturers, at which no representative of any of the defendants was present, nor was anyone present who had even any semblance of agency for any of the defendants, or any authority or even prima facie authority to bind any of the defendants.

I move to strike the testimony of Mr. Eugene Olsen on [fol. 1662] pages 143 and 144 of the transcript, on which he testified to a conversation with Mr. Ralph Bailey with reference to the question of licensing, there being no evidence now at the conclusion of the government's case indicating that Mr. Ralph Bailey had any authority to speak for the Besser Manufacturing or Mr. Besser on the question of licensing.

I move to strike the testimony of Mr. Eugene Olsen relative to conversations with Mr. Rosenthaler, respectively on pages 149, 152, 154 and 155 of the transcript of record, since they relate to the question of the granting of licenses, and there is now, at the conclusion of the government's case, no evidence whatsoever of any authority in Mr. Rosenthaler to discuss with Mr. Olsen or anyone else in behalf of Besser Manufacturing Company the question of granting licenses.

I move to strike the testimony of Mr. Olsen which appears

on pages 159, 160 and 161 of the transcript of record, which is another conversation between Mr. Olsen and the same Mr. Ralph Bailey with reference to the matter of employment—the purported matter of employment of Mr. Olsen, since now at the conclusion of the government's case there is no evidence whatsoever to show that Mr. Ralph Bailey had any authority of any kind in behalf of the Besser Manufacturing Company or Mr. Besser, relative to the employment of anybody.

I move to strike the testimony of the witness Eugene Olsen on page 166 and following of the transcript, in which he purported to relate conversations with his customers [fol. 1663] or potential customers, and to report alleged statements to such customers or potential customers of unnamed representatives of the Besser Manufacturing Company.

I move to strike from the record the Exhibit 115 which is a letter presented by the witness Mr. Olsen from a purported customer along the same type of evidence of the conversations.

I move to strike the testimony of the witness Graveley, found on pages 218, 219 and 220, purporting to relate to conversations which Mr. Gravely had with customers or potential customers relative to contacts made with such customers by purported unnamed representatives of the Besser Manufacturing Company.

I move to strike the testimony of the witness Wynn, in which he purported to relate a conversation with a Mr. Stenneman, relative to—this is found on page 299 of the transcript—relative to a conversation with an unnamed representative of the Besser Manufacturing Company, by the customer and not by the witness Wynn.

I move to strike the testimony of the witness Wynn found on page 300 of the transcript in which he purported to relate a conversation had by a purported customer of his, a Mr. Haymaker, relative to contacts by certain Besser representatives never identified or named.

[fol. 1664] I move to strike the testimony of witness Milewski found on page 613 of the transcript of record, in which he purports to testify to conversations occurring between himself, Milewski, Mr. Olsen, and Mr. Milewski's attorney, Mr. Shivel, out of the presence of any representa-

tive or officer of the Besser Manufacturing Company or Mr. Besser.

I move to strike the testimony of the witness Milewski on page—beginning on page 627 of the transcript, relative to his conversation with a customer or potential customer by the name of Miller.

I move to strike Exhibit 138, which is a letter passing between Mr. Milewski and Mr. Miller.

I move to strike the testimony of the witness Milewski on page 633, in which he purports to relate his conversation with a man by the name of Lacey as a customer or potential customer, and move to strike Exhibit 135, which is a letter written by Mr. Lacey to the Lith-I-Bar Corporation.

I move to strike the testimony of the witness Milewski in which he purports to relate a telephone conversation with Mr. Longenecker.

I move to strike the testimony of the witness Longenecker relative to the same telephone conversation.

I move to strike generally the testimony of the witnesses Olsen, Milewski and Wright as to any conversation had between himself, Mr. Bailey, Mr. Rosenthaler and Mr. Stark, [fols. 1665-1676] since now at the conclusion of the government's case there is no evidence whatsoever indicating, prima facie or otherwise, any authority on the part of Messrs. Bailey, Rosenthaler and Stark, in the given instances, to represent or to speak for the Besser Manufacturing Company or Mr. Besser.

I move to strike from the evidence the testimony or the exhibit commonly referred to as the Stone agreement, and all testimony relative to the Stone agreement, for the reason that now at the conclusion of the government's case there is nothing whatsoever about the agreement or about the testimony relative to the agreement which shows any materiality or relevancy to the issue presented in the case.

I think that completes my motions.

RULINGS ON MOTIONS

The Court: All right. The third and fourth objections are denied. I am in no position to say what can or cannot be stricken until I look up the record and the references that are made thereto.

[fol. 1677] The Court: Well my inclination is to find that there is no conspiracy as to the Gelbman people at all. I do not say there is as to anybody else. I hesitate, however, to let you go at this time, having taken all of this and being possibly in error. So that I deny that motion without prejudice. I deny the other motions without prejudice. To [fols. 1678-1683] me, what you possibly have got here, and the only thing you have got is the purchase of the stock in the Stearns Company by Mr. Besser, the Stearns Company being at that time one of the leading opponents that he had in the field, according to the reports and the information that I have.

[fols. 1684-1689] The Court: I will deny any motion to strike. You can reserve them because I am in no position right now to say what should or should not be stricken. So you may be prepared to go ahead.

[fol. 1690] COLLOQUY

Mr. Babcock: I am advised by counsel for the Stearns Manufacturing Company and Messrs. Gelbman and Andrus that at the present time, at least, they do not contemplate offering any evidence.

The Court: All right.

Mr. Babcock: For the defendants. So that, at this time, I advise the court that in behalf of the Besser Manufacturing Company and Mr. Besser, our evidence will consist, first of all, of clearing the record of a few miscella-

[fol. 1691] neous items.

The Court: I thought you said you weren't going to put in any evidence?

Mr. Babcock: I said counsel for Stearns and Gelbman had advised me that they didn't contemplate——

The Court (Interposing): I thought you said you weren't. I thought you were resting on the case as it is now. I am sorry.

Mr. Babcock: Yes, your Honor.

The Court: Go ahead.

Mr. Babcock: In behalf of the Besser Manufacturing Company and Mr. Besser, we will offer a few items of miscellaneous matter to deny some of the statements made by Government witnesses and Mr. Besser himself, who,

affirmatively, will testify to the progress of the Besser Manufacturing Company, only to protect its patent rights——

The Court (Interposing): I understand your theory, that everything you did was to protect your patent rights, and you had a perfect legal right to do that.

Mr. Babcock: Yes, your Honor.

The Court: Well, suppose that resulted in a monopoly, Mr. Babcock? What about that? Hasn't the Government or the court some rights still?

[fols. 1692-1694] Mr. Babcock: Our contention on that, your Honor, is that even if it does appear to some degree a monopoly resulted, it was only an indirectly resultant monopoly which is not forbidden under the decisions, and that any restraint of trade was not an unreasonable restraint of trade, which, since the adoption of the "rule of reason" by the Supreme Court is a necessary element of the case.

[fol. 1695] Delmar R. Fox, called as a witness on behalf of the Defendants, having been first duly sworn by the Clerk, testified as follows:

Direct examination.

By Mr. Henry:

Q. Where do you live, Mr. Fox?

A. Alpena, Michigan.

Q. What position do you hold with the Besser Manufacturing Company?

A. Sales Manager.

The Court: You have to keep your voice up. This is a large room.

By Mr. Henry:

Q. Mr. Fox, do you know Mr. Harry Longenecker?

A. Yes, sir.

Q. And will you tell the court whether you were at his plant or office in April of this year?

A. Yes, sir; I was.

Q. Will you tell me when that was, and the occasion of your being there?

A. It was on April the 22nd, and the occasion of my visit there was on the complaint of Harry Longenecker and also an attempt on my part to try to get Mr. Longe-
[fol. 1696] necker to make payments, to make payments against a Vibra-Pack agreement. He was several months delinquent.

Q. On the occasion of your being there, will you tell the court what, if anything, was discussed between you and Mr. Longenecker? What was said either by him or by you in reference to a pending patent case?

A. There was no discussion of any patent case whatsoever.

Q. The testimony of Mr. Longenecker, as appears on page 742 of the transcript, is that you said "that the case was concluded in favor of the Besser Manufacturing Company". Will you state whether or not he correctly stated anything that you had said?

A. I deny making any statement whatsoever to that effect.

The Court: When was this date?

Mr. Henry: April 22nd, 1950.

The Court: All right.

By Mr. Henry:

Q. I would also like to ask you, Mr. Fox, whether you determined the nature of the trouble Mr. Longenecker claimed to be having with his machines?

A. Well——

Q. (Interposing.) Did you?

A. Pardon?

Q. Did you determine the trouble?

A. No, not exactly. I could say this much, however, that in checking over his plant, along with Mr. Eddy (?), we
[fol. 1697] walked out into the yard, and going into the hopper to be elevated into the bins was probably the most atrocious material I have ever seen from which to make concrete block or cinder block.

Q. What was the material?

A. The material was, or appeared to me, to be apartment house ashes mixed with glass and also iron.

Mr. Neville: Excuse me.

A. Scrap steel.

Mr. Neville: Excuse me, Mr. Henry. Your Honor, I move that the entire testimony of Mr. Fox about what he saw in this plant be—in the first place, it is immaterial.

The Court: Be what? Be stricken from the record?

Mr. Neville: Yes, your Honor. Be stricken. It is immaterial, to begin with.

[fol. 1698] Mr. Henry: The testimony that Mr. Longenecker gave, your Honor, was that the blocks were not satisfactory and that was the reason why he refused to pay the money.

The Court: Oh.

Mr. Henry: I am asking——

The Court (Interposing): That is different.

Mr. Henry: I am asking this witness what he found was wrong.

The Court: That is different. I had forgotten about that. No, you are right. It is competent. I will agree with you. I don't see why it isn't.

Mr. Neville: I believe he also went into—somewhat into [fol. 1699] the description of the premises. I am not sure I understood correctly.

The Court: His description of the premises can be left out. But that part about the material that was being used in the making of these blocks may stand, because I do remember now that Mr. Longenecker said he was having trouble with the machine, and that that is one of the reasons he gave why he did some other things.

By Mr. Henry:

Q. What can you say, Mr. Fox, as to the productive capacity of Mr. Longenecker's machine as appears from the reports that he has sent to you?

A. Well, all I can say is that I would—I would make the statement that his production was satisfactory.

[fol. 1700] Cross-examination:

By Mr. Speer:

Q. Mr. Fox, was the only topic of discussion that you had with Mr. Longenecker in April concerning his complaint about his block machine?

A. I would say ninety-five per cent of it.

Q. What was the other five?

A. The other five was as I was leaving the plant.

Q. What was that?

A. We discussed—I asked Mr. Longenecker what he contemplated doing at his Geneva (?) plant.

[fol. 1701] Q. And what did he say?

A. He said that he was thinking of putting in a smaller machine.

Q. What kind of a machine?

A. A Lith-I-Block.

Q. All right. He said that. What comment did you have to say to him?

A. I made the comment, naturally as a salesman would——

Q. (Interposing) Did you explain——

A. (Continuing) —that the machine he should put in would be the Vibrapack.

Q. I see. So that it is a fair assumption to make that you were attempting to interest him in the purchase of a Besser machine at his plant in Geneva?

A. That is correct.

Q. Did you have any information about a patent case that was filed against the Lith-I-Bar people?

A. I knew of the case.

Q. And had you ever discussed the case with anyone else at the Besser Company?

A. I would answer "Yes" to that.

Q. And with what particular person did you discuss this case?

A. Well, there were any one of several.

Q. We are interested in finding out who they are or were?

A. Well, as far as a discussion on the case was concerned,

it wasn't a discussion. It was an inquiry on my part as [fol. 1702] to how it was progressing.

Q. All right. It was an inquiry, then. Whom did you inquire of, Mr. Fox?

A. Of Mr. Stark.

Q. All right. What did Mr. Stark have to say?

A. That no decision had been reached.

Q. All right. Did you ask of anybody else?

A. Mr. Besser.

Q. What did Mr. Besser say?

A. Gave me the same answer.

Q. All right. Did you inquire of anyone else at the Besser Company?

A. Not that I recall, offhand.

Q. Did you discuss this case at all with Mr. Elroy Boboltz?

A. No, sir.

Q. Do you recall ever having heard Mr. Boboltz say anything about this case?

A. Not that I recall. We were just—may I ask a question?

Q. Surely?

A. We are speaking now prior to my visit to Longenecker, or since my—which time is it?

Q. At any time, have you ever heard Mr. Boboltz say anything about that case?

[fols. 1703-1738] A. Oh, we have talked about it very recently, yes.

Q. What was the approximate date of that conversation?

A. Oh, about four or five days ago.

Q. About four or five days ago. Mr. Fox, have you discussed that case with anyone else besides the people that you have just told us?

A. Not that I can remember.

Q. So you are stating here today that, under oath, that when you were in Philadelphia, at the plant of Mr. Longenecker, that you did not at any time say anything about the patent-infringement suit against the Lith-I-Bar company?

A. I did not discuss it with Mr. Longenecker.

Q. Did you discuss it with anybody else in his office or in his plant?

A. No, sir.

[fol. 1739] EUGENE F. OLSEN, recalled as a witness on behalf of the Defendants, having been previously duly sworn, testified further as follows:

Direct examination.

By Mr. Babcock:

Q. You have been sworn, Mr. Olsen. This may sound unnecessary to you, but so that we have a complete record [fol. 1740] of it, you are the same Eugene Olsen who previously testified in this case?

A. Yes, sir.

Q. Now, Mr. Olsen, you recall giving some testimony on the incident of the actual consummation of the sale of your stock in the Stearns Manufacturing Company at the Smith-Hague office in Detroit?

A. Yes.

Q. At that time, did you state that you were withdrawing your promise to stay out of business for five years?

A. I had made no promise, and, therefore, did not say I was withdrawing any.

Q. Did you make any statement of that substance?

A. No, sir.

Q. Was there ever at any time prior to the actual consummation of the sale of your stock that you had ever promised anybody to stay out of business, out of the business of manufacturing concrete block machinery?

A. No, sir.

Q. Did you ever state to anyone, either at that time of the consummation of the sale of your stock or at any time previous thereto, that you were withdrawing your promise to stay out of business for five years?

[fol. 1741] A. No, sir; because I had made no promise.

The Court: Gentlemen, let's not try that case. You can ask the question, but let's not go any further.

Mr. Babcock: I am not going any further. I just have those questions.

The Court: I mean by that, we are not interested. The first thing you know, we will get into what the contract provided.

Mr. Babcock: I understand.

The Court: The statement is immaterial, whether he did or whether he did not, as far as I am concerned; except as, I suppose, it bears upon his credibility.

Mr. Babcock: It also bears upon the credibility of the witness Wright who gave positive testimony he heard such a promise made and withdrawn at that time.

The Court: All right.

Cross-examination.

By Mr. Speer:

Q. Well, then, I will ask you this, Mr. Olsen. At or about the time of the transfer of your stock in the Stearns Company, did anyone ever ask you to stay out of the concrete block machine industry upon the transfer of this stock?

[fol. 1742] A. Yes.

Q. And who was the person who asked you?

A. Mr. Wright.

Q. Mr. Pierce Wright?

A. Correct.

The Court: When was this and where was it, if the witness is going to get into that again.

A. It was at the closing of the deal in the offices of Smith-Hague. I believe it was on March 26th.

By Mr. Speer:

Q. Can you——

The Court (Interposing): Just a minute, please. Every year has a March 26th. Let's fix it.

A. 1948.

The Court: All right.

By Mr. Speer:

Q. And can you recall for us approximately what Mr. Pierce Wright had to state at that time?

A. He wanted to know what I was agreeing to in connection with this deal, and when I inquired what he meant by that he said, "Such as staying out of this industry for at least five years."

Mr. Speer: That is all that I have, your Honor.

[fol. 1743] Redirect examination.

By Mr. Babcock:

Q. May I just ask what the witness's response at that time to Mr. Wright's question was?

A. I refused to make such a promise.

Cross-examination.

By Mr. Gelbman:

Q. Mr. Olsen, at the time you were with Stearns and just prior to your sale of your stock, did you, on behalf of the Stearns, receive a licensing agreement with Louis Gelbman concerning sintering patents?

A. Stearns received such a license. I can't recall even approximately the date.

Q. Well, was it prior to your——

A. (Interposing.) It was prior to my resignation as President of Stearns.

Q. And do you recall having a conversation with Mr. Gelbman after you sold your stock concerning the future of the sintering license agreement?

A. No, but there may have been such. I do not recall.

Q. Do you recall whether Mr. Gelbman ever expressed any concern over the future of his sintering license agree-
[fol. 1744] ment with Stearns, because you were out of the corporation?

A. Yes; he called at my new location and we discussed that situation. In general, I remember he was apprehensive.

Q. Does the name "Leftwicz" (?) mean anything to you?

A. I know Mr. Leftwicz.

Q. Will you tell us who he is?

A. He was an employee of Mr. Gelbman and I was with

Stearns and subsequently I was told and have reason to know Leftwicz—or they separated and Mr. Leftwicz is in a similar kind of work now, I understand.

Q. Do you know whether or not he is working on the principle or process known as Agolite?

A. Yes; he is.

Q. And that is a process that is in competition with sintering, isn't it?

A. The end result of the product they make is certainly similar.

Q. The process is different, but the result or ultimate purpose is similar; is that correct?

A. Yes.

Q. That purpose is to achieve a light-weight aggregate, isn't it?

A. Right.

Q. And do you know whether Mr. Leftwicz has been employed by the Besser Corporation?

[fol. 1745] A. Yes; I have reason to know that he has a connection of some kind.

Q. And do you know the connection that he has?

A. No.

Q. Do you know whether or not he has been working on Agolite?

A. Yes.

Q. With the Besser Company?

A. Why, certainly there is an association there.

By Mr. Gelbman:

Q. Have you ever seen the Agolite process?

[fol. 1746] A. Yes.

Q. And have you ever seen it in any plant within this locality?

A. Marietta, Ohio.

Q. And do you know whether or not the Marietta, Ohio, plant was installed by the Besser Company?

A. Yes; it was.

Q. Do you recall ever stating to Mr. Gelbman, after your going into the Gene Olson Corporation, that you would hold money aside for him in the event that an infringement action was ever brought against you?

A. Will you repeat that?

Q. Do you recall ever having made a statement to Mr. Gelbman, after you had formed the Gene Olsen Corporation, saying that if the infringement action was ever brought against you, you were holding money aside to pay for any royalties you might have to pay?

A. No.

Q. You don't recall such a thing?

A. No!

Q. Was it possible that you might have said such a thing to Mr. Gelbman?

A. I don't know how to answer you on that. It is certainly possible, but I don't recall saying if. It seems to me I would be rather foolish to say that.

[fol. 1747] Q. You have been very friendly with Mr. Gelbman for the number of years that you have known him?

A. Yes, sir; yes.

Q. And when was the first time, Mr. Olsen, that you requested of Mr. Gelbman a license on his patents?

A. On behalf of whom?

Q. On behalf of Gene Olsen Corporation?

A. The summer of 1948.

Mr. Gelbman: That is all.

Redirect examination.

By Mr. Babcock:

Q. Mr. Olsen, when you said that you knew the plant at Marietta, Ohio, was installed by the Besser Manufacturing Company, you didn't mean the buildings and the real estate and all that, by the word "plant", did you?

A. No. I was told by the owner they had built that. That the sintering machine proper had been furnished.

Q. By the Besser Manufacturing Company; the Besser Manufacturing Company supplied the machinery that is there?

A. Yes, sir; that is what I meant.

Q. That is all that you meant?

A. Yes.

Q. You have no personal knowledge of the terms under

[fols. 1748-1902] which machinery was supplied or anything of that kind?

A. No, I do not.

Q. You just knew it came from the Besser plant?

A. I was told by the owner that the Besser had made the equipment.

Mr. Babcock: That is all.

Mr. Gelbman: One question.

Recross-examination.

By Mr. Gelbman:

Q. That Marietta machine doesn't use the Sinter-Lite process, does it?

A. Not as I know the Sinter-Lite process.

[fol. 1903] Mr. Gelbman: I am going to call Mr. Gelbman at this time, your Honor.

The Court: All right. Is that agreeable? Who started in on their case?

Mr. Henry: I did, your Honor.

The Court: Is that agreeable?

Mr. Henry: Yes, your Honor.

[fol. 1904] The Court: All right. It is really out of turn but it is all right.

Louis Gelbman, called as a witness on his own behalf, having been first duly sworn by the Court, testified as follows:

Direct examination.

By Mr. Gelbman:

Q. Now, Mr. Gelbman, for the years prior to 1942, what business were you generally engaged in?

A. Manufacturer of concrete products.

Q. And how long have you been engaged in the concrete products business?

A. I left school in 1907 and I went to work for a concrete contractor in 1907.

Q. And you are fully familiar with the concrete products industry?

A. Yes, sir.

Q. And that both from the standpoint of a manufacturer of concrete products themselves and a manufacturer of the concrete products machinery?

A. Yes, sir.

Q. And you are the inventor of one of the patents which are in evidence in this case, the so-called Gelbman patents?

A. Yes, sir.

[fol. 1905] The Court: Well, was he or was Andrus?

Mr. Gelbman: He is referring to the——

A. (Interposing) He was the financer.

The Court: He was the angel?

A. Not too much.

The Court: I meant by that, he furnished the money.

A. We both did, your Honor.

The Court: All right. You are the inventor. That may stand.

By Mr. Gelbman:

Q. Now, prior to 1942, an action was brought against a customer of the Besser Company known as Bell, was it not?

A. Yes, sir.

Q. And that was based on a patent infringement?

A. Yes, sir.

Q. And the ultimate outcome of that suit was a declaration of invalidity of two claims of the patent involved in that suit?

A. That is right.

Q. And after the judgment of the District Court in that suit, did you or did you not file a notice of appeal?

A. I filed that notice.

Q. Now, after the notice of appeal was filed, were you approached by anybody in connection with a proposed li-
[fol. 1906] cense agreement?

A. By Mr. Gene Olsen of the Stearns Company.

Q. And did you personally meet Mr. Besser?

A. Yes, I did.

Q. You were acquainted with Mr. Besser for some time prior to that time, weren't you?

A. Oh, yes, for a good many years.

Q. And the ultimate outcome of that meeting was a license agreement dated December——

A. (Interposing) December 7th, 1942.

Q. Dated December 7th, 1942?

A. That is correct.

Q. And that is the same license agreement referred to in Plaintiff's Exhibit 10?

A. Yes, that is it.

Q. May I have it? (Document handed to counsel). This license agreement was drawn by your attorneys?

A. That is right.

Q. And that was the firm known as Emory, Varnum, Whitteman and Deal (?)?

A. That is right.

Q. At 60 East 42nd Street, New York City; is that right?

A. Yes.

Q. Do you know what type of practice that firm of attor-
[fol. 1907] neys were engaged in?

A. They handled patent law pretty much. They were reputed as being top notch outfit in patent law.

Q. And you relied upon their advice, I presume?

A. That is correct.

By Mr. Gelbman:

Q. What was your intention in drawing this agreement?

A. Well, first we were going to withdraw the suit, in the appeal.

The Court: In what?

A. The appeal. The suit we had filed for the Court of Appeal.

[fol. 1908] Q. You are talking about the infringement action?

A. I am talking about the infringement action. The first suit had been rather costly, and I was——

The Court (Interposing): You have to keep your voice up.

Mr. Gelbman: Yes.

A. The first suit was rather costly and I was rather anxious to stop any further expenditure, if possible.

By Mr. Gelbman:

Q. What was your financial position at that time?

A. Not too good.

Q. Was there any other intention on your part?

A. Yes. I thought it would be for the best of the industry too stop any further litigation and get the machines in production.

Q. And I presume that you were also interested in a return on your invention?

A. Well, naturally.

The Court: Wait a minute. What contract is that?

Mr. Gelbman: That is the license agreement, Plaintiff's Exhibit 10.

The Court: I know. But the contract between him and who else?

A. Besser and Stearns.

Mr. Gelbman: Gelbman, Stear-s, and Besser Corporation. [fol. 1909] The Court: Isn't that the agreement that gave the exclusive license to Besser and Stearns?

Mr. Gelbman: That is the agreement that gave the exclusive license to Bessers and Stearns; yes, that is right, your Honor.

The Court: You say you were interested in helping the whole industry?

A. I certainly was.

The Court: How could you possibly help the whole industry by giving one firm or two firms an exclusive right?

A. At that time, your Honor, there were only two firms in this business that amounted to anything.

The Court: Well, according to you, if your patents were so good, there would be only two firms that would ever amount to anything, isn't that true?

A. I understand that I have a legal right to give——

The Court (Interposing): I didn't ask you what you understand. That certainly has brought up your intention.

A. Well, my intention was to stop litigation.

The Court: Your intention was that, you said among other things, you said to help the industry, and by this contract, and by your own statement that there were only two firms that were any good in the industry, you were going to give those firms the exclusive license on the patent. [fol. 1910] That is the way you were going to help the industry.

A. Yes, sir.

The Court: You may proceed. You may proceed with your question.

By Mr. Gelbman:

Q. Now, Mr. Gelbman, in the development of your patented articles, a vast expenditure of money was necessary, was it not?

A. Some $165,000 was put into this.

Q. That was by yourself and Mr. Andrus?

A. Myself and Mr. Andrus.

Q. And then from a manufacturing standpoint, any manufacturing of these machines, did the organization have to be financially sound or secure?

A. Oh, yes.

Q. And, in your opinion, were the firms of Besser and [fol. 1911] Stearns financially sound and secure?

A. Yes.

Q. And able to make these machines?

A. Not only financially, but they had the engineering knowledge that was required.

A. And you are familiar with both organizations and the products it has manufactured?

A. Yes.

Q. And in your opinion what is the quality of both machines that they have manufactured?

A. The most outstanding machines in the industry.

Q. Now, prior to the Besser contract, did you have a—strike that, please. Prior to the Besser license or Besser and Stearns license agreement, Plaintiff's Exhibit 10, you had a license agreement with the Stearns Corporation alone?

A. An exclusive license with Stearns Manufacturing Company.

Q. Now, this Plaintiff's Exhibit 10 provided for a new payment of royalty to you, did it not?

A. That is correct.

Q. And that payment of royalty, was it substantially lower than the previous license agreement that you had?

A. The original, on the Stearns, the Stearns contract, provided me with twenty per cent royalty on the selling price of all machines and ten per cent on all parts. The [fol. 1912] contract between Stearns and Besser and myself and Andrus, the royalty dropped to less than one-half of one per cent on machines that was used domestically, nothing on machines that was shipped out of the country, and nothing on parts at all.

Q. Now, during the years of 1946 and 1947 you made certain claims or allegations of infringement against various individuals or corporations. Did you make those allegations or claims or infringement against those corporations in good faith?

A. Always in good faith.

[fol. 1913] By Mr. Gelbman:

Q. In your opinion, Mr. Gelbman, did those parties infringe upon your patents?

A. Yes, sir.

Q. You began a suit against the Darden Corporation for infringement, in the State of New Jersey. Was such action begun against the Draden Corporation with the intention that it be prosecuted to judgment?

A. Yes, sir.

[fol. 1914] By Mr. Gelbman:

[fol. 1915] Q. The Darden suit was subsequently withdrawn, was it not, because Mr. Darden asked you to withdraw it?

A. That is right.

The Court: Well, of course, now—there is no objection. It may stand.

By Mr. Gelbman:

Q. Who was it that proposed the Darden license agreement be drawn? Who was it that proposed the Darden license agreement?

A. Mr. Darden himself.

The Court: In other words, the Darden suit was settled, wasn't it?

A. The Darden suit was settled.

By Mr. Gelbman:

Q. Now, Mr. Gelbman, I show you a letter—would you mark this, please.

(Letter from Stearns Manufacturing Company dated [fol. 1916] March 24, 1950, was thereupon marked Defendant's Exhibit 176 for identification.)

(Agreement accompanying letter of March 24, 1950, was thereupon marked by the Reporter for identification as Defendant's Exhibit 177.)

[fol. 1917] By Mr. Gelbman:

Q. I show you a letter dated March 24, 1950, addressed to the Stearns Manufacturing Company, Inc., Adrian, Michigan, marked Defendant's Exhibit 176, and ask you if you ever saw the same?

A. Yes; I have seen it before.

Q. Under what circumstances did you first see that letter, Mr. Gelbman?

A. This is the letter from my attorneys. I went in and asked them to write a letter to Stearns and Besser asking them for an amendment changing the exclusive part of our contract.

The Court: Letter to whom? Stearns and Besser?

A. Stearns.

Mr. Gelbman: Stearns.

A. And to Besser.

Mr. Gelbman: The contents of the letter read to be conveyed to Besser. Shall I read the letter?

[fol. 1918] The Court: Is that the one I have seen?

Mr. Gelbman: You haven't seen it yet.
The Court: I am sorry.
Mr. Gelbman: I will offer it in evidence.
The Court: I thought I had seen it.
Mr. Gelbman: I offer it in evidence.
Mr. DeGree: May I ask Mr. Gelbman if that is supposed to have been received by the addressee?
Mr. Gelbman: It was, and subsequently returned.
The Court: Any objection?
Mr. DeGree: No.
Mr. Speer: I have no objection.
The Court: May I see it please?

(Exhibit handed to the court.)

The Court: Where is the agreement?
Mr. Gelbman: I have it here. I am about to offer that.
The Court: Of course, I think you ought to offer them both together, as one.
Mr. Gelbman: Well——
The Court (Interposing): The letter means nothing; just says "I am going to send something by mail".

By Mr. Gelbman:

Q. I show you this letter marked—this agreement marked [fol. 1919] Defendant's Exhibit 177 and ask you if that is the agreement which accompanied that letter?
A. That is right.

Mr. Gelbman: I offer that in evidence.
Mr. DeGree: That is the purported agreement?
Mr. Gelbman: Yes, Mr. DeGree.
The Court: This is written in 1950?
Mr. Gelbman: That is right.
The Court: This is since the lawsuit has been started?
Mr. Gelbman: That is correct, your Honor. But this has to do with this letter which the Government has offered in evidence, where we requested a change in the license agreement about the non-exclusive or exclusive rights, and a claim or a change they claimed originated from Besser.
The Court: Do you think that this case can stand on something that is—well, this is an offer by you or a sug-

gestion by you to have Besser and Stearns give up their exclusive rights?

Mr. Gelbman: That is true, your Honor.

The Court: That is what this lawsuit is about, among other things, isn't it?

Mr. Gelbman: That is right. But the point in this respect, [fol. 1920] your Honor, is based upon the letter, Exhibit 156.

The Court: Did you get a reply from Besser to the letter?

Mr. Gelbman: I will come to that, your Honor. The letter which was offered in evidence as Exhibit, Plaintiff's Exhibit 156.

Mr. Neville: Which is dated April 5th, if I may direct your Honor's attention.

Mr. Gelbman: That is right; which is dated after this suit.

Mr. Neville: That is right.

The Court: Well, this is a letter which was written by Gelbman?

Mr. Gelbman: That is correct.

The Court: After this lawsuit started, and almost after he knew that it was actually going to be tried here in this court.

Mr. Gelbman: That is correct.

The Court: All right.

Mr. Gelbman: But the point——

The Court (Interposing): If he is willing right now——

Mr. Gelbman (Interposing): The license——

[fol. 1921] The Court (Continuing): ——to modify this contract that he entered into back in 1942, was it?

A. Yes.

The Court: As far as he is concerned, there may have been a chance. He is willing now to help the trade or the industry in a manner he didn't help them before.

Mr. Gelbman: He had been willing before. He may have contractually put himself beyond that point, but that is——

The Court (Interposing): He signed the contract.

A. I sacrified twenty per cent royalties for a half of one per cent. That is quite a sacrifice.

The Court: All right. I have my own ideas whether you

sacrificed anything, and I have my own ideas about whether you intended to benefit the trade. I think you are looking out for Gelbman.

A. I am not even yet, your Honor.

The Court: You are now.

A. If your Honor——

The Court: You may be looking out for Gelbman now, because now you are looking for it to help the trade. I don't know how much good you gentlemen think this testimony is, but put it in. You have the right to.

Mr. Gelbman: It is not being offered for that purpose, [fol. 1922] your Honor.

The Court: No, but it suits his purpose.

Mr. Gelbman: For the purpose of showing that we are willing to give a license to everybody.

The Court: What is it in for?

Mr. Speer: That is just what I was going to ask, if it isn't for that purpose I don't understand.

Mr. Gelbman: I will show what it is in for.

The Court: What is it?

Mr. Gelbman: The Government has made a claim—I am led to believe the Government has made a claim that Besser has said to us, "Now, we are sending us or sending Stearns a suggestion that they give up their exclusive portion of their license, but we won't do any such thing."

The Court: Well, but——

Mr. Gelbman (Interposing): I want to show——

The Court (Interposing): They are talking about the day this lawsuit was started. When was this lawsuit started?

Mr. Gelbman: April, 1949.

The Court: A lot of people get religion after the Government starts a lawsuit.

[fol. 1923] Mr. Gelbman: But this is in reference to Plaintiff's Exhibit 156, your Honor.

The Court: That is it. It is a letter written by you in April, last April, a couple of months ago. Now, it is just like the fellow that robs the bank, and they catch him on the outside, the policeman catches him, on the outside, and he says, "Well, all right, I will put it back."

A. I don't think that is the interpretation.

The Court: It is the same principle.

A. No.

The Court: As far as this court is concerned. Except he may have—I don't mean you have robbed a bank or anything like that, but I mean it is doing something after the——

A. (Interposing) No, it isn't the intent to change that at all. We are trying to explain the reason for this letter. I have been accused in this court of being under Mr. Besser's domination.

The Court: No, no.

Mr. Speer: No.

The Court: You were accused in this court of entering into a conspiracy with Mr. Besser some years ago.

A. In 1942.

[fol. 1924] The Court: And until Uncle Sam brought the action why you never wrote any of these kind of letters, did you?

A. Oh, yes, I did.

The Court: Let's see one of them you wrote before?

A. Let me see——

The Court (Interposing): I would be interested in that.

A. Let me see the FBI exhibits. May I step down?

The Court: Yes, certainly, if you have any letters that you wrote before the Government started this lawsuit or investigation.

A. If I haven't got them here I have them in my files, your Honor. The FBI picked these out. They may not have included them. I wrote several letters. I wrote, in the testimony now, to Mr. Besser and Mr.—and Stearns, and Mr. Darden.

The Court: The letter that is written in the last sixty days here?

A. This is explaining something different. This is not at all an intention to come in and say we are going to make this showing. I made the request of Stearns and Besser, and they tell me I merely made the request of Stearns; I did not make it of Besser. Have we got the letter to Darden?

Mr. Gelbman: May I go ahead?

The Court: Go ahead as you started out.

[fol. 1925] Mr. Gelbman: I will go ahead.

By Mr. Gelbman:

Q. Now, subsequent to your sending of Plaintiff's Exhibits 156 and 157, did you receive a phone call from anybody?

Mr. DeGree: Pardon me, Mr. Gelbman. Do you mean 176?

Mr. Gelbman: 176 and 177.

Mr. DeGree: Clear up the record.

The Court: They are both admitted. I mean, did you have a chance to look at the agreement?

Mr. Speer: Yes, I did, your Honor. We have no objection.

Mr. DeGree: No objection.

The Court: Both are admitted.

By Mr. Gelbman:

Q. Subsequent to your receiving 176 and 177, did you receive a phone call from any person?

A. Yes. I have been asked by Mr. Stark of the Besser Company to try and do something about licensing other people; and at the request of Mr. Gene Olsen at the convention in the month of February, I went to Stark, and Stark said, "Well, when I get back to Alpena I will talk to Mr. Besser and see if we can't agree on something."

The Court: Now, I would think the Government would want to place the time and date, but if the Government [fol. 1926] doesn't want to——

A. (Interposing) This is February of 1950.

By Mr. Gelbman:

Q. You mean——

The Court (Interposing): That is after the lawsuit was started, too.

A. This is all after the lawsuit was started.

Mr. Gelbman: That is all with reference to this letter, your Honor. That is the only purpose of this testimony.

The Court: All right.

A. And at the convention assembled at the Sherman Hotel, in February of 1950, I asked Mr. Stark whether he would try to do anything, and he promised he would.

Mr. Speer: I will object to what Mr. Stark——

The Court (Interposing): Mr. Stark is a defendant here?

Mr. Gelbman: No, he is not.

Mr. Speer: What did Mr.——

The Court (Interposing): I will let it stand.

A. He is a member of the Besser Company.

Mr. Speer: What did he say?

The Court: He is right here in the court room. I will let it stand.

A. In March he called me on the long distance phone and said he was going down to Florida to interview the [fol. 1927] Appley Company, and if I would send a request to Stearns and Besser he would talk to Mr. Wright in Detroit and he thought it was very possible that some action could be taken on this matter.

By Mr. Gelbman:

Q. And that was just prior to the sending out of Defendant's Exhibits 176 and 177?

A. That is right.

Q. And then after that Plaintiff's Exhibit 176 and 177 was sent out and returned to you, did you receive another phone call from Mr. Stark?

A. I did, from Clearwater, Florida.

Q. What did Mr. Stark say to you?

Mr. Neville: May I ask when was that conversation, telephone conversation?

A. That was about the first part of April, 1950.

By Mr. Gelbman:

Q. And what did Mr. Stark tell you at that time?

A. He said he had a communication from his office that

the proposal that I had sent in was not what they wanted, not what they would consider. I said, "Well," and I went to my attorneys, and that is it.

Mr. Speer: Excuse me a minute.

The Court: I don't see the materiality of this, gentlemen. You have explained the letter, but now he is——

Mr. Gelbman (Interposing): We will get down to it.

The Court: All right, but——

[fol. 1928] Mr. Gelbman: We are getting down to Plaintiff's Exhibit 156.

The Court: I don't want the conversation between him and Stark and so and so, that they refused to consider it or all of the details of the argument on that, gentlemen.

A. So I sent them a new letter.

By Mr. Gelbman:

Q. And——

The Court (Interposing): As a matter of fact, I would be very interested in any letter that he sent to the Besser Manufacturing Company along that line in 1943 or 1944 or 1945 or 1946 or 1947 or 1948. In the meantime, Besser has advertised the Gelbman patent all over the world. And now is the first time I ever know of that he ever wanted to or thinks about giving it to other people.

Mr. Gelbman: Oh, no, your Honor. I believe that the Government has, as part of the exhibits——

A. (Interposing) I am certain of this on the Darden request.

Mr. Gelbman: The Darden request for license.

The Court: That is after.

Mr. Gelbman: The Appley request for license is before the lawsuit was begun.

The Court: The Darden—is that the fellow that is going to manufacture thirty-five machines and then he is out of business?

Mr. Gelbman: That is right.

[fol. 1929] The Court: Just like telling a lawyer to practice law for two years and then you are through.

Mr. Gelbman: Before that they gave him that thirty-five machine license.

The Court: Yes. But it has all been since the Besser people have done a lot for the Gelbman patents. I don't know whether they think they have or not, but I believe they have.

A. I requested both Stearns and Besser for the right to license Darden before any action was taken.

The Court: Well, I would like to see some tangible evidence of that.

Mr. Gelbman: Well, Mr. Darden has even admitted that.

The Court: When was the Darden suit?

Mr. Gelbman: In 1946.

The Court: All right. 1946. Four years after they got it. All right, gentlemen, go ahead.

By Mr. Gelbman:

Q. Now, did you have, in this conversation with Mr. Stark—was a proposed letter to be written by you to Stearns and Besser discussed over the phone?

A. It was.

Q. Did you make any request of Mr. Stark at that time?

A. I told him it was difficult to understand how I could write a letter that would suit him, being the amendment [fol. 1930] didn't suit him, and if he would be good enough to write me a letter stating what he wanted and it was satisfactory to me, I would write it.

Q. Did you subsequently receive such a letter from Mr. Stark?

A. I did.

Q. And pursuant to that request, did you send a letter to the firm of Besser Manufacturing Company and to the firm of Stearns Manufacturing Company?

A. I sent both a letter.

Q. Now, I show you Plaintiff's Exhibit 156 and ask you if that is the letter that you sent to the Stearns Manufacturing Company?

A. Yes; that is correct.

Mr. Neville: Do I understand that to be the letter as suggested by Mr. Stark?

A. That is right.

Mr. Gelbman: That is correct.

Mr. Babcock: As requested by the witness.

Mr. Neville: I might ask, was that same correspondence sent to the Besser?

Mr. Gelbman: I am just putting it in.

The Court: Same letter sent to Besser?

A. Same letter exactly.

[fol. 1931] Mr. Gelbman: I am about to include that letter, your Honor.

The Court: All right.

(Carbon copy of letter to Besser Manufacturing Company was thereupon marked by the Reporter for identification as Defendant's Exhibit 178.)

By Mr. Gelbman:

Q. I show you a paper marked Defendant's Exhibit 178 and ask you if that is a copy, carbon copy of a letter which you sent to the Besser Manufacturing Company?

A. It is.

Mr. Gelbman: I offer it in evidence.

[fol. 1932] The Court: It may be admitted.

Mr. Gelbman: Mark this, please.

(Whereupon letter from Stearns Manufacturing Company dated April 21, 1950, was marked by the Reporter for identification as Defendant's Exhibit 179.)

By Mr. Gelbman:

Q. I show you a letter dated April 21, 1950, on the stationery of the Stearns Manufacturing Company, and marked Defendant's Exhibit 179, and ask you if you received that letter?

A. Yes, sir, I did.

Mr. Gelbman: I offer it in evidence.

[fol. 1933] The Court (Interposing): It may be admitted.

By Mr. Gelbman:

Q. Now, Mr. Gelbman, did you ever recive any reply from the Besser Manufacturing Company?

A. No, sir; I never had a reply.

The Court: Well, the reply from the Stearns only says that somebody is going to see you abouf it, isn't that it?

Mr. Gelbman: Yes.

By Mr. Gelbman:

Q. Has anybody seen you from Stearns?

The Court: That, of course, is since when?

Mr. Gelbman: April 21st, I believe.

Mr. Speer: April 21st, 1950.

[fol. 1934] By Mr. Gelbman:

Q. I show you Plaintiff's Exhibit 162 and ask you when and under what circumstances you first saw that agreement?

A. I saw it this morning here in court. That is the first time I saw it.

The Court: Which one is that?

Mr. Gelbman: That is the Appley, proposed Appley agreement.

The Court: Which one is that? Is that the——

Mr. Gelbman: That is Appley.

The Court: Appley or Stone?

Mr. Gelbman: That is Appley.

[fols. 1935-1936] By Mr. Gelbman:

Q. I will show you that exhibit, Mr. Gelbman——

The Court (Interposing): Excuse me.

By Mr. Gelbman (Continuing):

Q. —and the first time you saw that was this morning?

A. That is correct.

Q. Did you authorize anybody to prepare this for you?

A. I don't—the only thing I know when John Stark called me and told me he was going down to see Appley about a license agreement.

Q. And——

A. (Interposing) And that is all that was said about it.

Q. Did you authorize anybody to prepare this agreement?

A. No, sir.

Q. For you?

A. No, I did not.

Q. Do you know if Mr. Andrus authorized anybody to prepare the agreement for him?

A. I don't think he—he is retired out of the firm for two years. I am pretty sure he didn't.

The Court: What is the date of this?

Mr. Gelbman: This is dated the 1st day of April, 1950. Supposed to be——

[fol. 1937] By Mr. Gelbman:

Q. Does Mr. Besser of the Besser Corporation have the right to sublicense your patents?

A. No, sir.

The Court: That is provided in the 1942 contract.

Mr. Gelbman: That is right.

The Court: That is where he was going to help the trade. All right.

By Mr. Gelbman:

Q. I show you Plaintiff's Exhibit 159, which is the Stone agreement, and ask you under what circumstances you first heard of that agreement?

A. In this court room, on the first day I came in.

By Mr. Gelbman:

Q. And by "the first day", you mean the day when Mr. DeGree made the motion?

A. That is right.

Q. With respect to the Stone agreement?

A. That is right.

Q. Had anybody discussed with you or with Mr. Andrus [fol. 1938] the proposed Stone agreement?

A. Never heard of it, sir.

Q. When was the first day——

The Court (Interposing): Where is Andrus? Is he here?

Mr. Gelbman: No, your Honor. Mr. Andrus is a retired gentleman.

The Court: So far as he knows.

Mr Gelbman: Mr. Gelbman handled——

A. (Interposing) I know he doesn't know that. I know that, too.

The Court: I know, but you can't testify to that for him any more than I can. As far as he knows, it was not discussed with Mr. Andrus.

Mr. Gelbman: That is right.

The Court: But whether or not it was discussed with Mr. Andrus——

Mr. Gelbman (Interposing): Well, Mr. Andrus' attorney in this court said it wasn't, too.

The Court: He wasn't on the stand either. It will stand as a statement of his impression and that is all. I think you are absolutely right, and probably Andrus doesn't know anything about it, but he can't testify to it.

By Mr. Gelbman:

Q. Mr. Gelbman, when was the first day you read a [fols. 1939-1940] copy of this agreement?

A. You mean on the plane? Monday night.

Q. Monday night?

A. Yes.

Mr. Gelbman: May I say at this time for the record I received a copy of that agreement Monday morning at 11:30 in the United States mail, in my office.

The Court: May 15th or 16th, is that what you mean?

Mr. Gelbman: No. I received it just this past Monday. I have never heard of it or never saw it until——

[fol. 1941] By Mr. Gelbman:

Q. Since you have read a copy of Plaintiff's Exhibit 159, are you in favor of such agreement?

A. No, sir.

Mr. Neville: I object to that question, whether or not he is in favor of it or not.

The Court: Well, he claims he is under Besser's thumb all the time. I am going to let it stand.

By Mr. Gelbman:

Q. Will you tell us your reasons why you are not in favor of that agreement?

Mr. Babcock: Well, does the record show he answered [fol. 1942] the previous question?

The Court: He said the answer was that he was not in favor of it, as I understand it. Didn't you say that?

A. That is right.

Mr. Babcock: And wouldn't sign it?

Mr. Gelbman: It wasn't made out for him.

Mr. Babcock: What is that?

A. He didn't inform me.

Mr. Gelbman: He is not a party to it.

A. I am not a party to it.

The Court: I know it, gentlemen. But it can't go into effect until you agree to it, can it, as far as you are concerned?

A. Well, it is not a question of whether Besser has the right to license the patent.

The Court: You said a little while ago that——

Mr. Babcock: If your Honor please——

The Court (Continuing): —you just said a while ago that Besser didn't have the right to license it, didn't you?

A. That is right.

The Court: Have you changed your mind on that?

A. I have not, sir.

The Court: What is that?

[fol. 1943] A. I have not, sir.

By Mr. Gelbman:

Q. I believe I asked you your reasons for your disfavor of this Stone agreement.

A. Well, it goes into a matter of a sintering process, and I have an exclusive license with the Stearns Company, and I am certainly not in favor of them adopting another series of machinery to be in competition with mine. And this makes provision for taking over a set of machinery that the Besser Company is tied up in its manufacture, and they want Stearns to take that over, and I am very much concerned about my sintering machine.

The Court: Well, it throws your process out and replaces it with the Besser's process, according to you?

A. No.

By Mr. Gelbman:

Q. It may not throw your process out?

[fol. 1944] A. I wouldn't be sure, your Honor, as it is in that. I think my process will come in, the same as may Besser's. It may be a little egotistical, but I have spent the last eight years on that.

The Court: But you said that, didn't you? I mean, you understand this, and I want you to explain it to me. You are not in favor of this contract, you say, because it does away with your sintering process?

A. It gives the Stearns Manufacturing Company a new one, a new sintering process.

The Court: Another one?

A. Another one. And I have an exclusive agreement with them on mine that has been working for the past eight years.

The Court: All right. But you said something about the Besser Company putting theirs in.

A. The Besser Company is interested somehow in this other.

The Court: Marietta?

A. Marietta.

The Court: Yes.

A. And in this contract they propose to give this to Stearns.

The Court: Yes.

A. And I object, because Stearns has an exclusive contract to manufacture mine.

The Court: In other words, if they have both of these they might not manufacture yours at all?

[fol. 1945] A. That is correct.

The Court: I think I got it right when it was first stated. All right. Is that your only objection to it?

By Mr. Gelbman:

Q. Now, you object—are you objecting for any other reason besides that?

A. Well, I stated before, I object to the right of the Besser Company to write a royalty agreement on my block machine patents.

Q. In other words, the limitation on the size of machine would also affect your patent agreement or license agreement?

A. Well, I gave Stearns the same right as Besser, and I never changed that. I don't intend to change it, unless they will both agree to license somebody, the contract will stay, unless the Government changes it. I think both of these companies are spending a lot of money and a lot of time in producing this machine, and as far as I am concerned, as I stated before, I gave them both a license and I am willing to stand by that license as is.

The Court: Well, but it cuts down on you? It cuts down on your revenue if that agreement goes into effect; isn't that true?

A. Well, unless Besser makes the machines——

The Court (Interposing): I am talking about the agreement you are talking about that we have got here.

[fol. 1946] Mr. Gelbman: The Stone agreement.

The Court: The Stone agreement.

A. The Stone, naturally, they limit the Stearns Company to manufacture various machines.

The Court: All right.

Mr. Neville: Your Honor, did I understand the witness to say he wanted to stay on or abide with his initial agreement with Stearns and Besser?

A. That is correct.

The Court: Well, he gave that answer, I think, but don't take any unfair advantage of that statement, because you have got to take into account the rest of his testimony, that when it comes to modifying his agreement through this Stone contract he is not in favor of that.

Mr. Neville: No.

The Court: But he does say he is willing to modify the Stearns-Besser agreement as to exclusive right and give it to everybody. That is his position on the witness stand, as I understand it.

A. That is correct.

The Court: All right. So you can't take any unfair advantage of only half of the statement of the witness. You may proceed.

By Mr. Gelbman:

Q. Was your statement in the letter, Defendant's Ex-
[fol. 1947] hibit—Plaintiff's Exhibit 156, to Stearns, concerning a decrease of your returns from the patents, true of the last few years?

A. Why, I think the decrease started in 1948. In 1949 it was down to a minimum royalty. 1950 is just a little better. In fact, the Besser Company is better and Stearns is still on a minimum royalty.

The Court: Stearns are?

A. They are still on a minimum royalty. We have a provision in there for a minimum royalty.

By Mr. Gelbman:

Q. So that there has been a decrease in your revenue since the war years?

A. Oh, very much so.

Q. Now, you received a request from Mr. Olsen for a license under your patent, under your block machinery patents, is that correct?

A. That is right.

Q. And are you willing to license Mr. Olsen?

A. If I have the consent of the Stearns and Besser Company, yes.

Q. And you have received requests, I believe, from other firms with respect to possible licenses?

A. Yes, I have.

Q. And are you willing to license those other firms?

A. If my two licensees agree, yes.

[fol. 1948] The Court: Well, you mean you have the right? You are not limiting it to——

Mr. Gelbman (Interposing): No.

A. If the Stearns——

The Court (Interposing): If it happens to be that they are the parties to the contract, and if you are given that right you will do that?

A. Certainly.

The Court: Suppose something happens—well, all right.

Mr. Gelbman: That is all the examination I have. You may inquire.

Cross-examination.

By Mr. Speer:

Q. Mr. Gelbman, I believe you stated that one of the prime conditions in granting this exclusive license to Besser and Stearns was due to the fact that they were both financially and—well, they were both financially secure; is that true?

A. I believe so, yes.

Q. Now, then, before this case began, in April of 1949, did you have any requests from other block manufacturers under your patents?

A. You mean for machines?

[fol. 1949] Q. From concrete block machine manufacturers?

A. Yes, I had several of them.

Q. Could you tell us from which companies you had such requests?

A. Well, I remember the Darden Company.

Q. All right. Did you receive any other requests from Darden?

A. Yes, there was three or four others. I would say Appley was one, in Florida.

Q. All right. Do you recall receiving a request from Appley in June of the year 1947?

A. Possibly. I wouldn't remember the incident unless I see the file. Possibly I did.

Q. Well, I will show you a photostatic copy which is Exhibit No. 11, which purports to be from J. W. Appley & Company to Mr. Louis Gelbman. Do you recall having had that correspondence?

A. Yes, I remember it.

Q. And in there didn't they ask you—didn't the Appley Company ask you about obtaining a patent license?

A. That is correct.

Q. All right.

The Court: When was this? In 1947?

Mr. Speer: Yes, your Honor.

A. June 30, 1947.

The Court: All right.

By Mr. Speer:

Q. Now I show you Exhibit No. 12. And isn't that cor-
[fol. 1950] respondence in answer to this earlier correspondence from Appley?

A. Yes, sir.

Q. And what did you explain to Mr. Appley there?

The Court: Are those in evidence?

Mr. Speer: They are in evidence, yes, your Honor. Exhibits 11 and 12.

A. I acknowledged receipt of his letter dated June 30th, postmarked August 8th, 1947.

> "The cut of your machine was not included. Kindly send one to each——"

The Court (Interposing): I don't hear you.

A. (Reading):

> "The cut of your machine was not included. Kindly send one to each of those concerned."

And:

> "The Stearns Manufacturing Company of Adrian and the Besser Manufacturing Company of Alpena, have an exclusive license for the use of our patents. We are forwarding them a copy of your letter for their comments and consideration. On receipt of their replies, we will communicate with you."

In other words, they left out the photograph of the machine, and I asked them to send photographs to both [fol. 1951] Stearns and Besser and to myself.

The Court: A photograph of what machine?

A. Their machine. They requested a license to manufacture under these patents and they neglected to send along a photograph or a cut of the machine.

By Mr. Speer:

Q. Now, then, Mr. Gelbman, did you then ask both Besser and Stearns whether or not they would be interested in granting Appley a patent license?

A. In the natural course of events, I did.

By Mr. Speer:

Q. I will show you Exhibit No. 15, Mr. Gelbman, and ask you in referring to that if that isn't correspondence from you to Appley, and what is the date of it?

A. August 27th, 1947.

Q. Did you tell there to Appley that you took up this matter with Both Besser and Stearns?

A. May I read it?

[fol. 1952] Q. All right.

A. (Reading):

> "In reply to your letter in which you request consideration as to a license to permit you to make and sell a pressure head for use with your block machine, and as we have licensed Stearns Manufacturing Company and Besser Manufacturing Company exclusively and as they are not interested we are in the position of being unable to do anything. We are not unmindful of the fact that our patents are being infringed

and information and data is being collected with a view of taking action at the proper time."

Yes, I wrote that letter.

Q. Now, can you recall discussing the patent situation with any other block machine manufacturer?

A. Oh, maybe dozens of them.

Q. Well, then, in order to conserve time, did you follow this same practice——

A. (Interposing) Yes.

Q. (Continuing) —in each and every one of those instances?

A. Yes, sir.

The Court: What same practice?

Mr. Speer: Well, that is he talked with both Besser and Stearns on it.

A. That is right.

[fol. 1952-A] Mr. Speer: That is true? All right.

The Court: And you got the same answer and you wrote them—practically the same letter, telling them that you know that most of their machines were infringing on your patents and that you were getting data for the purpose of bringing suit?

A. That is correct.

The Court: All right.

By Mr. Speer:

Q. Now, in all of those instances, before you asked Besser and Stearns, did you make any investigation of these companies that asked you for a patent license? By investigation, I mean an investigation into their finances?

A. No, not necessarily. I had no right to grant a license.

The Court: What other companies were in the business in 1942?

A. Why, Multi-Plex was in business.

The Court: Multi-Plex? Where was that?

A. They are down in Ohio.

The Court: Is it a pretty good concern?

A. I would rate them about third.

The Court: I don't mean in size. I mean are they pretty good financially?

A. They are an old established concern. They have a [fol. 1953] new management lately.

The Court: I mean back in 1942. Were they a good concern back in 1942?

A. They were a fair concern.

The Court: What other people were in the block business, or making——

A. (Interposing) I think we had——

The Court (Continuing): —block machines?

A. (Continuing) —Kent Machinery Company in Ohio.

The Court: How about this man that brought the suit in New York? What is his name?

A. Bell?

The Court: Yes.

A. He is a manufacturer of block. He is not a machine manufacturer.

The Court: He is not a machine manufacturer?

A. We had to sue the user. I think the best two were Besser and Stearns.

The Court: What is that?

A. Besser and Stearns was the outstanding companies.

The Court: Were they in 1942?

A. Yes, sir. In 1910. I know, of course, the size of the machinery was much smaller, but they are outstanding. I think the Besser deserves a lot of credit from the industry. [fol. 1954] This is off the record, but they don't——

The Court (Interposing): Yes, it will be off the record.

A. All right.

The Court: Taken off the record now.

A. A man works all his life in the industry.

The Court: Yes, sir; and he has done quite a bit for you.

A. I don't deny that, sir.

By Mr. Speer:

Q. Mr. Gelbman, have you at any time since the execution of the Gelbman-Besser-Stearns agreement known as Exhibit 10, dated December 7th, 1942, have you granted to

any other block machine manufacturer an unlimited patent license?

A. An unlimited?

Mr. Gelbman: I object on the ground that it is beyond his capacity to grant any unlimited license unless these other defendants consent to it.

The Court: Overruled.

A. No, sir.

[fol. 1955] By Mr. Speer:

Q. Now, I believe you stated upon direct examination that in your opinion it was best for the industry to enter into this agreement with Besser and Stearns in December of 1942. Now, in your opinion, tell us why it was considered by you to be best for the industry?

A. Well, it would settle the question of manufacturing my machinery. Why, I had been engaged since 1926 in the developing of this machine, and being a practical block manufacturer I appreciated its value, and, having the thing open to a continuous lawsuit, it was an unsettling condition.

I know practically everybody in the block industry, and a lot of them would say, "Now, I would like to buy a Besser machine, but I don't want to get tied up in an infringement lawsuit." We have to sue the user, which makes me go out and sue, sometimes, my best friend.

And in order to settle that condition in the industry, I think I did a wide lot in accepting the terms of that contract, because I have cut back, like I stated, from a twenty per cent royalty to less than a one per cent royalty.

Q. Well, let me ask you this: By granting the license only to Besser and Stearns, why did you think that would be best for the industry? Was it true that Besser and Stearns were the only people in the industry?

A. Well, they, to me, in my opinion, were the important people that were manufacturing machinery at that time, [fol. 1956] in 1942.

Q. They were the only important— —

A. (Interposing) I would say they were the only, in my opinion. I rate the Besser Company the No. 1 com-

pany in manufacturing machinery, and I rate the Stearns Company as No. 2. That is still my opinion.

Q. That was true at the time this agreement was entered into?

A. That is true.

Q. And you had been in this concrete block industry since when?

A. I graduated from public school in the City of Yonkers in 1907 and I went to work for J. E. Boyce (?), & Company who were manufacturers of concrete products. We made them by hand with all kinds of work back in 1907.

The Court: Using a vibrator?

A. No, sir; we used a piece of iron we now call a tamper.

The Court: I see. Didn't shake them at all?

A. No; we didn't have——

The Court (Interposing): You heard of that fellow with the hand tamper, how they were put on. Who was the man who had it built? What was his name?

Mr. Besser: Samuelson.

The Court: Yes, Samuelson. You heard him talk about the hand tamper a long time ago?

Mr. Besser: That is possible.

[fol. 1957] The Court: All right.

By Mr. Speer:

Q. Now, Mr. Gelbman, do you believe or is it your opinion that the block machine manufactured by the F. C. George Company constitutes an infringement of the Gelbman patents?

A. Well, I made a request——

Q. (Interposing) Just answer the question, please.

A. Yes, in some instances.

Q. Could you please tell us what particular instances you are referring to?

A. The instance of the sliding feed drawer out from under the main hopper, and mounted so that the mold is free to vibrate without contact with the feed drawer. The question that comes up is the combination machine. George, in my opinion, has not got a tamper. He has got a vibrator.

[fol. 1958] Redirect examination.

By Mr. Gelbman:

Q. There was some testimony by a Mr. Gravely, I believe, during the first week of this trial that you had a conversation with a Mr. Essenson or Kerenson——

A. (Interposing) Harsenson (?).

Q. Did you know that gentleman?

A. I met him, I think, on two occasions.

Q. Will you tell the court whether you ever told Mr. Harsenson that if he purchased a Gravely machine that you would sue him for infringement?

A. Well, Mr. Harsenson, I met Mr. Harsenson, and he had already bought a Gravely, two of them in fact, and had them installed in his plant within three blocks of my plant, and he came in and asked me if I would be good enough to go down and see if I could get the machines to operate. And I told Mr. Harsenson that I was very busy [fol. 1959] at the time but I said I would send one of my sons down, who stayed three or four days trying to get his machines to work. And to my knowledge they are not working as yet. I think the plant is closed down, and probably abandoned.

Mr. Gelbman: That is all, Mr. Gelbman.

The Court: Any other questions?

Mr. DeGree: No.

The Court: Who do you consider the No. 1 company in the industry today?

A. The block, or in the manufacture of machinery?

The Court: Yes?

A. Besser No. 1; Stearns No. 2.

The Court: I see. And they were in 1942?

A. They have been ever since I have been affiliated with the industry.

The Court: And now you are willing to—you are anxious to have everybody that is financially responsible have the right to——

A. (Interposing) With the consent of Besser and Stearns.

The Court: You are willing? I didn't say you would do it. I said you are willing to do it and anxious to do it?

[fol. 1960] A. I wouldn't say I was anxious to do it. I have some responsibility to these licensees.

The Court: I don't say you haven't. But now you want to try to get Besser and Stearns to give up there exclusive rights, don't you?

A. I have been, yes.

The Court: Yes. You wrote letters to them?

A. That is true.

The Court: So that you could license others besides them?

A. Well, I thought I could stop a lot of this infringement. I can't go on bringing suits.

The Court: Never mind what you thought. That is what you tried to do. You would like to be released from Besser and Stearns so that you could license everybody, and part of your reason is, as you stated in your letter, because your income isn't as much as it was before?

A. That is right.

The Court: Yes. Now, in 1941 was it that Besser started a lawsuit or somebody started a lawsuit against Besser?

A. I started against Bell, H. W. Bell.

The Court: Who had bought one of the Besser machines?

[fol. 1961] A. That is right.

The Court: That is in '41?

A. That is right.

The Court: And you settled that lawsuit by the contract of 1942?

A. Correct.

The Court: Now, Mr. Gelbman, you weren't thinking about the trade in 1942 any more than you were thinking about it today, isn't that true?

A. Well——

The Court (Interposing): You were thinking about Gelbman and his finances, isn't that true?

A. Well, if that was true, why would I want today to license these people?

The Court: Because a lawsuit has been started by a gentleman with very long whiskers called Uncle Sam

and now you want to do it. That is the reason, if you ask the court for his opinion.

A. I have——

The Court (Interposing): I don't believe you had ever had that reason.

A. I——

The Court (Interposing): And because of your pocket-[fol. 1962] book.

A. Here is a request from Appley which ante-dates the man with the whiskers and in which I asked these gentlemen to give me the right to license Appley. I will produce in this court at least a dozen such letters.

The Court: I have been waiting for them.

A. There is one right there.

The Court: Since 1942 and 1944. All right. As long as there are no more questions, the court has no more.

(Witness excused.)

The Court: Put on the next witness.

Mr. Babcock: Before the next witness is called to the stand, in the light of the information given the court and us this morning by Government counsel that they were having an FBI accountant prepare a summary with the interrogatories as the basis, and in the light of developments regarding the charts that have been offered by the defendants as summaries of the same interrogatories, I merely volunteer the suggestion that we would be willing and anxious to have a certified public accountant of our employment——

The Court (Interposing): Work with them?

Mr. Babcock (Continuing): —work with the FBI.

[fols. 1963-1965] The Court: I think——

Mr. Babcock (Interposing): So that we can work out a chart that we can accept mutually.

The Court: Any objection to that?

Mr. Speer: No, your Honor.

The Court: I think it is a good suggestion and I think the Government ought to follow it.

[fol. 1966] JESSE H. BESSER, having been previously duly sworn as a witness, called on his own behalf, testified as follows:

Direct examination.

By Mr. Henry:

Q. Your full name is Jesse H. Besser?
A. Yes, sir.
Q. And your residence?
A. Alpena, Michigan.
Q. You are an individual defendant in this case?
A. Yes.
Q. And the Besser Manufacturing Company is also a defendant?
A. Yes.
Q. You have testified here your office with the company. Will you state it again?
A. President of the Besser Manufacturing Company.
Q. And how long have you resided in Alpena?
A. Since 1898.
Q. How long has the Besser Manufacturing Company [fol. 1967] been a corporation in this state?
A. Since 1897.
Q. And its corporate term was renewed as it expired?
A. Yes.
Q. So that it is still a Michigan corporation?
A. Yes, sir.
Q. You are a member of the Board of Directors and, as President, have exercised the general management of the corporation?
A. Yes.
Q. For a number of years?
A. Yes, sir.
Q. How many years have you individually been connected with the corporation? And it commenced when and in what capacities?
A. Well, right from the very beginning, in 1897, although I was quite young then. But in an official capacity, first as secretary in 1903.

The Court: Who did you say started this? Your father?

A. Yes, sir.

By Mr. Henry:

Q. Will you state to the court what business the corporation was engaged in at the time of its organization?

A. Originally, in '97, in the manufacture of staves and shingles from wood, in Alpena.

Q. When did—give the court your age, Mr. Besser?

A. Sixty-eight. Born in '82.

[fol. 1968] Q. When did the corporation begin to be interested in the concrete machinery business?

A. In 1904.

Q. Has the corporation been engaged in that business continuously since?

A. Yes; it has been.

Q. Was it engaged in other businesses following 1904, before it became exclusively engaged in the concrete machinery business and allied products?

A. The stave and shingle business tapered off and ended in 1905. There was a very slight over-lapping there. From, at least, from 1905 on, exclusively in this concrete machinery business. In 1904 it started the concrete machinery and finished up on the stave and shingle business.

The Court: Just a minute.

(Short intermission.)

The Court: This public accountant would be in the nature of an observer, wouldn't he? He wouldn't be doing the work.

Mr. Babcock: Well, the objective of the charts, the chart that was offered by the Government, the resulting figures were slightly different than the resulting figures that were the objective of the charts offered by the defendant.

The Court: I see.

[fol. 1969] Mr. Babcock: So that it struck me that the two could be combined into one chart and the two accountants collaborate in the preparation of them.

The Court: The FBI will not, I guess, collaborate with

anybody. They will come in and put in their own figures, and what they will do, if you want to have your man there observing the work, so that if something is wrong with it he can make a notation and tell you, "Now, this item does not include something that I think ought to be in there," I don't think there would be any objection to that, would there?

FBI Agent Shine: I think not, your Honor.

The Court: As an observer, but not to work with him. Probably the result of the observation would be he would be working with him before they get through. I don't know. But they never go on record as permitting that, as you probably know from past experience.

Well, if that is what you want, we will convey the information. I am not asking you to take any action now, Mr. Babcock. But you may inform the District Attorney's office.

(Short intermission.)

By Mr. Henry:

Q. Who founded the corporation, the defendant, Besser Manufacturing Company?

A. My father, Herman Besser.

Q. How many years was he identified with it as a con-[fol. 1970] crete machinery business?

A. From the beginning of the concrete machinery part of the business in 1904 until his retirement in '25, which was one year before his death.

Q. How many years have you been exclusively engaged in the business of the corporation?

The Court: I think he said 1897 was when he began. He was a young chap at that time, and he was then about fifteen or sixteen years of age. Is that right?

A. Yes, sir.

The Court: Have you got any truant officer up there at Alpena?

A. I had time off for school.

The Court: All right. After school.

A. Several months vacation.

The Court: All right.

By Mr. Henry:

Q. But from 1904 on, the corporation was engaged in the manufacture of concrete block machinery?

A. Yes.

Q. And will you state whether or not you and your father were the controlling owners of the property during all of the time since 1904?

A. Yes, we were.

Q. Since your father's death, and now, as you have testified, you own most of the stock of the corpora-[fol. 1971] tion?

A. Yes.

Q. And your wife is Anna M. Besser?

A. Yes.

Q. And she holds what position with the Corporation?

A. Secretary.

Q. And is it true, as appears from an exhibit in this case, that Anna M. Besser is the owner of all of the stock other than that owned by you?

A. Yes.

Q. What was the nature of the business back in the early years?

The Court: He has said they were in the stave——

Mr. Henry (Interposing): I mean, the nature of the concrete machinery business.

The Court: Oh.

By Mr. Henry:

Q. Commencing in 1904, and in the early years following that year?

A. That was the development of the machines which were hand machines, those days, and the promotion of the machines and the assisting in the promotion of their product.

Q. What sort of machine was the first machinery built?

A. It was a hand machine. A hand machine in every way. Material was shoveled in. Concrete was shoveled into the mold, and it was tamped by hand and taken out by hand. Even the mixing was done by hand in the first

[fol. 1972] years, the mixing of the concrete, getting about 450 block per day.

Q. What was the size of the block manufactured by that first machine?

A. Then, during the early years, there were several sizes, sixteen inches long, as now, and some twenty inches long. But soon settled into the sixteen inch length, the same as now.

Q. Can you tell how many years the so-called standard size, eight by eight by sixteen, has been the standard unit size?

A. Since 1906.

The Court: You haven't got a picture of the first Besser machine, have you?

Mr. Henry: I am having one marked now, your Honor.

The Court: Of the first Besser machine?

Mr. Henry: Yes, your Honor.

The Court: I would like to see it.

(Illustration of first Besser machine was thereupon marked Defendant's Exhibit 180 for identification.)

The Court: This is curiosity on my part, Mr. Henry.

By Mr. Henry:

Q. I hand you Defendant's Exhibit 180 and ask you to state whether on it appears an illustration of the type of first machine manufactured by your company?

A. Yes, that does.

[fol. 1973] Q. Is that a photograph?

A. Yes, sir.

The Court: Just what I thought. I mean, along that line. I don't know why. Off the record.

(Discussion off the record.)

By Mr. Henry:

Q. Mr. Besser, Exhibit 180 appears to be a reprint of an article and illustrations appearing in the August, 1949, edition of Pit and Quarry. Is that correct?

A. Yes.

Q. Have you read the text of the article?

A. Yes.

Q. As to the early history of the industry, and all of the text?

A. Yes.

Q. Would you state whether or not it generally reflects the substances of the article?

A. Yes, it does.

Q. And are the illustrations contained in the article all photographs taken of the objects they purport to illustrate?

A. Yes, sir.

Mr. Henry: I will offer Exhibit 180 in evidence.

Mr. Neville: Objected to because it is immaterial and irrelevant in this cause.

The Court: It may be admitted.

By Mr. Henry:

Q. What was the capacity, the block capacity per day, [fol. 1974] of a block substantially the size of eight by eight by sixteen, we will say, commencing as early as 1906?

A. It states on that sheet, two hundred per day, with two men. That would mean to include the mixing of the material in that case, so it was from 100 to 150 block per day per man.

Q. And was all of the power used in that machine man power?

A. Yes, sir; entirely so.

Q. What can you tell us about the aggregate used at this time as compared with the aggregate commonly used or that can be used today?

[fol. 1975] A. It was just the sand and gravel, or crushed stone, in those days. And it was, of course, hard to get properly graded, clean aggregate then, as available now. Each block maker had to prospect for and get his aggregate.

By Mr. Henry:

Q. What was added to this aggregate?

A. The cement and water.

Q. Following 1906, when did your father and you develop the first marked improvement in the machinery?

A. The first marked step, marked step up, was in 1909.

Q. What was that?

A. That was the power tamper, for use over the block mold, whereby the tamping was done by power instead of by hand. The concrete was still shoveled into the mold and the block was removed by hand. But the tamping, then, from 1909 on, was done by power, with about a two horse-power engine or motor.

Q. Were you then using the two-cavity machine?

A. No. No, that was all one. One-at-a-time.

Q. Did the use of the power tamper increase the productive capacity of the machine?

A. Yes, that did. That really trebled, trebled the capacity. And about that time the power mixing became more common, which also helped it along.

Q. You say that improvement occurred about 1909?

[fol. 1976] A. Yes.

Q. And for how long did the process then used continue before further improvement? Marked improvement?

A. The next marked improvement was in 1914, with the advent of the complete automatic machine for making the block.

Q. Will you give a brief, general description of your first 1914 automatic machine?

A. With a mold similar to the one used first, only made heavier to stand the power tamping, and then using that power tamper which came out in 1909, made somewhat heavier, and combined with the automatic feeding of the concrete into the mold, and the automatic finishing off of the block.

The Court: Wait a minute. The automatic feeding from a hopper or from a feed box?

A. From a hopper.

The Court: Not a feed box?

A. No, sir.

The Court: I mean, it didn't go along on tracks?

A. No, sir.

The Court: And there was no vibration?

A. No, sir. That is right.

The Court: All right. That must have been similar to the hopper feed box that we see in the Shinn patent, don't you think so?

[fol. 1977] A. A little different method of feeding was used in the——

The Court (Interposing): Oh, yes; I know that. But I mean the——

A. (Interposing) The basic difference.

The Court: Yes.

A. The material was just shoved across, thrown across, just like throwing a shovel full over.

The Court: It was?

A. In these machines we are speaking about.

The Court: Yes.

A. Just like taking a shovel full of material and throwing it over. That method was used.

The Court: I see.

A. In those days.

The Court: All right.

A. Because the tampers were working in the meantime, and we had to keep out of the way of those tampers working up and down into the mold.

The Court: Did the tampers work while the feed box was being filled?

A. They worked while that material was just thrown over. There was not room for anything to come underneath the tampers except just the material that was thrown over by the machine, the same as doing it by shovel. Every time the tampers would raise, the material would throw [fol. 1978] in.

The Court: As a matter of fact, sometimes they threw in four or five feedings before you had your block tamped?

A. Yes, sir. They used about eight drops of the tampers, and a feed each time.

The Court: I see. Did they stop the tampers, then?

A. No, no; it didn't stop. But just during this reversal, it went up and down. While it was reversing there was time to throw in that material.

By Mr. Henry:

Q. The tampers would go up, and you would put more material in the mold?

A. Yes.

Q. What production could you get then, Mr. Besser?

A. That stepped up to making 1800 blocks a day, then.

Q. One at a time?

A. Yes.

Q. How many years following 1914 was that method of manufacture employed, in your plant?

A. That method was employed until the advent of the plain pallet stripper tamper in 1924.

Q. Now, tell us about the advent of the plain pallet stripper in 1924? That was your patent, was it not?

[fol. 1979] A. Yes, sir. You see, the machines previous to that were mostly face down machines, because they were mostly rock-face machines, a rock face on the block, and they were best made face down, so that the block had to be turned over for ejection, and the sides had to be swung down to relieve the block. And in 1924 the stripper machine came out. With that, the mold does not open up; the same as the present-day machines in that respect. The block is just forced out of the mold the same as the bullet out of a gun.

The Court: Was that the Scott machine?

A. No, sir.

The Court: Couldn't be.

A. No; this is still a tamper machine.

The Court: No vibration?

A. No vibration.

The Court: No vibration. What patent was that, the Taylor or Ferguson patent?

A. No. That was the Besser plain pallet stripper patent.

The Court: Oh; your own?

A. Yes, sir.

The Court: Did you have a patent on it?

A. Very much so. Yes, sir. That ran out in 1946. The plain pallet stripper makes all the different units on the one set of inexpensive pallets.

[fol. 1980] By Mr. Henry:

Q. If you began using that process in 1924, and it ran out in 1946, why was it that the life of the patent didn't terminate right away?

A. In 1924 were the first machines that were developed, and in 1925 it went into production. And then the patent was issued in 1929. There was a period there while it was in the Patent Office, of course. And so it ran from the issuance in 1929 to 1946.

The Court: You used it three or four years on the patent applied for?

A. Yes, sir.

By Mr. Henry:

Q. And the expiration of the patent, the seventeen years commenced in 1929?

A. Yes.

Q. When did you first make a block machine that produced more than a single unit?

A. That started in 1939, with the change-over to vibration. As mentioned before, the length of time to make a block by vibration is slightly longer than by tamping. Therefore, it made it more necessary to make more at a time, to make two or three at a time. And, of course, the industry needed the more capacity, too. So in 1939 was the beginning of the two or more at a time.

Q. Then from 1925, when you introduced the plain pallet, until 1939, your machinery didn't produce in excess of [fol. 1981] one unit?

A. That is right, except in the very small units. The four inch, we made two at a time, of course. But the eight inch, standard size, one at a time.

Q. What was the capacity of the automatic plain pallet machine that you manufactured from 1925 to 1936, per day?

A. That was 3,000 to 3,600 per day, operating six or seven cycles per minute.

The Court: How many block?

A. One each time. One at a time.

The Court: 3,600. Using the Scott patent on that?

A. No, sir.

The Court: Didn't you have—what do you call it—vibration?

A. No, sir. Still speaking of the tamping machines.

The Court: You mean from——

A. (Interposing) 1925 to 1939, was still the tamping machines.

The Court: Exclusively tamping?

A. Yes, sir.

The Court: Well, they got as high as 3,600 using exclusively tamping?

A. Oh, yes.

The Court: One at a time?

A. Yes, sir.

[fol. 1982] The Court: I was surprised yesterday when somebody said 2,400.

Mr. Speer: Your Honor——

The Court (Interposing): I thought that was the limit. Way back there, fifteen or so—ten years ago—you had a machine, ten or fifteen years ago, you had a plain pallet tamping machine, without vibration, that manufactured 3,600 a day?

A. Yes, sir. That was twenty-six years ago, starting with the advent of the plain pallet stripper tamper in 1924. That ran six or seven shots a minute.

The Court: That is more than you can get today with a single vibrating machine, isn't it?

A. Yes, sir. For the reason as stated, being that the cycle is a little bit longer on the vibration, because you have to coax the material down in a little bit.

The Court: I know it.

A. Whereas, with the tamper, we pushed it down in.

The Court: What is the limit you know of that they make today, with a strictly tamping machine?

A. We still have some of these machines working, and that would be the limit, six or seven a minute.

By Mr. Henry:

Q. I think the court means what other manufacturers have a machine that has——

[fol. 1983] The Court (Interposing): No. If that is the greatest number by anybody, that is what I want to know. Because I know that I have got to change a line that I have written before, because I was under the impression that you couldn't get anything like that with a strictly tamping machine. Anything like that number.

A. That was common-place from 1924 to 1939.

The Court: All right.

A. On the plain pallet stripper tamper.

By Mr. Henry:

Q. Was that 3,600 a day, one at a time, on the plain pallet?

A. Yes.

Q. Tamper?

A. Yes.

Q. Was that rated capacity or delivered capacity? I want you to tell the court here.

The Court: I don't care.

By Mr. Henry:

Q. The machines actually in use produced that many block per day?

A. Yes. That was the actual capacity.

Q. And is there anything in that process of tamping utilized by you during the years following 1925 and through 1939 that is in any way restricted under any present patents that you claim?

A. No, sir.

[fol. 1984] Q. So that any manufacturer that copied that identical machine, successfully copied it, would get the identical results?

A. Yes.

The Court: Wait a minute, now. Be careful. You heard the question?

A. He said "successfully copied it".

The Court: He said the identical results.

A. I was depending on his wording, "successfully copied it".

The Court: Yes. Get the identical results?

A. Yes, sir.

The Court: Don't you know that the claim is made in the Gelbman patent that you get a superior block, and that you made the claim at Bay City you get a superior block by the process of vibration, and feeding of the mold as the feeder moves over the mold? Isn't that true?

A. Excuse me. We are still speaking of tamping, on this.

The Court: Well, no. That is where Mr. Henry got off. That is what I was watching for. Mr. Henry said you get the identical block.

Mr. Henry: I had reference to——

The Court (Interposing): If that is true, then the Gelbman patents aren't true, because your Gelbman patents claim that because of the Gelbman method patent, that runs over the block, it runs over the mold, it automatically feeds the mold, and the pressure as it automatically [fol. 1985] feeds.

Mr. Henry: Well, I think, your Honor, that I meant exactly what I said. But I don't think the court did. You understand what I said or meant.

The Court: All right.

Mr. Henry: Let me put the question, put another question.

By Mr. Henry:

Q. Could any manufacturer, utilizing the same method of manufacture that you did between 1924 and 1939, produce an equal number of blocks, namely, 3,600 a day, with a similar machine, without violating any or infringing upon any patents?

A. Yes, sir. The answer is "Yes". And that was a tamping machine.

Q. Have you any knowledge of the volume of manufacture, either by years, or commencing with the 1925 method of manufacture?

Mr. Speer: Excuse me, Mr. Henry. I wonder if I could have that again. I didn't understand that particular question.

Mr. Henry: I have asked the witness how many machines

they made of that type, by years, if he knows, commencing in 1925.

Mr. Speer: Yes.

A. From thirty to fifty per year.

[fol. 1986] By Mr. Henry:

Q. Prior to 1930 or 1931, will you state whether or not there were any improvements in your machinery other than you have generally mentioned, up to now?

A. Yes; there were continual improvements.

Q. Will you tell the court what notable or marked improvements had occurred?

A. Continual progress in making the machine more simple and longer lasting, with large production, and continuous effort to make a block that would come up to the most exacting requirements to make block out of real concrete, a block that was smooth-cornered and attractive.

Q. Now, Mr. Besser, by the year 1930, where we are up to at the present time, you had then been in the block business, with your father or alone, your company had continuously been in that business, for some twenty-four or twenty-six years, since that start of the business; is that correct?

A. Yes.

Q. And what can you tell the court as to your general acquaintance in the industry and in the trade, by that year? Whether or not you had been identified with the trade, as an industrial field?

A. Yes. I spent at least one-third of my time in the field, going over the country, calling on and giving service to the users of our machines throughout the country, so I had a very good acquaintance with the people that were [fol. 1987] making concrete block.

Q. Well, other than the customers whom you visited, did you have occasion over the years to observe the developments of other manufacturers?

A. Very much so.

Q. And what can you tell as to whether or not the industry was growing generally during those years?

Mr. Speer: Just a minute. I object to that question. That Mr. Besser isn't competent to state whether the industry was growing or expanding. That can be proved by other evidence.

The Court: It can be proved by him, too. He may answer. I think Mr. Henry Ford or Mr. Olds or somebody could come in here and tell us the progress of the automobile business. There is a man right in the business. He ought to know something about it.

A. The industry was growing constantly. The quantity of the block and the quality of the block improved——

Mr. Speer (Interposing): Excuse me a minute. Now are we talking about the block industry or the block machine industry?

By Mr. Henry:

Q. The question was directed to the block machinery business, rather than the block patents that manufactured the blocks with the machines. So confine your answer to that, Mr. Besser.

[fol. 1988] A. Yes. There were an increasing number of machines being used each year, and the industry was expanding.

Q. Would you have any present knowledge of the approximate number of manufacturers of block machines in the years prior to 1930?

The Court: Give me that again, Mr. Henry.

Mr. Henry: I am asking the witness whether he has present knowledge of the number of manufacturers of block machines about the year 1930.

Mr. Speer: Now, I——

Mr. Henry (Interposing): How many other manufacturers there were.

Mr. Speer: Excuse me.

The Court: If he knows, he can tell, if he knows. But it is not the best evidence.

Mr. Speer: It isn't; no.

The Court: The evidence has been—has that been included in your case?

Mr. Speer: Yes, your Honor. We have offered that.

The published figures obtained from the year 1929 by the Department of Commerce, and that has been offered in evidence here.

The Court: Wouldn't that be better than——

Mr. Henry (Interposing): No, I don't think so, your [fol. 1989] Honor. The exhibit was received over the objection that the data, the source of the data for the exhibit, was not established.

The Court: Well, I will let him answer. I will let him answer the question to see how much variance there is with him. But I certainly am going to be inclined to take the Government's report on it, more than I am his memory today on how many people were in the business in 1929 or 1930. He may not know. You can give it, if you want to.

A. There are ten or twelve block machine manufacturers of importance. And then a number of small hangers on.

The Court: Well——

Mr. Speer (Interposing): I will either ask that that answer be stricken, or ask Mr. Besser to explain what he means by the word "important".

The Court: You can ask that on cross-examination.

Mr. Speer: And "hangers-on".

The Court: You can ask him on cross-examination. But I think he can tell how many people were in the block business, the block machine business at that time. That is that were actually in it, just exactly as you could in any other industry. A man that is in it can almost tell that.

Of course, some of the hangers on, you know, if they hang on long enough, become one of the big ones, espe- [fol. 1990] cially if they get some patent rights.

By Mr. Henry:

Q. Can you tell, Mr. Besser, from the names that have so frequently been read in the exhibits yesterday and today, of any of those who were in the business twenty years ago? Do you recall some of them?

A. Yes.

Q. Who were some of them?

A. There was, of course, the Consolidated Concrete Machinery Company at Adrian.

The Court: How long ago is this?

Mr. Henry: Twenty years ago.

The Court: Twenty years ago. That brings it to 1929 or 1930.

Mr. Henry: Yes.

A. The Multi-Plex Company at Elmore, Ohio. The Kent Machine Company at Kent, Ohio. The Dunn Company at Holland.

By Mr. Henry:

Q. All of those are companies that have been continuously in business?

A. Yes, sir.

Q. For the last twenty years.

A. Any of the issues of the trade publications of those years gives that completely.

Q. But you do know of those particularly, now?

A. Yes.

[fol. 1991] The Court: Big companies?

A. Yes, sir.

The Court: And they are still in business?

A. Yes.

The Court: You said there were ten or twelve. Can you remember offhand any of the others?

A. In those years, before the 1930's, there was the Ideal Concrete Machinery Company of South Bend.

The Court: Can you help him any, Mr. Henry?

Mr. Gelbman: Universal Tamper.

The Court: In your complaint you said there were only two companies of any importance at any time, I thought.

Mr. Henry: Perhaps, your Honor, a reference to Exhibits 166 and 167 may call other names to mind.

The Court: I was asking Mr. Henry if he could help him.

Mr. Henry: Beg pardon?

The Court: I was asking if you could help him out, if you had the names of some of the other companies.

Mr. Henry: I am handing them to him, from which he can pick the names.

A. The Universal Tamping Company of Peoria. And the Concrete Equipment Company of Holland. The Miles [fol. 1992] Company were one of the older ones, at Jackson.

The Court: Still in business?

A. Yes, sir. The J. B. Foote Company, at Fredericks-town, Ohio.

The Court: That is sufficient for me, if it is for you, Mr. Henry.

Mr. Henry: Yes, your Honor.

By Mr. Henry:

Q. Among those you referred to, Mr. Besser, was the Consolidated Concrete Machinery Company of Adrian. And I wish you would state, Mr. Besser, how you came to be interested in buying stock of that company?

The Court: I beg pardon?

Mr. Speer: Objection.

The Court: Read the question, will you?

(Question read by the Reporter.)

Mr. Speer: Objection.

The Court: What is the objection?

Mr. Speer: Any objection I might have had, I now withdraw, your Honor.

The Court: All right.

A. In the fall of 1930, a George Lay came to Alpena to look over what we were doing, and I loaned him a book. [fol. 1993] Mr. Henry: It appears from the minute book of the Consolidated Concrete Machinery Company he was a director and a principal owner of stock in that company.

The Court: What was he then?

A. He was associated with his brother, Frank Lay.

The Court: In what?

A. George Lay was. And then Frank Lay, he was in——

The Court (Interposing): In Consolidated, over there?

A. He had stock. He had stock in Consolidated and in other companies.

The Court: And he came up to Alpena to see what you were doing?

A. His brother, George Lay, came up.

The Court: All right. All right.

A. I loaned this book to George. And in the spring of 1931, I went back to get my book, and I didn't see George [fol. 1994] but I ran into Frank. And he told me that he owned stock in the Consolidated Company and would like to have me take it over. That was the way I got acquainted with that. And I took it over from him.

By Mr. Henry:

Q. You did meet Frank Lay whereabouts?

A. At his office, up on John R Street.

Q. In the City of Detroit?

A. Yes.

Q. Yes. Was it at that meeting that there was talk between you and Mr. Lay about your buying the stock?

A. Yes; there was.

Q. Who made the approach, and in what manner?

A. Mr. Lay did.

[fol. 1995] By Mr. Henry:

Q. Following your talk with Mr. Lay in Detroit in the spring of 1931—did you say?

A. Yes.

Q. (Continuing) —did you state whether or not you were down at Adrian and looked the property over?

A. Yes, later.

The Court: Should this take so long, to draw this out? The fact is he did buy all this—did he buy into this, or buy the Consolidated?

[fol. 1996] A. Yes, sir.

The Court: Well, that is all there is to it.

A. I bought that stock from Frank Lay.

The Court: Back in 1930.

A. 1931.

The Court: 1931. All right. The result was he bought the Consolidated plant.

Mr. Henry: Well, your Honor will recall that the first item in the Government's complaint, under the offenses charged in Paragraph 4, sub-paragraph 15, is the purchase of the majority of the stock of the Consolidated.

The Court: All right.

Mr. Henry: And my examination is drawing out what occurred in connection with the purchase of that stock.

The Court: Well, he bought it, anyway.

Mr. Henry: He bought it.

The Court: No denial of that, is there?

Mr. Henry: Oh, no.

The Court: That is all they said. You did that.

Mr. Henry: Well, no, the complaint——

The Court (Interposing): What paragraph is it? I have the bill of complaint.

Mr. Henry: Paragraph 15, your Honor. The purchase of the stock is admitted, but then the paragraph proceeds that thereafter Besser Co. caused the manufacturing plant [fol. 1997] of the Consolidated Concrete Machinery Corporation at Adrian, Michigan, to be closed and dismantled, and subsequently caused Consolidated Concrete Machinery Corporation to be dissolved.

The Court: Is there anything untrue about that?

Mr. Henry: No; not on the facts. But that there was any——

The Court (Interposing): He doesn't say who started it, and I don't think it makes any difference whether it is his idea, or whether it was the other man's idea.

Mr. Henry: All right.

The Court: I don't think it makes any difference at all. However, it is on the record that they came up to take a look at his plant. He loaned them a book. He had to go back after it, and at that time got interested in the plant and finally bought the plant, and did what they claim was done here, but not for the purpose that they conclude later on that he did it. Isn't that true? Is there anything in that paragraph that isn't true?

Mr. Babcock: I think it is not true and not established by the facts, that Mr. Besser or the Besser Manufacturing Company caused the dissolution of the Consolidated. Mr. Olsen testified that he was a director, a member of the

[fol. 1998] Board of Directors of Consolidated right up until its final dissolution, and that he participated with the other directors in the decision that the Consolidated was an unprofitable venture at that time, and that it ought to be dissolved.

The Court: Do they say you caused the dissolution?

Mr. Babcock: Yes, your Honor. I think they do.

Mr. Neville: Your Honor, may I invite your attention to the fact Mr. Henry has just now stated that the facts as stated in the paragraph are true?

The Court: Yes. They have to agree among themselves, too.

Mr. Speer: And I refer, if I may, your Honor, to as——

Mr. Babcock (Interposing): That is all a conclusion.

Mr. Speer: There is a signed stipulation between the——

The Court: You are somewhat slow with that, Mr. Babcock. You have to make your responses sooner, in the future. Although you may go ahead and interrogate him as you started out. I don't want to interfere with you.

Mr. Henry: All right, your Honor.

By Mr. Henry:

Q. Following the purchase of the stock, the plant was [fol. 1999] removed, or certain of the property of the Consolidated was removed to Alpena, as appears in the testimony up to this time?

A. Yes.

Q. I want you to state to the court what was done in the way of operations of the Consolidated following the removal to Alpena?

The Court: You mean in Adrian?

Mr. Henry: Following the removal from Adrian to Alpena.

The Court: Did they move the plant up there and set it up as the Consolidated, or did they move the machinery and everything up there and work it under Besser?

Mr. Henry: Oh, no, no, your Honor. They operated at Alpena as Consolidated.

The Court: Operated a separate plant at Alpena?

Mr. Henry: In the Besser plant, as a separate company.

The Court: As a separate company?

Mr. Henry: Yes, sir.

The Court: Consolidated?

Mr. Henry: Yes, your Honor.

The Court: Took advantage of the name, I suppose, that had been on the market for some time. Is that right, [fol. 2000] Mr. Besser?

A. Yes, sir.

The Court: All right.

By Mr. Henry:

Q. Did you first, after acquiring the stock and going on the Board of Consolidated, continue operations at Adrian?

A. Yes.

Q. And for how long, and with what results?

A. It was for a number of months. And the results were unprofitable, so the need of reducing the expenses became apparent, and then the removal to Alpena occurred. The Consolidated owed a great deal, and the Besser Company, of course, took over that stock, but then they had so much to pay to pay the accounts that it was finally removed to Alpena.

Mr. Henry: Your Honor, my statement of a few moments ago, I wish to withdraw. A literal reading of the complaint, that the Besser Company caused the plant at Adrian to be closed and dismantled, I overlooked. That is not true, that the Besser——

The Court (Interposing): Who is it?

Mr. Henry (Continuing): —that the Besser caused the Consolidated to be dissolved. I correct those answers.

The Court: Was the Consolidated later dissolved?

[fol. 2001] Mr. Henry: Yes, your Honor.

The Court: By whom?

Mr. Henry: But it was done by Consolidated and not by Besser. The charge against Besser——

The Court (Interposing): Who owned Consolidated when it was dissolved?

Mr. Henry: Besser Manufacturing Company controlled the stock.

The Court: Let's not quibble over words. What he did was to buy the Consolidated plant, work it a while at Adrian and found it wasn't profitable, brought it up to his own plant up there, worked under the name Consolidated up there, had no good results, and then finally dissolved Consolidated. Isn't that true? Isn't that the whole thing, Mr. Besser? Have I stated that correctly, Mr. Besser?

Mr. Babcock: Your Honor hasn't stated anything wrong, but there are one or two factors that have already been developed by the evidence, by Mr. Olsen's testimony, that are not included in the court's summation, that are important. One of which is that the evidence shows that after the removal of the Consolidated plant from Adrian to Alpena that Mr. Olsen, who had been President and the managing officer of Consolidated, traveled the United States for some time, seven or eight months, in an effort to make sales of Consolidated machines. That he was [fols. 2002-2004] continued as sales manager and the active manager of the Consolidated, and that he operated that for seven or eight months, travelling this country trying to make sales, but in the end he had not succeeded in being able to make one single sale.

Then, when he returned, then was the judgment of the Board of Directors exercised that the company ought to be dissolved.

The Court: I don't think that changes it a bit. They owned it and Mr. Olsen at that time was their man Olsen. At that time. He isn't, evidently, now. But he worked for them and they controlled the Board of Directors, and I don't see anything wrong in it at all. But let's not quibble over words. That is what happened.

[fol. 2005] By Mr. Henry:

Q. You testified yesterday, Mr. Besser, that the Besser Manufacturing Company continued the manufacture of the tamping, automatic tamping machines until 1939. Is that correct?

A. Yes.

Q. Did you, after 1939, continue the manufacture of those machines to any extent?

A. No.

Q. As to filling orders, or anything of that kind?

A. Just a few in 1940 and 1941.

Q. How many models of tamping machinery were you making up to 1939?

A. There were the two models, the fully automatic and the semi-automatic.

Q. What were the respective capacities? You stated the one was 3,600 a day?

A. Yes, sir.

Q. That was the fully automatic machine?

A. Yes. The other was slightly less, 2,500 a day.

[fol. 2006] Q. And since 1939, what has been the type of machinery manufactured?

A. The vibrating machines.

Q. Will you state how many models of the vibrating machinery have been made in the last eleven years or ten years?

A. The one general model, but a little variation in equipment. In some cases, three-at-a-time, more commonly that way. And in some cases, one-at-a-time. And then in some cases the latest front pallet feed arrangement, and then farther back the rear pallet feed, all based, I would say, on the one general model which came out in 1939, but with those variations.

Q. I wish you would state on the record briefly the differences between the tamping machinery manufactured prior to 1939 and in that year and the vibration machinery manufactured in that year and after?

A. The main difference is in the method of compacting the material in the mold. With the tamping machine, the mold rests on a solid support or anvil, and the material is packed in with four or more tamper bars which fit loosely into the mold and go almost to the bottom of the mold, and then they raise up and down about six times for each cycle of the machine, and every time they raise, new material [fol. 2007] is fed in.

Therefore, each time you drop, you don't go down quite so far, and the last drop is above the mold. So the mold is packed with this multiple number of tamper bars working up and down, about six times in each cycle and carrying

the material down positively into the bottom of the mold. That is true tamping. That is tamping as understood and universally used in the industry.

The Court: Is the—well, go ahead.

A. And no vibration. Just tamping.

The Court: All right.

A. Any finishing off of the block is done separately. So we have the——

The Court (Interposing): What do you mean by "finishing off"?

A. Smoothing off the top of the block.

The Court: Getting the edges off and all that, you mean?

A. Yes, sir.

The Court: All right.

A. We have about six strokes of those tampers, heavy strokes, of course.

Now, with vibration, the other method, which came into use especially from 1939 on, merely the vibrating of the [fol. 2008] mold causes the material to fall in, just like water, into that mold, and there would be about four hundred vibrations to the mold for one cycle against only six strokes of the tampers on the others. Of course, the violence is less on each vibration. So that the material is just coaxed into the mold by the vibration of it.

Anything else, beyond vibration, is a matter of finishing the mold—finishing the block and particularly compacting more densely the top of the block, and that is done after all of the material is in. The surplus is scraped off and then this head, this pressure head, comes down and that brings the block down to size and smooths and finishes the top of the block, but only goes into the mold far enough to bring the block down to size. Occasionally, the head might be raised and lowered one or more times, but we don't call that tamping. Not true tamping, in the industry.

The Court: What do you call it?

A. It is just a finishing of the block. The mold is already filled.

The Court: Is it true—at least, I have this impression—that the wear and tear on a tamping machine is much greater than the wear and tear on a vibrating machine?

A. The wear and tear is greater, because those tampers

bars, which I mentioned, go down into the mold and touch [fol. 2009] and wear it more in that way.

The Court: Not only that, the dropping of that big eight continually would tend to, oh, strain the rest of the machine, wouldn't it?

A. Well, to be accurate on that, that vibrating force is terrific, too. To state that absolutely accurately, to maintain the machine for vibration, to resist vibration in the other parts of the machine——

The Court (Interposing): Yes.

A. (Continuing) —it is a little bit more than if you are to resist tamping.

The Court: But you have got the vibrating machine in that resiliently mounted mold.

A. Yes, sir.

The Court: And the strain is on that part.

A. Yes, sir.

The Court: Which is a small, comparatively small part, but a very important part of the machine.

A. Yes, sir.

The Court: The rest of the machine, however, has no great wear and tear, has it?

A. That is right.

The Court: All right. Excuse me if I interrupted your line of thought, Mr. Henry. Just go right ahead.

[fol. 2010] Mr. Henry: No, your Honor. Your questions were quite appropriate.

By Mr. Henry:

Q. Does the violence of the use of the machinery in both the tamping and the vibrating process, require extraordinarily heavy machinery?

A. Yes, sir; it does.

Q. What is the weight of the machine that—what was the weight of the automatic tamping machine?

A. The tamping machine, the weight was 15,000 pounds. The vibrating machine, the weight is 25,000 pounds. That is particularly because the vibrating machine makes a larger number of units at one time.

(Illustration of Besser Vibrapac machine was thereupon marked Defendant's Exhibit 181 for identification.)

By Mr. Henry:

Q. I show you Defendant's Exhibit 181 and ask you to state what is illustrated on the front page of that exhibit?

A. It shows the Besser Vibrapac. The Besser automatic Vibrapac which makes three at a time.

Q. And is that a standard machine manufactured by your company?

A. Yes, it is.

Q. The exhibit itself is what? A trade circular?

A. Yes.

Q. Advertising matter?

[fol. 2011] A. Yes.

Q. Does the illustration on Exhibit 181 truly reflect a photograph or a likeness of the machine?

A. Yes, it does.

Mr. Henry: I offer Exhibit 181 in evidence. The only part of the Exhibit that is offered is the illustration of the machine.

Mr. Neville: No objection.

Mr. DeGree: None.

By Mr. Henry:

Q. Were the tamping machines that were on the market at the time you changed over to the vibrating method, were those continued in operation after 1939?

A. Yes, they were.

Q. And what did your company do with respect to servicing them and taking care of parts orders, and so forth?

A. We continued to service them and are still doing so.

The Court: This is a much different machine than the one I saw over at Midland, isn't it? I don't mean about whether they use your patent or not, but I mean in outward appearance?

A. Yes, sir.

The Court: This looks as though you could print the Detroit News on it. Like a printing press, doesn't it? Was that model you had up at Bay City like this?

[fol. 2012] A. Yes; that was. That model at Bay City was exactly like this, in one-quarter size.

The Court: You see the three blocks and the one pallet coming out there, don't you? I notice you have them nice and smooth and nice-looking, too.

A. They come out just that way.

The Court: All right.

By Mr. Henry:

Q. Going now, Mr. Besser, to the testimony you were giving at the close of yesterday's session, in connection with the Consolidated Concrete Machinery Company of Adrian, I ask you to state whether or not following your purchase of the stock in that corporation there was any change in the manufacturing by that company?

A. No; there was not any change.

Q. Either at Adrian or after the plant was moved to Alpena?

A. The same machines and product were being made, and the same effort or increased effort was being used to sell them.

The Court: Of course, that question may mean any one of a number of things. There must have been something changed. Otherwise, they wouldn't have moved it to Alpena.

Mr. Henry: I will break the question down.

By Mr. Henry:

Q. Following your purchase of the stock in the Consolidated, which I recall was in July of 1931, the operations of the company were continued at Adrian, in the same plant: is that correct?

[fol. 2013] A. Yes.

Q. Will you state whether there was any change in the management of the company, other than changes of officers on the Board of Directors?

A. The management remained the same.

Q. And who was the man in charge of the management?

A. Mr. Olsen. He specialized on sales. He was not the

general manager, but specialized on sales, as he always had done there.

Q. Did he continue that work the same afterwards as before?

A. Yes, sir; he did.

Q. And during all of the time that Consolidated continued as an entity, as its legal entity, as a corporation, will you state whether or not you and Mr. Olsen worked together?

A. Yes, sir; we did.

Q. In promoting the sale of the product of the Consolidated?

A. Yes, sir.

Q. And when consideration was given to moving the plant from Adrian to Alpena, will you state whether or not there was general agreement that that was the proper thing to do?

A. There was.

Q. What was the general condition of business in that industry in 1931 and 1932?

[fol. 2014] A. The business was scarce, in those years.

The Court: Was this around 1931 and 1932?

Mr. Babcock: 1931 and 1932.

The Court: Oh.

Mr. Henry: The purchase of the stock was, I believe the Exhibit shows, early in July of 1931. And the Government's proofs showed that the plant was operated at Adrian until October of that year.

By Mr. Henry:

Q. Is it true that they did operate in Adrian until late in 1931?

A. Yes.

[fol. 2015] Q. And what prompted the removal, the action of the Directors in removing the plant or the manufacturing by Consolidated to Alpena?

A. The imperative need for reducing the expenses, so that the company might continue.

Q. What was moved to Alpena?

A. Some of the machine tools, and the work in process.

Q. State what operations were continued from the Alpena office, from the removal of the plant there in October of 1931?

A. The operations were all conducted then from Alpena; the sales, and the manufacturing and design.

Q. What did Mr. Olsen do, both during the time he was at Adrian and during the time he was at Alpena?

A. He was general sales manager.

Q. Will you state what you know of his efforts to sell this machinery of Consolidated?

A. He worked energetically to sell the Consolidated machines.

Q. Office work only, or outside work?

A. In the field.

Q. And what can you say of the success of his efforts in selling the products of Consolidated?

A. He travelled the country, but it was very hard to get orders.

The Court: What year was this?

Mr. Henry: This was from July of 1931 to the dissolution [fol. 2016] in June of 1932.

The Court: Hard to get orders for anything, any kind of a machine, at that time, wasn't it?

A. Yes, sir.

The Court: Consolidated wasn't in any different position than Besser, was it, on that?

A. No, sir.

The Court: You don't have to tell me that there was a slight depression in 1930, '31 and '32. That I have heard about.

Mr. Henry: I think we are all aware of that, your Honor, and my purpose in showing the inability for sales is to show the fact that this company was unable to keep its head above water.

The Court: Oh, well, all right. But——

Mr. Henry (Interposing): And to account for the——

The Court (Interposing): But if you seek to give the impression that you couldn't sell Consolidated where you could sell something else, the court can't follow you along those lines. It was very difficult even to sell apples on the

corner in 1931 and 1932. I had charge of that matter in the City of Saginaw, so I know something about it. You may proceed.

[fol. 2017] Mr. Henry: I don't want your Honor to gain the notion that I am thinking any differently than your Honor in that respect.

The Court: No, no. But I heard yesterday—yesterday the statement was made that the business couldn't sell any machines, any Consolidated, and for the time being I was carried away with the idea that that machine wouldn't sell. But it was because of the times rather than the machine, as I understand the testimony. Isn't it, Mr. Besser? Or wasn't it, Mr. Besser?

A. Yes, sir.

The Court: Because if the Consolidated had been a machine that wouldn't sell, you certainly wouldn't have bought the plant, would you?

A. We certainly expected to be able to sell those machines.

The Court: All right.

A. At the time.

The Court: I think we understand each other.

By Mr. Henry:

Q. As to your own Besser Manufacturing Company during those years, was business pretty lean there, too?

A. Yes, it was.

Q. And when the action resulting in the dissolution of the Consolidated was taken, what was the financial condition of the Consolidated at that time?

[fol. 2018] A. The liabilities were considerably greater than the assets at that time.

Q. Well, was it necessary that a sale be made?

A. Very much so.

Q. And as a result of that dissolution, which appears from the minute book of Consolidated that is in evidence here to have been, I believe, the last of June, 1932—is that about the time that Mr. Olsen returned to Adrian?

A. Shortly after that.

Q. And your separation agreement, if we may call it that, or your agreement with Mr. Olsen at that time, is embodied in the agreement, Plaintiff's Exhibit 114, which is dated July 16, 1932; is that correct?

A. Yes.

Q. Is there anything in that agreement, Mr. Besser, in Exhibit 113——

Mr. Speer (Interposing): Excuse me. 114.

By Mr. Henry (Continuing):

Q. —114, that forbade or restricted Mr. Olsen from re-engaging immediately in the concrete block machinery manufacturing business?

A. No, sir.

Q. There is a provision, however, that the property at Adrian should not be used for a period of how many years? Paragraph 7, I believe.

[fol. 2019] A. Yes. Ten years from date.

Q. Now, I hand you Plaintiff's Exhibit 110, which is another agreement between the Besser Manufacturing Company and Mr. Olsen dated June 26th, 1934, and ask you to state what agreement was entered into at that time with respect to restricting the use of the real estate at Adrian?

A. That restriction is removed. Paragraph 7 is stricken and the restrictions are released.

Q. So that a little less than two years following the imposing of the restrictions against the real estate, those restrictions were removed; is that correct?

A. Yes.

Q. And that is about the time that Mr. Olsen re-engaged in the business in that plant?

A. Yes.

Q. Do you know whether or not he had previously, without using your real estate in Adrian, undertaken the manufacturing of machinery again?

A. Yes, sir; he had.

Q. So that it was with the full knowledge on your part, on the part of your company, that at the time the restriction was removed you knew that Mr. Olsen was going back into and was already back into the competitive block machinery manufacturing business?

[fols. 2020-2021] A. Yes, it was.

Q. And has been in that business continuously since, in his Company, Stearns, until he sold the stock, and later in the Gocorp Corporation?

A. Yes.

Q. I want to examine you now, Mr. Besser, with respect to the allegations in Paragraph 16 of the complaint, which concerns the purchase of certain assets from the Industrial Brownhoist, and as a preface to that examination I would like to read the paragraph, which is short. Paragraph 16:

> "In or about the year 1935, Besser Co. purchased from Industrial Brownhoist Corporation, an Ohio corporation, which was engaged in the manufacture and sale of concrete block machines, the inventory and assets of that part of the business of said company which related to the manufacture and sale of such machines. Thereupon, Industrial Brownhoist Corporation discontinued the manufacture and sale of concrete block machines."

That is the end of the paragraph.

Were you acquainted with or did you have knowledge of a corporation by the name of Industrial Brownhoist?

A. Yes.

[fol. 2022] By Mr. Henry:

Q. Tell us, Mr. Besser, what you know or knew at that time of the corporation, Brownhoist Corporation?

A. I knew that the Brownhoist Corporation was a combination of the Industrial Company at Bay City and the Brownhoist Company of Cleveland. They had moved to Cleveland and then back to Bay City.

Q. What was the general business of this corporation in 1935?

A. Making large railroad cranes and also other cranes for building construction.

Q. Where was the block machinery manufactured?

A. That had been moved to Cleveland, before they moved back to Bay City.

Q. How did you come to be interested in purchasing the assets?

A. The Brownhoist man from Bay City came to Alpena and offered to turn over—wished to turn over their stock of machines and parts.

Mr. Speer: Excuse me. If the man from Industrial Brownhoist came to Alpena, your Honor, and had a conversation with Mr. Besser, then we are entitled to that conversation instead of the witness's conclusions.

[fol. 2023] A. That man said to me, "Besser, we would like to turn over our concrete mixers and machines and parts to you."

The Court: What he meant was that he would like to make a deal to turn them over. Is that what he meant?

A. Yes, sir.

The Court: All right.

A. And immediately said he would do that for $20,000. They had not yet engaged in that part of the business, since moving back to Bay City from Cleveland.

By Mr. Henry:

Q. Do you know the type of machinery that this company, block machinery, that Brownhoist had in the hands of customers at that time?

A. Yes.

Q. What was the type of machinery?

A. They were face-down machines, as distinguished from the stripper machines.

The Court: What do you mean by that? They delivered the block underneath, is that it?

A. Wherein the block is turned over for delivery, and the mold has to be opened up to get the block out of it. The face of the block is made down, face down, which lends itself to the making of the old style block, the rock-face block.

[fol. 2024] By Mr. Henry:

Q. Was it similar to the type of machinery that you were manufacturing at that time?

A. Yes. Although it wasn't our main line, though.

The Court: You were using the stripper, weren't you?

A. Yes, sir.

By Mr. Henry:

Q. Those machines that were then in the hands of customers, were they machines that had adapted the use of the plain pallet?

A. No.

Q. Now, did you look over the property, the assets that he offered to sell?

A. No, I did not.

Q. Did you have a description of them?

A. Yes. And, of course, I had seen them before in several places where they were being used.

Q. I hand you Plaintiff's Exhibit 8, which has been received in evidence as a copy of the agreement and bill of sale whereby you purchased the assets of the Brownhoist. That is a photostatic copy of the original?

A. Yes. Yes; it is.

Q. Now, will you refer to the schedule attached or annexed to that exhibit and state to the court the number and capacity of mixers that were involved in the purchase, among other assets? How many mixers were [fol. 2025] there?

A. There were fifteen mixers.

Q. And will you tell the court, Mr. Besser, whether or not a mixer sold to a block plant need be of the block manufacturers own production, or is one mixer available for use on other machines of the other manufacturers?

A. Yes.

The Court: Yes, what? I don't know what you mean.

By Mr. Henry:

Q. Is it a separate unit entirely from the machine, Mr. Besser?

A. Yes.

The Court: It isn't attached to the machine, the mixer, is it?

A. No.

The Court: There is a difference between the mixer and the hopper, isn't there?

A. Yes.

The Court: The mixer could be—well, they had nothing to

do with each other, of course. At least, I don't think they do; do they, Mr. Besser?

A. The mixer mixes and furnishes the concrete.

The Court: Yes.

A. For the block machine.

The Court: Yes. But it might be a tub?

[fol. 2026] A. It might be. It has its own power which drives it.

By Mr. Henry:

Q. Could the mixers which you bought from the Brownhoist be resold to customers for use with Besser machinery?

A. Yes.

Q. Was there any agreement between you and Brownhoist as to their staying out of the block machinery manufacturing business?

A. No.

Q. Was there anything about this deal other than the meeting of a willing seller and a willing buyer?

A. No, sir, nothing whatever.

Q. And was the price that you paid for this property a reasonable price for what you received?

A. Yes.

Mr. Neville: Your Honor, I am going to object to further questions along those lines, because they are obviously leading questions.

The Court: I know it. But to tell you the truth, I can't see the importance of spending so much time on it. I think the way to do this is to get this in one or two questions and get the whole thing that is material on the record.

Mr. Henry: I have no further questions on this.

The Court: They claim it is a link in the chain and you [fol. 2027] claim you bought it because they came up and offered it to you. They weren't in the business then, actively, in any event, and you saw a chance to get something at a pretty good price.

A. Yes, sir.

[fol. 2028] By Mr. Henry:

Q. Going now to Stearns, Mr. Besser, will you state whether or not from 1942, when the Gelbman license agreement was entered into, whether both companies, Stearns and Besser Manufacturing Company have continuously since manufactured different models of block machinery?

A. Yes, sir.

Q. Did you have knowledge of Mr. Olsen's making stock available to the public some time following or about that time?

A. Yes.

The Court: This is the advent of the Gelbman patent?

Mr. Henry: Following the advent of the Gelbman patent, [fol. 2029] yes, your Honor.

The Court: All right.

By Mr. Henry:

Q. Did you know who had previously owned the stock of Stearns, before it was offered—before there was a public offering made of it?

A. Yes.

Q. Who was or who were the controlling stockholders?

A. Mr. Olsen.

The Court: Public offering? Did it go on the board of either the——

Mr. Henry (Interposing): No, your Honor.

The Court (Continuing): —the curb or the Exchange?

Mr. Henry: I think the proofs show that the permission was given by the Michigan Corporation and Securities Commission to sell this stock.

The Court: Over the counter?

Mr. Henry: Over the counter; yes.

The Court: All right.

By Mr. Henry:

Q. Do you know that a substantial part of the Olsen stock was so offered?

A. Yes.

Q. And sold to the public?

The Court: Now, this is getting up to 1940. Must be [fol. 2030] around 1945 or 1946?

Mr. Henry: Around 1946.

The Court: Well, the Gelbman patents came in around 1942. That is, they came in in 1938 or 1939. So why do you connect 1946 with the advent of the Gelbman patents?

Mr. Henry: I am stating to your Honor first—I did not break the line of questioning. But I showed first that between the time the two companies had the Gelbman license, from then on, continuously, throughout, both companies have been engaged in the manufacturing of different models of block machinery. Then I moved into the line of questioning as to what had happened to the Stearns stock.

The Court: Well, while we are on that question, there is something I would like to know, Mr. Besser. You were manufacturing, according to your testimony yesterday, a tamping machine that eventually turned out, or could turn out, 3,600 blocks per day?

A. Yes, sir.

The Court: There was no vibration machine on the market at that time that could turn out anything like that, was there?

A. No, sir.

The Court: All right. Now, the Gelbman patent came out in 1938. And in 1940 you were sued by Gelbman on a [fol. 2031] previous Gelbman patent. Isn't that right?

A. Yes.

The Court: And then that suit was settled, and in 1942 you joined Stearns as exclusive licensees under the Gelbman patents, both the apparatus patent and the method patent?

A. Yes.

The Court: The vibrating machine is a much more expensive machine than—or is it? I am asking the question: Is it a much more expensive machine to make than the——

Mr. Babcock (Interposing): Tamper?

The Court (Continuing): —than the tamper?

A. I would say it is just about the same.

The Court: So then considering the machines of equal

ability, a vibrator that only turned out one block per pallet would only turn out about 2,000 blocks a day, wouldn't it?

A. Yes.

The Court: A two pallet, 4,000, and now you have the three—or two blocks to the pallet 4,000; and three blocks, 6,000; is that right?

A. Yes.

The Court: Well, if that is true, what did Gelbman add, if anything, to the block business, the block machine busi-
[fol. 2032] ness? I haven't touched a tender spot, have I?

A. No. Very important.

The Court: You looked at me a minute or so.

A. Well, he put one of the finishing touches on the use of vibration. Until Gelbman came along, the material was vibrated in the mold, loosely, and struck off, and that was it. Gelbman came along and showed how to come down with a pressure head.

The Court: After vibration?

A. Yes, sir.

The Court: In other words, that vibrating machine that you had at that time, or that anybody was using, was a vibrating alone?

A. Yes.

The Court: It had no pressure, no tamping?

A. Yes, sir.

The Court: But Gelbman combined the pressure and the tamping?

A. Yes.

The Court: Or the "pressure and the tamping"?

A. Excuse me. He combined the pressure and the vi-
bration.

The Court: I mean—yes. Well, either pressure or vibration. Either pressure or tamping, with vibration. That is what he did.

A. He combined pressure with vibration.

[fol. 2033] The Court: I see.

A. And he got—he thereby compacted the top of the block properly, which otherwise was not accomplished, and he brought the block down to an accurate height.

The Court: And he also eliminated the ridges in the

block caused by the adding of material between tampings, didn't he?

A. Yes.

The Court: You don't call them "ridges"?

Mr. Stark: Strata.

The Court: What is it?

Mr. Stark: Stratification or laminations.

The Court: You know, when you put in the tamping, you could see it in the block.

Mr. Stark: Denser and lighter zones.

The Court: You could see the zones of the tamping.

A. Of course, that was accomplished basically by vibration.

The Court: Oh, yes.

A. But then Gelbman came along. We already had that, and Gelbman added that top vibration under pressure.

The Court: Did it add to the number of blocks?

A. It added to the number of blocks and gave a better block, and a block more uniformly packed from bottom to top and of accurate height, with a smooth top, and permitted faster operation.

[fol. 2034] The Court: All right.

A. The material in the bottom of the mold, naturally, is weighted by the material above, and that compacts fairly good itself. But the top part of the material, to get that tight, was difficult. In the first place, you had to vibrate it longer if you didn't have the pressure head, and even then the result was uncertain, so Gelbman's pressure head came right down and finished that thing off and compacted the top of the block.

The Court: I suppose it is the theory, as I remember in the patent case, that they took two old inventions and combined them and made something new. Isn't that it, Mr. Stark? Made something new and better?

Mr. Stark: Accomplished a new result in an unexpected manner.

The Court: All right.

By Mr. Henry:

Q. Is the same aggregate used in the old automatic tamping machine and the vibrating machine?

A. Yes.

Q. Then why is the block produced better from the vibrating machine than the one produced on the tamper?

A. The vibration machine makes the block as a whole, with no stratification as occurred with the tamping, and no wear on the mold which occurred when the tampers worked down into the mold.

[fol. 2035] Q. Do you mean by the stratification that if the tamper came down six times you would have six levels in one block?

A. Yes.

Q. And in the vibrated block, you have one compact unit?

A. Yes.

The Court: Well, I think I know what you mean. But I take it for granted that he means if it came down at six different points in the filling of the material. In other words, you shovel in some material and down comes the old tamper; shovel in some more and down comes the tamper. And with that situation, you can see where the material—you could see, at least, where the material was shoveled in, couldn't you?

A. Yes.

The Court: And now you can't see that any more. The vibrator, especially the vibrator wherein it takes the material as the feed box moves over the mold—you use that, don't you?

A. Yes.

The Court: But you found it necessary, for some reason or other, just like Lith-I-Bar, to add the agitators inside the feed box, didn't you?

A. Yes. But they are necessary particularly with some material that might be gummy or which would not settle [fol.2036] downn to the freely.

By Mr. Henry:

Q. Going again to the stock purchase, your testimony on cross-examination, when you were called by the Government, was that in the year 1946 you acquired some 13,000 shares of the Stearns stock?

A. Yes.

Q. Out of a total of about 189,000 shares?

A. Yes.

Q. And that you purchased none in 1947, but became interested again late in 1947 and early in 1948?

A. Yes.

Q. That is when you became interested in acquiring the Olsen stock?

A. Yes.

Q. You heard the testimony with respect to Mr. Olsen's connection with the Indiana Limestone Company?

A. Yes.

Q. Did you know he was the President of that company?

A. Yes.

Q. And did you know of the rumors that have been testified to that Indiana Limestone Company was interested in taking over Stearns?

A. Yes.

Q. Did you at any time have any direct dealings with Mr. Olsen in connection with the purchase of the stock of [fol. 2037] Stearns?

A. No.

Q. Have you been in Adrian at any time during these negotiations or since?

A. No.

Q. When were you in Adrian last, Mr. Besser?

A. My last time in Adrian was in 1931. 1931 in July.

Q. That was at the time of the Consolidated purchase?

A. Yes.

Q. Now, the consummation of the purchase of the Stearns—of the Olsen stock in Stearns, occurred, I believe, in March of 1948. Is that correct?

A. Yes.

Q. And you have knowledge of the reorganization of their Board of Directors and officers?

A. Yes.

Q. And you know how many of them? Do you know Mr. Hultmark?

A. Yes.

Q. He had formerly been connected with the company where?

A. In Chicago.

Q. In what capacity?

A. District Sales Manager.

Q. Do you know Mr. Wright?

A. Yes.

[fols. 2038-2041] Q. What other directors of Stearns? Do you know Mr. Hall?

A. Mr. Hall.

Q. Who was Mr. Hall? What was his business before going to the——

A. (Interposing) He was employed by the Stearns Company in Adrian.

[fol. 2042] Mr. Henry: I think Mr. Speer will agree with me on this statement, that the Board, from the time that Mr. Besser's Company purchased the Olsen stock, until May 5 of 1948, were Olsen, Delamater, Hultmark, Wright and Joslyn. And that at the May meeting——

The Court (Interposing): What time was that?

Mr. Henry: From March until May of 1948.

Mr. Speer: No, I don't. The way I understood it is that the actual change in the Board did not occur until the special Board meeting of May the 4th.

Mr. DeGree: Special stockholders' meeting.

Mr. Speer: Yes. But at that time, then I do agree that those five were placed on the Board.

Mr. Henry: And Mr. Olsen was replaced by Mr. Fildew, and Mr. Delamater was replaced by Mr. Hall. Is that correct.

Mr. Babcock: Later.

Mr. Henry: Later.

Mr. Speer: Yes.

Mr. Henry: So that Olsen, Delamater, Hultmark, Wright, Joslyn, Fildew and Hall have been directors at one time or

another, or all of the time, since the purchase of the Olsen [fol. 2043] stock. Is that correct?

Mr. DeGree: Since May 4th, 1948.

Mr. Speer: Oh, yes; that is correct.

By Mr. Henry:

Q. Mr. Besser, have you at any time since March of 1948, when you acquired the Olsen stock, given directions to any director of Stearns?

A. No, sir.

Q. Have you at any time since you acquired the Olsen stock participated in any way in the management of the corporation?

A. No.

Q. Have you, by suggestions or otherwise, dictated or attempted to dictate the policies of Stearns?

A. No, I have not.

Q. Have there been, in the period since you purchased the Olsen stock, any changes in the models of block machines manufactured by the Stearns Company at that time, or prior to the purchase?

A. They have made improvements from time to time and have added a two-at-a-time machine in the plain pallet type.

Q. During the same period, has there been any one, any individual or any individuals, who were the common representatives or agents of both companies?

A. No.

Q. And can you state whether or not the Stearns Company has been managed and operated since your purchase of the Olsen stock entirely independent of the Besser [fol. 2044] management.

A. Yes, sir.

Q. Or control?

A. Yes, sir; it certainly has been.

Q. Or management?

A. Yes.

Q. Do you know that the Stearns Company has continued the manufacture of the models of machinery, since you purchased the Olsen stock, that it was manufacturing before?

A. Yes. And they added another model, the two-at-a-time plain pallet machine.

Q. When you purchased the Olsen stock, state whether or not there were any strings of any nature on that purchase?

A. There were not.

The Court: How many shares did he purchase?

Mr. Henry: He purchased approximately 86,000.

The Court: 89,000, wasn't it?

Mr. Speer: That is what I thought.

Mr. Neville: Yes, he acquired actually close to 89,000 shares.

The Court: Yes. 89,000 shares at how much?

By Mr. Henry:

Q. What is it, Mr. Besser?

The Court: Is that at $6.00 a share?

Mr. Babcock: You know what the price was?

The Court: What did the total amount to?

[fol. 2045] Mr. Babcock: I don't know.

Mr. Henry: First the 13,000 shares that are part of the holdings acquired in 1946.

The Court: Yes, but what was the average? How much money did he have invested in the Stearns Company in 1948?

By Mr. Henry:

Q. Will you tell, Mr. Besser?

The Court: About?

A. About $900,000.

The Court: Almost a million dollars?

A. Yes, sir.

The Court: You want this court to believe that you didn't have anything to do with the management of that concern, with almost a million dollars of your money in the company, money invested in it, you let them go along just as though you had bought ten shares of stock or weren't in it at all?

A. That is the way it was.

The Court: All right.

A. I was overly busy with the Besser Company.

The Court: I know. But you had men, didn't you? You changed the Board of Directors the minute you got the stock, didn't you?

A. The Board of Directors was changed.

[fol. 2046] The Court: Well, it was changed. You put in or had people put in there that you had confidence in; isn't that true?

A. Yes.

The Court: And from time to time they kept reporting to you about the Stearns Manufacturing Company. You had your finger on the pulse of the Stearns Manufacturing Company, didn't you, Mr. Besser?

A. I received the same information that the other—I received the monthly reports, which was received by others who were interested.

The Court: Well, you mean other members of the Stearns corporation?

A. Yes.

The Court: Or stockholders?

A. Yes.

The Court: Do you suppose that they got all the telephone calls, too, that you got from them, either that you made to or got from the Stearns? I find it very difficult to believe that a man with almost a million dollars in a concern of that kind was just letting it go along and was not actively interested in it. I find it very difficult to appreciate that, gentlemen.

It is just like I failed to appreciate that Mr. Gelbman [fol. 2047] made the contract that he did for the benefit of humanity, yesterday. But if that is *that is* the testimony, it is:

By Mr. Henry:

Q. The monthly reports that you received apprised you of the general condition of the company?

A. Yes.

Q. And were these directors, Hultmark, Wright and Fildew, names suggested by you at the time that the replacements were to be made on the Board?

A. Mr. Wright made the suggestions.

Q. And you acquiesced?

A. Yes.

The Court: Well, now, Wright was the man whom you got to buy the stock?

A. Yes, sir.

The Court: He was your broker or your purchasing agent?

A. Yes.

The Court: All right. Wright suggested Fildew—or, was it Fildew?

Mr. Henry: Fildew and Hultmark.

The Court: Has he ever acted for you in any capacity?

A. No.

[fol. 2048] The Court: He is a Detroit lawyer?

A. Yes.

The Court: Partner or associate of Mr. DeGree?

A. Yes.

The Court: Wright was your man. Fildew was suggested by Wright, and you knew him. And who was the other?

Mr. Henry: Hultmark.

The Court: What is that?

Mr. Henry: Hultmark.

The Court: Hultmark?

Mr. Henry: H-u-l-t-m-a-r-k.

The Court: Oh, yes; Hultmark.

Mr. Henry: Formerly a Besser man that came from Chicago to Adrian.

The Court: He was working with Besser at that time.

Mr. Henry: He had been; yes.

The Court: He had been. How much of a Board did you have?

Mr. Henry: Five.

The Court: Five. You had three men out of the five that were elected practically by your company, isn't that true, Mr. Besser?

A. We knew what was going on, and we acquiesced in that; yes, sir.

[fol. 2049] The Court: Mr. Besser, I certainly understand that you knew what was going on. I don't like to have you put in the position of even indirectly trying to tell

the court you didn't know what was going on. I don't think you intended to tell me that, but that is what the testimony was until the court started to ask some questions.

You knew what was going on a lot more than the ordinary stockholder, didn't you, Mr. Besser. You had to.

A. Yes, sir.

The Court: Certainly. All right.

By Mr. Henry:

Q. And, as a large stockholder, will you state whether or not you were satisfied that the Board, which included three members either suggested or approved by you, was a competent Board to handle the affairs of the corporation?

A. Yes.

Q. And after they were selected, you permitted—or you did not interfere in their conduct as directors?

A. That is right.

The Court: Did you advise with them once in a while?

A. I saw Mr. Wright occasionally.

The Court: You talked over the corporation and gave advice, didn't you, at different times?

A. Very little.

[fol. 2050] The Court: Well, of course, whether what you would say would be very little and what he would say was very little, as soon as they grasped your idea of what you wanted done, and as long as they carried out that idea, that is what you wanted, isn't it?

A. That is the idea, except to make a success of the company. That was the only idea.

The Court: And if there had been any change in the policy of the company, any direct change in the policy, as, for example, if they started making nothing but vibrating machines entirely, they would have consulted with you on that change that would be that vital, wouldn't they, Mr. Besser, don't you think?

A. They did that very thing pretty well.

The Court: You mean they did do it?

A. The tamper sales, of course, got less.

The Court: Yes.

A. And they increased on the vibrator sales.

The Court: Yes. But they didn't——

A. (Interposing) That was automatic.

The Court: Stearns was a tamping machine, or their big out-put at that time was tamping, wasn't it? Or was it?

A. They had a number of very good years on the clipper tamper.

[fol. 2051] Mr. Babcock: 1946 and 1947.

The Court: Yes.

A. Their basis or their main machine was their Jolt-Crete machine.

The Court: That is what I mean.

A. Which is a vibrating machine.

The Court: If they had decided to abandon the Jolt-Crete machine, don't you think Mr. Wright or somebody would have talked it over with you as the main stockholder and the man responsible for their being on the Board?

A. I would say I was not in touch with the details. We made very little discussion about it.

The Court: I know you weren't in touch with the details at all, any more than the head of any big industrial firm is in touch with all of the details. But—all right.

By Mr. Henry:

Q. Has the Jolt-Crete been manufactured all during this period?

A. Yes.

Q. And that is the machine you described as a high production cored pallet machine?

A. Yes.

The Court: Is that a tamper?

A. That is a vibration machine.

The Court: Vibrator?

A. Yes.

[fol. 2052] The Court: Cored pallet vibrator.

By Mr. Henry:

Q. And of what capacity?

A. Six hundred an hour.

Q. Is that a machine well known in the industry, Mr. Besser?

A. Yes.

Q. One of the leading types of machinery?

A. Yes.

Q. Block machinery?

A. And then the two models of plain pallet vibrating machines, the three-at-a-time and the two-at-a-time.

Q. You say the two-at-a-time was one that was brought out after the date when you acquired the stock?

A. Yes.

Q. What is that model and what is the productive capacity per cavity or per machine?

A. That makes four hundred an hour.

Q. That would be at the rate of two hundred per one cavity and four hundred for two cavity?

A. Yes.

Q. Is that correct?

A. Yes.

Q. What is the model?

A. That is Model 50.

Q. And have you observed that machine in operation?

[fol. 2053] A. Yes.

Q. What can you say about it?

A. Quite a good machine.

Q. As to efficiency?

A. I found it to be quite a good machine.

Q. Now, linked with the Stearns purchase in 1948 is the sale to Stone in 1950. When did you first meet Ben Stone?

A. The middle of February, 1950.

Q. Where did you meet him, and under what circumstances?

A. I met him in Mr. Rosenthaler's office, and at the Detroit Club.

Q. When did the negotiations that resulted in the so-called Stone agreement commence?

A. The middle of February, 1950.

Q. Were there frequent meetings between then and the end of March, in which you were present with Mr. Stone and others?

A. Yes.

Q. Were the terms and conditions of the purchase matters that were considered through numerous conferences?

A. Yes.

Q. Do you recall who represented Mr. Stone as attorney in those meetings?

A. Mr. Tilley.

Q. And do you know what office he is connected with?

A. That is the Miller law firm.

[fol. 2054] The Court: Miller, Canfield, Mr. Besser?

Mr. Henry: Miller, Canfield, Paddock & Stone.

The Court: There isn't any member of that firm alive, is there?

Mr. Babcock: The original firm? No, your Honor.

By Mr. Henry:

Q. In those conferences——

Mr. Babcock (Interposing): Practically Ed McDonald's firm now.

The Court: Is he over there, too? Does he work over there? Does he actively engage?

Mr. Babcock: I think he is more or less of counsel, your Honor.

The Court: Off the record.

(Discussion off the record.)

By Mr. Henry:

Q. All right. You mentioned Mr. Tilley. Do you recall any other attorney from that office also representing Mr. Stone?

A. Mr. Miller.

Q. And were your meetings with Mr. Stone's attorney held, in part, in the office there, in Miller, Canfield, Paddock & Stone's office?

A. Yes.

Q. And at those meetings, you were present with Mr. Babcock and myself?

[fol. 2055] A. Yes.

Q. And were other meetings held attended by Mr. Stone and Mr. Tilley, in Mr. Babcock's office?

A. Yes, sir.

Q. Let me ask you, Mr. Besser, whether these attorneys, either Mr. Tilley or Mr. Miller or any other attorney—I guess there were no others; those two represented Mr. Stone—was that through any direct or indirect arrangement by you?

A. Positively not.

Q. Either as to his choice of counsel or as to remuneration?

A. No, sir.

Q. You had nothing to do with that whatever?

A. Nothing whatever.

Q. He picked his lawyers on his own account?

A. Yes.

Q. And you and your attorneys met with them and negotiated this contract?

A. Yes.

Q. Which was executed on May 31st, 1950, at your office?

A. March.

Q. March 31st, 1950, at your office?

A. Yes.

Q. At Alpena?

A. Yes.

[fol. 2056] Q. State whether or not at that time Mr. Stone paid you the $10,000 down payment provided for in the contract?

A. Yes, he did.

Q. Now, I want to ask you, Mr. Besser, whether there is, outside of the contract itself, any arrangement or agreement existing between you and Mr. Stone?

A. There is not.

Q. Neither in writing or verbally?

A. That is right.

Q. And the whole arrangement for the disposition of the Stearns stock is embodied in the terms of the Stone agreement of March 30, 1950?

A. Yes.

Q. I would like your explanation of the purpose of the sentence in Paragraph 8 which reads:

> "In consideration of these licenses, Stearns will pay a royalty of $125 to Besser and $75 to Louis Gelbman of New York, New York, on each machine with molds

to make one at a time of twelve inch width by eighteen inch length units and any other size or combination of units in this size mold, and a royalty of $250 to Besser and $150 to Gelbman on each machine with molds to make two at a time of eight inch width by eighteen inch length units and any other size or combination of units in this size mold, and the further payments of [fol. 2057] $125 and $75 on the cored pallet machines."

What was the purpose of putting in that sentence?

A. It was to give information to Stone regarding the payments to Gelbman, which already were being made by Stearns.

Q. Well, as to what Gelbman was receiving under the 1942 license agreement, was there any change as to the one and the two at a time machines?

A. No.

Q. And the purpose of putting in the figures, you say, was to apprise Mr. Stone of the fact that the company of which he was buying stock was committed to make these royalty payments?

A. Yes, sir.

By Mr. Henry:

Q. If this agreement, when carried into effect, terminated the manufacture by Stearns of the three-at-a-time machine, Gelbman's revenue, as he is receiving it now, would be reduced proportionately to the number of three-at-a-time machines not manufactured; is that correct?

A. That was in connection with the plain pallet only.

Q. Not the cored pallet?

A. That is right.

[fol. 2058] Q. There is proposed in this agreement nothing relating to the cored pallet machinery, no restrictions?

A. No restrictions.

Q. To continuing the manufacture of cored pallet machinery?

The Court: I think I asked you this before, but while it is fresh, are there any cored pallet machines that manufacture three blocks at a time?

A. Yes, sir.

The Court: How many do they get on that? I think I asked you that before.

A. Six hundred an hour.

The Court: Six hundred? That is about 5,000 a day?

A. Yes. That is the Jolt-Crete machine.

The Court: That is the Jolt-Crete? That is what you call the Jolt-Crete?

A. Yes.

The Court: How does it get that name "Jolt". Is that taking—you remember some of those old patents where they jolt it instead of vibrating it? Is that the idea of that machine, too?

A. Yes.

The Court: There is a jolt in there?

A. Yes.

[fol. 2059] The Court: You don't call it vibration. That is just a jolt?

A. I have often looked that up in the dictionary and you know that those two words are interchangeable in the dictionary.

The Court: "Vibrate" and "jolt"?

A. Yes, they are.

The Court: Yes?

A. And in this case it is vibration in both places, too.

The Court: Yes. So that the cored pallet machine is a vibration machine?

A. Yes.

The Court: In a way?

A. Yes.

The Court: All right.

A. That is basically because the vibrating means runs three hundred or more——

The Court (Interposing): Yes.

A. (Continuing) —revolutions.

The Court: Yes.

A. A minute.

[fol. 2060] By Mr. Henry:

Q. The terms of this contract, which have been the sub-

[fol. 2061] ject of considerable testimony in this case, con-

template that the Stearns Company will not manufacture the three-at-a-time plain pallet machinery; is that correct?

A. Yes.

Q. And that is one of the machines that they are presently manufacturing and known as their Model 15?

A. Yes.

Q. What is your contention, Mr. Besser, with respect to whether or not the Model 15 three-at-a-time plain pallet Stearns machine infringes your patents?

A. The answer is "Yes".

The Court: All right.

By Mr. Henry:

Q. Now, will you state what patents owned or licensed [fol. 2062] by you and not owned or licensed by Stearns are infringed?

A. The Scott patent and the Wellnitz patent.

The Court: Well, the Wellnitz is——

Mr. Henry (Interposing): That is the height and density control patent.

The Court: That is not outlawed. That has run out, hasn't it?

Mr. Henry: No, no. That is a new one that is owned by Besser.

The Court: Oh.

Mr. Henry: The Wellnitz patent.

The Court: It has that long. All right. I haven't heard anything about that except in this case, have I?

A. No, sir.

By Mr. Henry:

Q. Well, now, I am not going into the Scott patent, but the question—because there has been a great deal of testimony in regard to that. But it is your claim that the Stearns, on its Model 15 plain pallet machine, infringes the Scott patent?

A. Yes.

Q. And does it likewise infringe with the two-at-a-time, or the two-at-a-time machine?

The Court: The plain pallet?

[fol. 2063] A. Yes.

Q. With the plain pallet?

A. Yes, it does.

Q. And on the one-at-a-time?

A. I don't know if they are making a one-at-a-time there.

Q. But the two-at-a-time and the three-at-a-time, both those——

A. (Interposing) Yes.

Q. (Continuing) —you claim it infringes?

A. Yes.

Q. But by this agreement entered into with Mr. Stone, you propose to give them a license?

A. Yes.

Q. On your Scott patent, as to the two-at-a-time machine?

A. Yes.

Q. But restricted as to the three-at-a-time, or not given as to the three-at-a-time?

A. Yes.

Q. All right.

The Court: You never threatened the Stearns Company with a patent infringement lawsuit, did you, at any time?

A. No, sir.

The Court: But everybody else that used the Besser, why, you found out about, they were threatened with a lawsuit, were they not—that you found out about?

[fol. 2064] A. No, sir.

The Court: Well, several of them were, weren't they, between the Scott patent and the Gelbman patent?

A. Besser Company was always careful not to threaten anybody.

The Court: I don't mean "threaten" in a way that is wrong. I mean "advise".

A. Yes, sir.

The Court: Well, the Stearns Company was never advised before this came up that they were violating or infringing any of your patents, were they?

A. They were not advised officially. It was common knowledge, though.

The Court: Yes. And common knowledge that you acquiesced in it, isn't that true, Mr. Besser?

A. We didn't give them a license.

The Court: You acquiesced in it, knowing that they were violating or infringing your license on the Scott and later on the—whatever the name of that other patent is—what is that?

Mr. Henry: Wellnitz.

The Court: During all of these years, you never at any time advised them not to do it or they would be liable for infringement, until this lawsuit came up, isn't that true? If it isn't, I would like to see the letter.

[fol. 2065] A. Yes, sir; that is true.

The Court: All right.

By Mr. Henry:

Q. I wish you would explain on the record, Mr. Besser, what this Wellnitz patent is?

The Court: I think he did yesterday, Mr. Henry. I don't want to get too interested in it, either, unless it is material for you. First thing you know, I will be looking at that patent. Unless you deem it material. If you do, I don't want to shut you out.

Mr. Henry: Not as a patent, your Honor. I am trying to have it appear from the defendant's testimony that by the Stone agreement, as a part of the consideration for the Stone agreement, Mr. Besser was giving to Stearns patent rights that they did not have, including the patent rights on the Scott patent as to the two-at-a-time and less and as to the Wellnitz patent, which is owned by Besser and which they do not have. He was giving that also to them on the two-at-a-time and less machines.

The Court: Well, the court hardly agrees with you on that. I don't say they were giving it to them. They were removing any possibility of interference in the future to something that they had acquiesced in in the past.

Mr. Henry: Making it a matter of——

The Court (Interposing): That is all it was.

[fol. 2066] Mr. Henry (Continuing): —of writing.

The Court: I don't know how much consideration anybody would consider that.

By Mr. Henry:

Q. Will you state whether or not at any time in your negotiations with Mr. Stone there was any agreement in writing or out of writing that Stearns buy Gocorp?

A. There was not.

Q. In your discussions from time to time with Mr. Wright—you heard his testimony here? I said you heard Mr. Wright's testimony?

A. Yes.

Q. Did you at any time make, as a condition of any sale to him, the obligation on his part to buy Gocorp?

A. No.

Q. What can you tell us as to the reason for including in Exhibit 159, the Stone agreement, the paragraph relating to Agolite?

[fol. 2067] A. The purpose of the paragraph about Ag-lite——

The Court (Interposing): I have one. Mr. Babcock is letting me have one.

A. (Continuing) —was giving an additional product to Mr. Stone which he desired, and then the final produce from the Ag-lite machine would be the aggregate which would be used to make block from.

By Mr. Henry:

Q. Did you consider and Mr. Stone consider that contract provision concerning the turning over of Ag-lite to Stearns was an item of value?

A. Very much so.

Q. An asset of value?

A. Yes.

Q. Now, my understanding it—and correct me if I am wrong—Ag-lite machinery is used for the purpose of manufacturing Ag-lite from raw materials?

A. Yes.

Q. And is the product of an Ag-lite plant useful in common by all manufacturers of concrete blocks?

A. Yes.

Q. So that the establishment of Ag-lite plants provides [fol. 2068] a present needed material for the manufacture of blocks?

A. Very much so.

Q. I believe you testified as to what the raw materials are that are handled through this machine?

A. Yes.

Q. Or the process, in the use of the machine?

A. That is clay or shale.

[fol. 2069] By Mr. Henry:

Q. Did Mr. Olsen ever make any direct overture to you, prior to—at any time, did he ever make any direct overture to you on selling you Gocorp?

A. No.

[fol. 2076] By Mr. Henry:

Q. Have you ever negotiated with Mr. Olsen on the purchase of Gocorp?

A. No.

Q. Now, Mr. Besser, I want to read from the complaint, Paragraph 23, which concerns leases:

> "Since in or about October, 1947, Besser Company has adopted and adhered to the policy of leasing certain concrete block machinery to users and of refraining from selling such machinery for the purpose of retaining control of used concrete block machines and preventing the marketing of such used machines in competition with new concrete block machines manufactured by Besser Co."

When did you first enter upon a program of leasing block machines or a part of the block machines manufactured?

A. In October of 1947.

The Court: Is the truth of that paragraph admitted? I mean, is it admitted to be true?

Mr. Neville: I believe so, your Honor.

Mr. Henry: Oh, no.

[fol. 2071] Mr. Neville: On the leasing, yes, it has been admitted.

The Court: The question would indicate that it had been admitted, but I didn't know.

Mr. Henry: No, your Honor. No, that is not admitted.

The Court: What is your answer to that?

Mr. Henry: Just a moment. I am reading from Mr. Speer's copy of the answer:

> "Answering the allegations of Paragraph 23 of plaintiff's complaint, this defendant admits that, Besser Manufacturing Company has followed the practice and policy of leasing certain concrete block machinery to users thereof, but except for such admission denies the allegations of Paragraph 23."

The Court: Well, what you really mean by that is that you don't draw the inferences that the Government seems to draw by having that statement in the bill of complaint.

Mr. Henry: We deny that.

The Court: You say, "We do it, but we have a right to do it, and there is nothing wrong with it and no wrong intended."

Mr. Henry: That is true. And also that we admit only the leasing of certain block machinery, and not all block [fol. 2072] machinery manufactured.

The Court: All right. I would expect you would designate which ones. We might as well right now. It is the three block plain pallet?

By Mr. Henry:

Q. Will you tell the court, Mr. Besser, what machines—let me first ask you——

The Court (Interposing): Go ahead.

Q. (Continuing) —whether any——

The Court (Interposing): Go ahead.

Mr. Henry: May I first ask a preliminary question?

The Court: Yes. Certainly.

By Mr. Henry:

Q. Is there any machinery, block machinery, manufactured that is exclusively leased?

A. Yes.

Q. Now, will you state what machinery is exclusively leased?

A. The front pallet feed machine.

The Court: Is that one, two or three? Or may it be made in all ways?

A. It may be in all sizes, but customarily it is three.

The Court: That is the three pallet front feed machinery?

A. Yes.

The Court: Your practice is to lease that and not sell it?

[fol. 2073] A. Yes.

The Court: I suppose according to the number of blocks they make, or what?

A. Yes.

The Court: All right.

By Mr. Henry:

Q. You say this policy was inaugurated when?

A. October, 1947.

Q. And has that policy been unaltered since that date?

A. Yes.

Q. Do you also lease similar machinery without the front feed pallet?

A. Yes.

Q. And do you likewise sell machinery without the front feed pallet?

A. Yes.

Q. What model are you referring to, by trade name and number? Your V-3 or Super-Vibrapac? I mean, give me the trade name of what you lease and what you lease and sell?

A. The ones we lease are the V-3-R. And the other, which is sold, is a V-3.

Q. Now, the V-3 is without the return feed pallet?

A. Yes.

Q. And that machine you both lease and sell?

A. Yes.

[fol. 2074] Q. And the V-3-R with the return feed pallet you lease only?

A. Yes.

Q. What about foreign orders?
A. They are sold only, there.
The Court: You want to get your money in that case?
A. Yes.
The Court: All right.

By Mr. Henry:

Q. That is because you want to get your money, F.O.B. dock?
The Court: I suppose.
Mr. Henry: Mr. Speer, let me have Exhibit 152, please.
The Court: What is the feature of the front feed? Do you really make a front feed of the mix?

A. No. Just the pallets.
The Court: Oh.
A. You see, the pallets with the blocks on are taken off from the front.
The Court: Yes. Now, this front feed for the pallet, that is the means that they make to take them off?
A. The pallet with the block, and also puts the empty pallet into the front at the same time.
The Court: It makes it automatic. It is a return.
A. That is right.
[fol. 2075] The Court: That would probably be as good a name for it, the return pallet?
A. Yes.
The Court: The return pallet feed. That is right, isn't it?
A. Yes.
The Court: Because that entire pallet comes off, doesn't it?
A. Yes. It goes onto the racks.
The Court: That crane takes and pulls it over?
A. Yes.
The Court: The man puts another pallet on, and that pallet goes back into the machinery and receives the block, and it works automatically?
A. Yes.

The Court: All right. I don't expect you to rename your machine the "Return Feed Pallet", but just keep that in mind in the future.

Mr. Henry: I think the word or the letter "R" shows it.

The Court: Is that what it is?

By Mr. Henry:

Q. The V-3-R means "return", doesn't it, Mr. Besser?

A. Yes.

[fol. 2076] Mr. Henry: Vibrapac, three-at-a-time, return feed pallet.

The Court: I see.

Mr. Henry: V-3-R.

The Court: "Great minds".

By Mr. Henry:

Q. I hand you Plaintiff's Exhibit 152, and without—pardon me a moment, Mr. Speer. I have withdrawn that exhibit, which is the Longnecker lease, and instead I hand you the Plaintiff's Exhibit 101, which appears to be a lease form with no writing on it. Is that correct?

A. Yes.

Q. And is Exhibit 101 the form you use on all leases?

A. Yes.

Q. What can you tell the court as to the terms of payment that the lessee undertakes to pay you for a leased machine? There is a down payment, is there not?

A. Yes.

Q. And following the down payment, what are the terms of the rental? And I refer you to Number 4 on page 3.

Mr. Neville: Before the answer, I want to make an objection. It seems to me we already have the exhibit in evidence which would show it by the terms of the lease, and if we use that particular lease, if we are going to discuss the terms of the lease——

[fol. 2077] The Court: This is a sample lease before the court, isn't it?

Mr. Henry: Instead of the—first I handed the witness Exhibit 152, which is the Longnecker lease, and then I

handed him a similar Exhibit 101 which is the lease form only offered by the Government.

The Court: Well, of course, the lease form does not amount to anything.

Mr. Henry: Except that it does specify——

The Court (Interposing): Oh, it does. I looked for that to be blank, but I see that it is right in here.

Mr. Henry: It is in here.

The Court: $500 per month rental, minimum monthly rental, or one cent per eight by eight by sixteen block equivalent when that is greater. That is your usual contract?

A. Yes, sir.

The Court: Now, when you sell them, what do you charge for them? What do you charge these people over in Iceland and Greenland and North Africa that you have got them sold to? How much do they pay for that block machine?

A. The price of those machines that we sell is from $20,000 to $40,000.

The Court: About $40,000?

A. Yes.

[fol. 2078] By Mr. Henry:

Q. Under the terms——

The Court (Interposing): Excuse me. What is the life of that machine, Mr. Besser?

A. Ten years.

The Court: All right.

By Mr. Henry:

Q. And is the lessee required to pay the one cent per block throughout the ten year period, or may that be reduced by lease terms to a lesser amount per block?

A. Yes.

The Court: How long does that run for? That runs forever, doesn't it?

A. Five years.

The Court: Five years?

A. This runs for five years.

The Court: Then you make a new contract?

A. Yes.

The Court: That is, he doesn't own it at the end of five years?

A. No.

The Court: It is just like paying rent on a house?

A. Yes.

The Court: But you are not taking it away from him, I take it for granted, by some whim or caprice. You have to have a good reason. He has to make a breach of the con-

[fol. 2079] tract?

A. Yes. It is a firm lease.

The Court: I see.

A. There is one other point right in there. You mentioned the advance deposit. Well, a part of that is credited each month on his monthly payment.

The Court: I suppose that is true. How much is that advance deposit, anyway?

A. That is usually twenty per cent of the grand total.

The Court: Well, that is around $15,000?

A. Yes. And he gets one per cent of that back as a credit each month.

The Court: All right.

A. He gets all of his deposit back.

The Court: Well, he gets all of his deposit back, but he never sees it, does he? It is credited against his account?

A. Yes.

The Court: That is a paper transaction.

A. It makes quite a reduction in his monthly payment.

The Court: Yes, it makes quite a reduction in his monthly payment, but he gets it back because he doesn't have to pay something that he would ordinarily have to pay. All right. The court understands it.

[fol. 2080] By Mr. Henry:

Q. Is the lessee required, in purchasing your machine, to buy the supplemental equipment, such as hoists, racks and pallet forms?

A. No.

Q. What about mixers?

A. He is not required to buy them.

Q. If a customer or lessee wants to get all of the equipment and attachments necessary to operate the block plant, you are in a position to sell him complete equipment; is that true?

A. Yes.

Q. Machine and equipment. But if he doesn't want to buy the pallets or the racks or the hoists or the mixers, or other equipment, other attachments, he is free to go on the market and do that?

A. Yes, he is.

Q. And would own those independent of his lease on the machine?

A. Yes.

Q. When a customer leases one of your machines, what do you do about putting it in his plant? I ask, what do you do as a part of the lease agreement?

The Court: You mean whether they install it or not?

Mr. Henry: Yes.

The Court: You install it complete, ready for work, [fol. 2081] don't you?

A. We do not install the machines.

The Court: Oh.

A. We give instructions to have them installed, and we furnish our men to particularly give instructions in the use of the machine.

The Court: They pay the cost of that?

A. No; they don't pay for that.

The Court: They pay the——

A. (Interposing) They pay the cost of installing.

The Court: Yes. What is what I mean.

A. Yes.

The Court: But not the instruction that they get. That is done to make sure that they know how to operate the machine?

A. Yes.

By Mr. Henry:

Q. Well, you always send a man to the plant to put the machine in operation?

A. Yes.

Q. In their plant?

A. Yes, we do.

Q. And upon installation, are you required to and do you, under your contract, furnish service for the machine?

A. Yes.

[fol. 2082] Q. Paragraph 15 of the conditions reads that Besser will maintain a staff of engineers who will make periodic visits to the user's plant to inspect the operations of said plant and equipment, and make suggestions for securing good production and high grade results, and a high grade product. Both parties hereto will actively work together for this purpose. Now, is that literally carried out?

A. It is.

Q. By you, as lessor of the machine?

A. Yes, sir.

Q. And you do give that service?

A. Yes.

Q. Without charge to the customer?

A. Without charge.

[fol. 2083] By Mr. Henry:

Q. You testified the other day that a machine that is listed or leases as having a value in case it was sold of $40,000 has a cost of $20,000?

A. Yes.

Q. That is the manufacturing cost?

A. Yes.

Q. Now, in your business, Mr. Besser, what additional costs in the way of selling expense and other items go into the cost to you?

A. There is the selling and promotion and service expense in addition to that, which is about fifty per cent more.

Q. Building it up to around $30,000?

A. Yes.

Q. And, in addition to that, what service that costs you money goes into your sale at your general figure of $40,000?

A. The service of starting the machine, and looking after it thereafter.

Q. You actually have an investment in the machinery that is placed in the customer's plant, under lease, of somewheres upwards of $30,000; is that correct?

A. Yes.

Q. From your experience as a manufacturer of block machinery, do you have a very intimate knowledge of the block manufacturers' business?

A. (No answer.)

[fol. 2084] Q. And over all of the years you have been in the business of making the machinery?

A. Yes, very much so.

Q. What is the field that you keep in close touch with?

A. The whole country.

Q. Could you tell the court to what extent you have visited block plants throughout the country, over the years, either in time or number of visits, or generally?

A. I spend at least one-third of my time in visiting plants, that way, throughout the country.

Mr. Speer: Well——

A. (Interposing) And giving them service.

[fol. 2085] By Mr. Henry:

Q. You say you spend one-third of your time on these visits. Have you visited the block plants where the machinery is made by other manufacturers than you?

A. Yes.

Q. And some plants, I presume, have both your machinery and other machinery in them?

A. Yes.

Q. Can you tell—first let me ask you whether the retail price of block to the contractor or consumer varies in different localities?

A. Somewhat.

Q. Due to what, principally?

A. Variation in the cost of the aggregate, mostly.

Q. Within general limits, can you state what the price of block eight by eight by sixteen is to the customer, today?

A. The average price is 16 or 17 cents.

Q. Now, from your knowledge over the years, will you

state how that price compares with the price of block to [fol. 2086] the consumer ten years ago?

A. The price is just about the same.

Q. And for a period of how many years has—let me ask you—I will withdraw that question. Has the retail price of blocks remained fairly constant over the number of years?

A. Yes, it has.

Q. Over how many years?

A. The past twelve or fifteen years.

Q. Now, what can you say as to how the cost of machinery for the manufacture of blocks—whether that has fluctuated and approximately what that cost to the manufacturer is for the use of the machinery that makes the block?

A. The cost for the use of the machinery and, therefore, the cost per block, has become less.

By Mr. Henry:

Q. Your testimony before recess was that the cost to the consumer of blocks is currently 16 or 17 cents?

A. Yes.

Q. And that that scale or price has remained fairly constant continuously over the period of ten years; is that correct?

A. Yes.

[fols. 2087-2088] Q. What can you say as to whether or not the price of one cent down to three-quarters of a cent per block for use of the machinery, as currently under your leases, whether that cost has likewise remained constant over the years?

A. Yes, it has.

The Court: Does the witness say—and I want to make sure—that you could buy a concrete block today as cheaply as you could ten years ago?

Mr. Henry: Yes, your Honor.

The Court: Is that right?

By Mr. Henry:

Q. That is your testimony, Mr. Besser?

A. Yes.

[fol. 2089] By Mr. Henry:

Q. Referring now to Heading 5 in the very last para-
[fol. 2090] graph, Number 24, of the complaint, I wish to read it:

> "Besser Co. and Jesse H. Besser have monopolized the aforesaid trade and commerce in concrete block machines and have acquired and obtained the control of approximately eighty per cent of the production of such machinery."

Now, Mr. Besser, I will not inquire concerning the first allegation in that paragraph, because that is a matter for consideration by the court, but I do ask you whether or not it is true that Besser machinery is accountable for the production of approximately eighty per cent of the number of blocks produced in the business?

Mr. Neville: Well, I object to that question, your Honor, because the answer necessarily will call for a self-serving declaration.

The Court: You may answer.

A. No, it does not.

Mr. Henry: I think, if your Honor please, that when the exhibits that we are working on are re-submitted, that further reference to that will be made in connection with this item.

The Court: All right.

By Mr. Henry:

Q. Dropping down to Paragraph C under Paragraph 24, I read:

[fol. 2091] "Persons desiring to engage in the manufacture and sale of concrete block machines have been excluded therefrom."

Now, I will ask you to state, in connection with that——

The Court (Interposing): What is your answer to that? You deny it?

Mr. Henry: Yes, your Honor.

The Court: All right.

Mr. Neville: Same objection.

The Court: What is it?

Mr. Neville: That the answer necessarily will call for a self-servicing declaration.

The Court: Can't a man defend himself for what he is accused? Is that the position of the Government, you can say anything about them you want to? And when he gets on the stand he can't deny it?

Mr. Neville: Well, he can't deny it and say he is not, that the allegation generally is not true, your Honor.

The Court: I think he can. If he can't, why the law, my conception of it, is wrong.

Mr. Neville: This part of the complaint, if I may point out to your Honor, is a special feature of a pleading which merely states the conclusions of what happens as a result of these different allegations.

[fol. 2092] The Court: Well, we will just let him make his own conclusions now. Let's see what he says.

A. I would say positively that nobody had been kept from making block machines.

By Mr. Henry:

Q. No one excluded from the business of manufacturing block machinery?

A. Nobody excluded.

Q. Now, let me ask you this question——

The Court (Interposing): I suppose what you mean by that, what the pleading means, the actions resulted in that. Isn't that what the Government means?

Mr. Neville: Precisely, your Honor.

The Court: All right. He can deny it. He has denied it.

By Mr. Henry:

Q. Will you state whether or not block machinery utilizing the principle of vibration may be manufactured without violating the patents licensed to or owned by you?

A. Yes; they may be and are.

The Court: Wait a minute. All right. You say that it is possible to have a vibrating machine, that has vibration and tamping, and that it doesn't violate your patents,

either that you have directly or that are controlled by you?

A. Yes, sir.

[fol. 2093] The Court: Well, do they turn out any 6,000 a day, blocks a day? Could you have one like that?

By Mr. Henry:

Q. Do you want to state an example of a machine that utilizes the principle of vibration without violating the patents?

A. Yes, sir. That is one of the best examples which has been stated, is the Jolt-Crete machine.

The Court: The Jolt-Crete machine? That is a cored pallet?

A. Yes.

The Court: What else besides Jolt-Crete?

A. The question is narrowed now to manufacturing 600 an hour?

The Court: No, no.

Mr. Henry: No.

The Court: No. He asked you——

By Mr. Henry (Interposing):

Q. The question was applied to any machine or any machinery manufactured.

A. Yes.

Q. Regardless of capacity.

A. In the case of the Jolt-Crete, they are doing those things and they are making 600 an hour also. And the others that are doing those things——

The Court (Interposing): Now, wait a minute. Jolt-Crete is not what you would truly call a vibrator. It is a [fol. 2094] tamper, isn't it?

A. No, sir, it is not.

The Court: I thought you said that there was a little bit of jolt in there, and that is not vibration.

A. No. I said that they had over 300 R.P.M. on their vibrating shaft. Therefore, it is a vibrating machine.

The Court: All right. They make that. But they make 600 an hour. That is 4800 a day. On a cored pallet. All right. Now, what e ; what other machines?

A. The Fleming machine; the Appley machine.

The Court: Wait a minute. What is the Fleming machine? Is that a cored pallet or plain?

A. That is a plain pallet.

The Court: How many do they make? How many block can you make on their plain pallet?

A. They make 1800 to 2,000 an *hour*.

Mr. Speer: What is that?

A. Per day. 1800 to 2,000 per day.

The Court: All right. It is easy to get the hours and days mixed in these things. That is 2,000 a day. All right.

By Mr. Henry:

Q. Is that on a delivery of—how many block on a pallet?

A. That is one-at-a-time with the plain pallet.

[fol. 2095] Q. Do you know of that type of machinery being set up in groups or batteries of machines?

A. Yes.

Q. So that three machines, working side by side, would have the capacity equal to the capacity of your machine, would it not?

A. Yes; that is right.

The Court: Well, another way to put that, and the way the Government would like to have you put it, is that one machine of yours is equal to three of the others.

Mr. Henry: In productive capacity.

The Court: Instead of three being equal to one. Of course, I think that is the way the Government would rather have you make that statement on the record.

Mr. Henry: Well, in the capacity, that would be true; yes.

The Court: Yes.

By Mr. Henry:

Q. The capacity of the Appley, do you know what that is?

A. That is about the same.

The Court: Same as what?

A. Same as Fleming.

The Court: 2,000 a day?

A. 1,800 to 2,000 a day.

The Court: Well, but do they have two pallets or three [fol. 2096] pallets, or two blocks or three blocks per single pallet in any one of those machines?

A. No. Those are both one-at-a-time machines.

The Court: You would have to have three of their machines to get the results that you get with one of yours?

A. Yes.

The Court: All right.

By Mr. Henry:

Q. What is the comparative—do you know what those machines sell for?

A. They sell for $1500 to $2,000.

The Court: They sell for that?

A. Yes, sir.

The Court: What is the principle of vibration in the Fleming? Was it Fleming?

Mr. Henry: Yes.

A. Yes.

The Court: What is the principle of vibration in the Fleming?

A. The principle of vibration is the off-center weight on a shaft.

The Court: And does it vibrate independently of the rest of the machine?

A. No, it does not.

The Court: Does the Appley machine vibrate independ- [fol. 2097] ently of the rest of the machine?

A. We have not determined that it does.

The Court: You mean there has been some question about that? If it does vibrate independently from the feed box or the rest of the machine other than the resilient mounting that it is placed upon, it violates the Gelbman patents in your opinion, does it not?

A. In that case, yes, sir.

The Court: All right.

By Mr. Henry:

Q. And you have that in mind in agreeing to license them for the two-at-a-time machine?

A. Yes.

Q. Now, reading Paragraph D of Paragraph 24:

"Purchasers and users of concrete block machines have been denied access to a free competitive market therefor."

By Mr. Henry:

Q. So far as you have knowledge, or from your knowl-
[fol. 2098] edge of the industry, state whether or not there is free competition in the marketing of block machinery?

Mr. Neville: Now I will make my objection.

The Court: Cross-examination. It might be objectionable on the ground it is a conclusion.

Mr. Speer: It is an opinion.

The Court: But, nevertheless, what he means, and I think the question, the bill of complaint intends to say that because of the actions this resulted, and I think that he is permitted to deny it. I think he should be permitted to deny it—or admit it. Of course, if he should admit it that would make it much simpler than if he should deny it.

A. There is certainly the utmost of freedom of competition.

[fol. 2099] Cross-examination.

By Mr. Neville:

Q. Mr. Besser, while we still have fresh in our minds the question of competitors being free to manufacture machines which do not infringe with your patents, do you know of any manufacturer today in production who manufactures a three-at-a-time plain pallet machine which does not infringe on your patents?

A. No.

Q. So that anybody who manufactures a three-at-a-time plain pallet machine today is, according to you, not infringing on your patents?

A. As far as I know.

Q. That is your position. All right. Now, I believe you have testified that you are familiar with the block industry as distinguished from the block machinery industry?

A. Yes.

Q. I think you said you spend one-third of your time in that part of the industry?

A. Yes, sir.

Q. Would you be able to tell us, Mr. Besser, what the total output of blocks would be for the year 1949, for instance?

The Court: Of what?

[fol. 2100] Mr. Neville: Concrete blocks.

A. Something over one billion.

The Court: You mean in the——

Mr. Neville (Interposing): In the industry.

The Court: In the industry. In——

Mr. Neville (Interposing): 1949.

The Court: The total concrete blocks?

Mr. Neville: Blocks manufactured or produced in 1949.

The Court: All right. He says over a billion something.

By Mr. Neville:

Q. Now, does that——

The Court (Interposing): What did you say? I would like to have your answer on that question. We have some charts around here that ought to mean something. I don't know. How many? One billion what? I don't expect you to be——

A. (Interposing) I don't think the final figures are in for 1949, but the industry has been making a billion or more for a number of years. Therefore, I would say that in 1949 they made over one billion.

The Court: All right.

By Mr. Neville:

Q. One billion?

A. One billion; yes.

[fols. 2101-2102] The Court: Are we going to have some figures on that, gentlemen? Isn't that what we started to have some figures on before?

Mr. Babcock: So far as disclosed by the interrogatories.

Mr. Henry: For the years 1946, 1947 and 1948.

The Court: The Government tried to show a report. That was back in 1929. Did you have any one of the recent years? Has it been submitted?

Mr. Neville: I propose, your Honor, to offer in evidence the Census of Manufacturers for the year 1947 which has figures for 1947.

The Court: All right. All right.

By Mr. Neville:

Q. But for 1949, your estimate would be that the industry produced, from all concrete block machines on the market or in use, something over one billion blocks?

A. Yes.

[fol. 2103] By Mr. Neville:

Q. What would be the figures for the year 1948, Mr. Besser, if you know?

A. That would be the same.

Q. I see. Now, I am going to show you this brochure and ask you what it is, if you can tell us?

A. Census of Manufacturers, 1947.

Q. As it applies to the concrete, gypsum, mineral wool and stone products, lime; is that correct, Mr. Besser?

A. Yes.

The Court: Wait a minute. Does that go beyond the concrete block industry?

Mr. Neville: Yes. It covers a number of other items, your Honor. But I am not going to offer it as to the other items. Just as it applies to the concrete blocks.

The Court: All right.

By Mr. Neville:

Q. At the bottom we read "U. S. Department of Com-
[fol. 2104] merce, Bureau of Census, Washington, 1949."

And at the top there is an identification which reads "M. C. 32 D". Is that correct, Mr. Besser?

A. Yes.

Mr. Neville: I offer this document in evidence as Exhibit 182.

(The document referred to was thereupon marked Government's Exhibit 182 for identification.)

The Court: Any objection?

Mr. Babcock: I wonder if counsel will certify to the court and to us that they personally have obtained this from the U. S. Department of Commerce? We don't know anything about it or its source at the moment, and it doesn't certify itself.

The Court: I know it doesn't. But will you certify to that effect?

Mr. Speer: Yes, we will, your Honor.

The Court: Mr. Speer so certifies, and I will accept it. I will accept the certification. As to any other objections, I want to know.

Mr. Babcock: I would like to take a moment to look at it. If I notice anything else, I will state the objection on the record.

The Court: All right.

[fol. 2105] By Mr. Neville:

Q. I might state from memory, having looked at that exhibit, that the figures for the year 1947 read approximately 1,042,000,000.

The Court: The witness said, as I remember, that he based the 1949 figure on the fact that for the past two or three or more years the concrete blocks produced had been slightly over one billion.

A. Yes.

The Court: That bears him out, doesn't it?

Mr. Neville: Yes, it does.

The Court: He didn't have the government report before him when he gave that testimony.

Mr. Neville: No. I think that I have taken the answer at its face value.

By Mr. Neville:

Q. Now, I am now looking, Mr. Besser, at the Defendant's Exhibit 180, which is part of the August issue, 1949, of "Pit and Quarry". Now, this particular exhibit has a story, has it not, of the history of the Besser Company?

A. Yes.

Q. Now, where did "Pit and Quarry" get the information to write this story, Mr. Besser?

A. From the Besser organization, mostly.

Q. You have read this?

A. They came to Alpena and interviewed a number of [fol. 2106] the Besser organization.

Q. I see. Were you interviewed yourself, Mr. Besser?

A. Yes.

Q. You have read the story, have you?

A. Yes.

Q. And you vouch for its accuracy?

A. I don't recall anything in there that isn't accurate.

Q. I would like to read a paragraph from the top of page 134:

> "Based on the ultra-conservative figure of 2,000 operating hours per average machine per year, it is evident that the total annual output of Besser block machines must be considerably in excess of one billion units or enough to build some 200,000 concrete masonry homes of average size."

That would seem to indicate, would it not, Mr. Besser, that Besser machines produced the great bulk of concrete [fol. 2107] blocks which are produced today?

A. That would seem to indicate that; yes.

The Court: Let me take a look at that, will you?

(Document handed to the court.)

By Mr. Neville:

Q. Now, I believe that you testified earlier, or on direct examination, that to your knowledge there were some twelve companies in business today which you considered

competitors. I am not sure, but did you name those companies?

A. I named quite a number of them.

Mr. Henry: I think, Mr. Neville, the companies he named were companies in business in 1931 that are still in business.

Mr. Neville: Yes, but I am speaking now of the companies which——

Mr. Henry (Interposing): There may be eight or ten companies.

Mr. Neville: Yes, but I am speaking now of the companies named by Mr. Besser which are in business today.

By Mr. Neville:

Q. Now, I wish you would be good enough to name two or three of those now, Mr. Besser.

The Court: Two or three?

Mr. Neville: He has already named them, your Honor, and I don't recall the names, but I wish he would name two or three of those companies which he has named.

[fol. 2108] The Court: That were in business?

Mr. Neville: No. That are in business today as competitors of the Besser Company.

The Court: All right.

A. The Stearns Company. Gocorp Company. Lith-I-Bar Company. Multi-Plex.

By Mr. Neville:

Q. Now, if you will stop there for a moment, what type of a machine does the Multi-Plex Company manufacture?

A. They make both vibrating and tamping machines, and also presses.

Q. Speaking now of the vibrating machines that are manufactured by Multi-Plex, would you describe the type of machine that is manufactured?

A. Well, whether they use tamping with that, I would not be able to say. Whether it is simply vibration or whether they combine tamping with vibration, they have several models there on that.

Q. Well, do they feature a cored pallet or a plain pallet?
A. A cored pallet.
Q. A cored pallet?
A. Yes.
Q. Now, you were about to continue, after mentioning Multi-Plex?
A. Yes. The Kent Machine Company.
Q. All right. On Kent, what type of machine do they manufacture?
A. They make cored pallet machines.
[fol. 2109] Q. All right. Any other companies?
A. The Fleming Company in St. Louis.
Q. What do they make?
A. Plain pallet machines.
Q. All right. What type of plain pallet machines?
A. Vibrating machines.
Q. Yes. But how many? One-at-a-time?
A. One-at-a-time.
Q. Or three-at-a-time?
A. One-at-a-time.
Q. One-at-a-time. All right. Any other company?
A. The Appley Company of St. Petersburg. That is a cored pallet machine, vibrating machine. The Columbia Machine Company of Portland.
Q. I didn't get your answer. The Columbia, Mr. Besser?
A. The Columbia Machine Company of Portland, Oregon.
Q. Yes. What type machine do they manufacture?
A. They make a plain pallet vibrating machine.
Q. One-at-a-time?
A. Two-at-a-time.
Q. Two-at-a-time? That is two-at-a-time?
A. That is right.
Q. Have you ever threatened Columbia with an infringement suit?
A. No.
[fol. 2110] A. Have you discussed with Columbia the possibility that they might be infringing on your patents?
A. We have.
Q. You have.

A. There is the Scripps-Pierson Company up at Seattle.

Q. What type machine do they manufacture?

A. They make a plain pallet vibrating machine.

Q. One-at-a-time? Two-at-a-time?

A. That is a three-at-a-time.

Q. A three-at-a-time?

A. Yes.

The Court: Who is this?

A. Scripps-Pierson Company.

The Court: They have a three-at-a-time machine?

A. Yes.

The Court: Does that use the Scott patent?

A. We have not—I don't know about that.

The Court: Does it use the Gelbman patents?

A. I am not in a position to state on that.

By Mr. Neville:

Q. Have you discussed with the Scripps-Pierson Company the possibility that they might be infringing on your patents, Mr. Besser?

A. Yes. And as I remember now, the conclusion was that they were not, at that time.

[fol. 2111] Q. That they were not?

A. Yes.

The Court: Which company is that, Mr. Besser?

A. The Scripps-Pierson Machine Company.

The Court: Where is that located?

Mr. Neville: In Washington.

The Court: A vibrating machine, three pallet—or three block, single pallet?

Mr. Neville: I understand it is a three-at-a-time plain pallet vibrating machine.

The Court: And the conclusion was that they were not infringing. Does he mean by that, his conclusion or their conclusion?

By Mr. Neville:

Q. What do you mean by that, Mr. Besser?

A. I mean the Besser conclusion.

The Court: All right.

By Mr. Neville:

Q. Then would that be an exception to the statement that you have made previously to the effect that to your knowledge there was no manufacturer producing a three-at-a-time plain pallet vibrating machine today who is making such a machine without infringing on your patents?

A. Yes; that would be an exception.

Q. Is that the only exception?

A. That is the only one I can think of.

[fol. 2112] Q. I would like to refer just a minute to your testimony regarding the purchase of Consolidated. Now, what exactly did that purchase cost the Besser Manufacturing Company, Mr. Besser?

A. The first purchase of stock from Frank Lay was $10,000.

Q. Yes.

A. And the Besser Company put up money for the past due accounts and did take over a little other stock. I do not have it in mind what the other—what the other amounts were. But I remember the first transaction definitely. $10,000 to Frank Lay.

Q. Can you give us approximately what it meant, as an out-put of dollars and cents, to the Besser Manufacturing Company, to acquire the stock of Consolidated? How much money was risked?

A. Another, probably, another $10,000.

Q. So, in all, it was a $20,000 venture?

A. Well, in addition to that, of course, there was the payment of past due accounts of the Consolidated Company.

Q. Yes.

A. Which ran a lot more than that, the way it worked out.

Q. Do you recall what it did amount to?

A. That was about $100,000.

Q. So now we are up to $120,000; is that right? Does that represent the figure?

A. Yes.

[fol. 2113] Q. In round figures?

A. Yes.

Q. Now, what did Besser get for that? Aside from the stock certificates?

A. Well, the only thing else we got was an account receivable.

Q. What did that amount to?

A. Well, the amount just stated, which I just stated. The amount we advanced on the accounts there, about $100,000.

Q. Well, I understood your previous statement to be accounts payable. Am I incorrect in that? That you assumed obligations on the part of Consolidated?

A. That is right.

Q. Which amounted to $100,000?

A. Yes.

Q. Now we are speaking of an account receivable, are we not?

A. The same amount was there. It became an account receivable when the Besser Company took it over. Account receivable as far as Besser was concerned. Account payable——

Q. (Interposing) Did you recoupe the $100,000?

A. It was accounts receivable, as far as Besser was concerned. Accounts payable as far as Consolidated was concerned.

Q. What I am trying to get at, Mr. Besser, what did the Besser Manufacturing Company put out in the way of money to acquire the Consolidated?

[fol. 2114] A. According to my estimate there, it was $20,000 to $100,000.

Q. All right. But the $100,000, if I understand you correctly, you could consider, as far as Besser was concerned, as an account receivable which eventually, if you did make collection, constituted a recoupement for Besser of $100,000?

A. Yes, sir.

Q. Which, in the last analysis, means that the Consolidated deal meant an out-put of $20,000; is that correct?

A. If it ever made the collection.

Q. Did it ever realize——

A. (Interposing) No, it did not.

Q. To what extent did the collection materialize, if it did at all?

A. It didn't materialize, except as shown on the books of the Consolidated Company there, when the assets were sold.

Q. Did the Besser Manufacturing Company pay out the $100,000?

A. Yes.

Q. To whom?

A. To numerous creditors, corporations and banks, of the Consolidated Company.

Q. And never got any of that back?

A. Well, we got some of that back in the final transaction whereby the assets of the Consolidated Company were sold.

Q. Well, before I come to that, did you make any collection on the accounts receivable?

[fol. 2115] A. We made no collection, no sir. But, as I said—except as some of the assets——

Q. (Interposing) I will come to that.

A. (Continuing) —were disposed of. Otherwise, there was no collection.

Q. Now, you might tell us what assets Besser acquired in this transaction?

A. The work in process and some machine tools.

By Mr. Neville:

Q. And what was that, Mr. Besser?

A. That was concrete block machines and parts, and mixers.

Q. Well, perhaps I didn't understand.

The Court: That only means the machines that they are then working on.

A. Yes.

[fol. 2116] The Court: That is all.

By Mr. Neville:

Q. In the state of construction?

The Court: That is it.

A. Yes.

By Mr. Neville:

Q. What machines were being constructed, or would you consider "work in process"?

The Court: Well, I don't see how he could remember that.

Mr. Neville: Well, these machines are not made by the dozen, your Honor. They are made one, two and three at a time.

The Court: I know it. He would have to have a look—I should think—he would have to have a look at the balance sheet of the Consolidated at that time, which may be available here.

Mr. Neville: I assume he looked at the plant, too, at that time, your Honor. He would see with his own eyes what machines——

The Court (Interposing): How long ago was this?

Mr. Neville: 1931.

A. Yes.

The Court: He ought to remember everything that happened that year.

Mr. Neville: Well, I will ask him in this way, if he [fols. 2117-2120] remembers.

By Mr. Neville:

Q. Do you remember, Mr. Besser?

A. Well, I have stated that the work in process consisted of the block machines, and parts, and mixers.

Q. Do you remember how many block machines?

A. No.

Q. All right. What else would you include under assets?

A. Machine tools.

[fol. 2121] By Mr. Neville:

Q. Was there a plant there, Mr. Besser?

A. Yes.

Q. Can you tell us as to the valuation of that plant?

The Court: Are you talking about the plant as real estate, or as equipped with machinery in it? I would like to know what you mean by that.

Mr. Neville: Well, then, I would like to break it down.
The Court: All right.

By Mr. Neville:

Q. First of all, did Besser acquire the real estate of the Consolidated Company?

A. There was a mortgage on the real estate.

The Court: Well, did you acquire the real estate subject to the mortgage?

A. I think we did. That may have been turned back immediately.

The Court: You can see, when a man can't remember that about the transaction, he would have some difficulty re-
[fol. 2122] membering about the number of screws and bolts that were in process at that time.

By Mr. Neville:

Q. What buildings were on the real estate, Mr. Besser?

A. There was a shop and office buildings on the real estate.

Q. And can you give us figures on the valuation of that shop and office buildings?

A. Well, I really couldn't, Mr. Neville.

By Mr. Neville:

Q. What machinery was moved from the Consolidated plant to the Besser plant at Alpena?

A. About one-fourth of the machinery was moved to Alpena.

Q. And what did that consist of, if you remember?

A. Lathes and drilling machines.

[fol. 2123] Q. Does that mean that from the time of that removal the Consolidated plant proper was an incomplete plant, a plant that was not equipped to produce concrete block machines?

A. The attempt was made right then to dispose of the other assets.

Q. Please answer my question.

A. At Adrian.

Q. You haven't answered my question.

A. Yes.

Mr. Babcock: I will ask to have clarified the use of the word "proper". I don't know whether counsel means what was left at Adrian or what was removed to Alpena.

The Court: I think the question is a fair one. He wants to know, with this one-fourth of the machinery moved out of this Consolidated, it would still be considered a concrete block machinery company, intact, able to make concrete block machines. I think the question, as read——

Mr. Babcock (Interposing). As moved to Alpena?

The Court: Oh, no, no.

Mr. Neville: Well, that isn't the question. Mr. Babcock is confusing it now.

[fol. 2124] The Court: What was left at Adrian.

Mr. Neville: What was left at Adrian.

Mr. Babcock: That is no longer the "Consolidated plant proper".

The Court: This time we are talking about——

Mr. Neville (Interposing): Yes.

The Court (Continuing): —they bought the Consolidated plant. According to your testimony, you tried to run it as a plant down there, and this happened to be in the early years of the depression, and for that or some other reason they couldn't make a go of it. They then started to move the plant up to Alpena, and finally did. But they only moved, according to the witness, about one-fourth of the machinery. I don't know whether the time has been set for the removal of that one-fourth—or has it?

Mr. Neville: I believe so.

The Court: When was it?

Mr. Neville: From the past testimony.

The Court: When was it?

Mr. Neville: I believe it was in April of 1931.

Mr. Henry: October of 1931, is the testimony.

The Court: That makes a great deal of difference.

Mr. Neville: It was shortly after the stock purchase, your Honor.

[fol. 2125] The Court: They bought the stock in February or March.

Mr. Speer: No, your Honor.

The Court: When?

Mr. Speer: I believe they bought that stock in July of 1931.

Mr. Henry: Bought the stock in July and operated the plant at Adrian until October, and at that time moved the plant to Alpena and manufactured there.

The Court: All right. The Government is trying to show that your statement that you really tried to operate the plant over at Adrian is not true. Is that what you are trying to show?

Mr. Neville: Yes, your Honor.

Mr. Speer: July, August, September, October. Three months. Three months.

The Court: I thought it was six months. Somebody testified to that before. Where did I get the idea of six months?

Mr. Neville: There was testimony. My recollection is that there was testimony to that effect, your Honor.

Mr. Henry: Six months, your Honor, was the operation at Alpena. They operated the plant from July until October at Adrian, and at that time they moved the machinery [fol. 2126] to Alpena and continued the operations at Alpena plant until July of 1932.

The Court: Oh.

Mr. Henry: That is the testimony.

The Court: I see. And then they——

Mr. Henry (Interposing): And then they dissolved the corporation.

The Court: All right. All right.

By Mr. Neville:

Q. Then from July, 1931, to October, 1931, we have the period during which the Consolidated plant, if I may refer to it as such at that time, remained intact at Adrian?

A. Yes.

Q. In October, however, you made the removal of approximately one-fourth of the equipment. Now, the question is, from that time on, was it possible to operate the Consolidated plant at Adrian as a plant capable of producing concrete block machines?

A. The plant was not complete after the removal of part of the equipment.

Q. All right. What did you do with that equipment, eventually, after that?

A. It was sold.

Q. It was sold.

The Court: Which equipment are you talking about [fol. 2127] now?

Mr. Neville: The three-fourths left at Adrian.

The Court: All right. But there was one-fourth that went up to Alpena, you know. You have got to differentiate.

Mr. Neville: I am following that one-fourth, your Honor.

By Mr. Neville:

Q. Now, would you tell us again what that one-fourth consisted of, Mr. Besser?

The Court: Lathes and——

Mr. Babcock (Interposing): Drills.

The Court: What?

Mr. Babcock: Drills.

The Court: Drills. That is right. This record is long enough without having you repeat some of the answers.

Mr. Neville: All right.

By Mr. Neville:

Q. Now, as of the time that we had the removal to Alpena of one-fourth of the equipment, were any Consolidated machines, or machines that we now refer to as the Consolidated formula, were any of those manufactured at Alpena?

A. Yes, there were.

Q. How many?

A. Several. Several machines and parts.

The Court: What was the Consolidated? A tamping? [fol. 2128] A. Yes.

The Court: Cored pallet?

A. Yes.

The Court: One-at-a-time?

A. Yes. Nothing but tamping in 1931.

The Court: 1931. Nothing but tamping. Made about 200? Go as high as 200 an hour?

A. Yes. Right in there.

The Court: Consolidated was making a cored pallet one block tamping machine, and you continued to make some of those, although you yourself, had a better—was it a cored pallet you manufactured in 1931?

A. Plain pallet.

The Court: Plain pallet? That is right.

A. Yes.

The Court: Isn't that true?

A. Yes, sir.

The Court: That was evidently to take care of their customers and to take advantage of the Consolidated name; is that right?

A. Yes.

The Court: I don't see, gentlemen, why you are wasting so much time on this. This is 1931 and 1932, they took over this plant and the plant ultimately passed out of [fol. 2129] existence. I wouldn't be surprised, if you looked at the records, you would find that there was more than one plant that passed out of existence in 1930, 1931 and 1932, until the country started to move. All right.

Mr. Neville: All right.

By Mr. Neville:

Q. Let me ask you this, Mr. Besser: When you purchased the Consolidated Company, was it your intention to operate that company as a continuing concern?

A. It was; very much so.

Q. When did you decide not to go ahead with this plant, to operate it as a continuing concern?

A. We became convinced we could not do so in the spring of 1932.

Q. Why wouldn't you say you became convinced in October of 1931, when you began to dismantle that plant?

A. Well, it was still an operating concern then, still going on as a separate entity then.

Q. Perhaps you misunderstood my question. When you acquired Consolidated, was it your intention to operate

that company as a continuing concern at Alpena—at Adrian, rather. I misspoke myself.

A. At Adrian. Yes, it was. And then later it was the determination to operate it the same way, as a continuing concern, at Alpena.

Q. And when did you become convinced that that was [fol. 2130] not possible or not feasible?

A. In the spring of 1932.

Q. And you had made how many machines?

A. As I stated before——

Q. (Interposing) Consolidated machines?

A. (Continuing) —we had made several machines and a number of parts for machines in the field.

Q. Did you sell them, Mr. Besser?

A. We sold several machines, yes, during that period.

Q. I am referring to the Consolidated machines, of course.

A. Yes. That is right. But not enough, as I stated before. Not nearly enough to be able to keep going.

Q. I believe you testified, Mr. Besser, on direct examination, that during the time of Mr. Wright's tenure at the Stearns Manufacturing Company, or the time during which you held stock there, or the Olsen stock, you made no attempt to manage the company or to influence the company's policies; is that correct?

A. Yes.

Q. Do you still stand on that statement, in view of the so-called Stone contract, Mr. Besser?

A. Yes. Positively so. Yes, sir.

Q. Don't you think in the Stone contract you at least attempted to exert influence on the policies and manage- [fol. 2131] ment of the Stearns Manufacturing Company?

A. No, sir. May I state further on that?

Q. Yes?

A. The Stone contract was merely a sale of the Stearns stock owned by Besser, and the giving of a license on the Besser patents, which was needed in order to sell the stock.

Q. It went a little bit beyond that, didn't it, Mr. Besser? Wouldn't you say it was a little bit more than a contract

providing for the sale of your stock to Mr. Stone, Mr. Besser?

A. Well, I already added the other point, the giving of a license also under the patents of Besser, which was necessary in order to sell the stock.

Q. With the further proviso that you would be eliminating the Stearns Manufacturing Company from the manufacture of the three-at-a-time plain pallet machines, isn't that true?

A. Certainly that was true.

Q. Wasn't that one of the very important features of that contract?

A. It was an important feature. The giving of the Besser license was an important feature, and that was a part of it.

Q. You wouldn't have sold—or would not have signed this agreement had not that proviso been in it, would you, Mr. Besser?

Mr. Babcock: I object to that as pure speculation.

The Court: No, he can say whether he would or not.

[fol. 2132] A. I can't say that I would not have done so.

By Mr. Neville:

Q. Let me put it this way to you: It was one of the essential conditions of this contract, was it not?

The Court: He said he couldn't say that he would not have signed it. I probably should not have permitted the answer in the first place. But I went far enough so that it is in, anyway. He says he couldn't say.

By Mr. Neville:

Q. Now, of course, I think we all know that you are the originator of the plain pallet machines, Mr. Besser.

A. Yes, Mr. Neville.

Q. And that once upon a time you had a patent on those machines?

A. Yes.

Q. Which expired in 1946. Isn't it true, Mr. Besser, that you feel you have the right, or a special right, to

have the say in the manufacture of the three-at-a-time plain pallet machines, no matter who manufactures them?

A. I only feel that I have a right to have the say in connection with the present patents of the Besser Company.

Q. As a matter of fact, haven't you expressed yourself in the past to the effect that, as the originator of the plain pallet machines, you should have the right as to who manufactures and who does not manufacture the plain pallet machines?

A. No.

Mr. Henry: You say "in the past". Do you mean [fol. 2133] before 1946 or after?

Mr. Neville: From now on, as far as Mr. Besser can remember.

Mr. Henry: I think the question is framed as——

The Court (Interposing): He was answered it, anyway.

Mr. Henry: It is confusion.

The Court: He said no.

A. I said "No". I might have qualified it, that before 1946 I thought I had a considerable right. But I took the question to mean more in the last several years. I took the question to mean more in the last several years. And my answer was "No".

By Mr. Neville:

Q. Is it not your feeling now, Mr. Besser, that anyone manufacturing a three-at-a-time plain pallet machine is usurping your rights as the originator of that machine?

The Court: Three-at-a-time plain pallet?

Mr. Neville: Yes, your Honor.

The Court: Nothing else? You are sure of that question? Do you want that question in there as it is?

Mr. Neville: Yes. First of all, I want as to the——

The Court (Interposing): Go ahead. All right.

A. No, it is not my feeling, the way the question is answered—is asked. That certainly is not my feel- [fol. 2134] ing.

Mr. Neville: Then perhaps I am not stating my question. Would you be good enough to read the question?

The Court: I tried before to see if you wanted to correct it. But he answered the question just the same today as I think he would have answered it any other day and every other day.

Mr. Neville: Can I have a re-reading of my question, your Honor?

The Court: Yes.

(Question read by the Reporter.)

By Mr. Neville:

Q. What was your answer?

The Court: The answer was "No".

By Mr. Neville:

Q. Now, would your answer have been the same, or would it be the same if I asked that question referring to plain pallet machines, without specifying three-at-a-time plain pallet machines?

A. Yes; it would be the same.

The Court: The only claim on that, Mr. Neville, is that any single, double or triple, or whatever you have in the future, block machines that use the plain pallet, and for the next four or five years use the Scott patent, which suspend the mold, and which use the Gelbman patents that feed the mold and then vibrate the mold separate from the feed box, and then using pressure or tamping there-[fol. 2135] after while the mold is vibrating, that they have a special right on those. Is that right?

A. Yes, sir.

The Court: It has nothing to do with the plain pallet, because any rights he may have had in the plain pallet, because of the plain pallet, have gone, and the question that was asked before about the three-at-a-time, three blocks at a time,—there is a machine now manufacturing three blocks at a time that turns out 4,800 to 5,000 blocks a day, but that is a cored pallet, the so-called Jolt——

A. (Interposing) Jolt-Crete.

The Court: Yes. That is right, is it not?

A. Yes, sir.
The Court: All right.

By Mr. Neville:

Q. Is it your desire and your intention, Mr. Besser, to remove from the field anyone else but yourself who is manufacturing three-at-a-time plain pallet machines?

Mr. Babcock: I submit that his desire is not to be considered.

The Court: He can testify. That goes to intent, and I permitted some answers to questions of yours based on intent. The question, perhaps, needs re-framing, but I think what you mean, "is it your intent". Is that what you mean?

[fol. 2136] Mr. Neville: Yes. It is expressed in the alternative, "desire or intent".

The Court: All right. You want to use the word "intent"?

Mr. Neville: Yes, your Honor.
The Court: All right.
A. No, sir; it is not.

By Mr. Neville:

Q. Wouldn't you say you manifested that intent, Mr. Besser, by entering into the Stone agreement?

A. Positively not.

Q. How do you interpret that part of the contract which takes the *Besser* Manufacturing Company out of production of the three-at-a-time machines, plain pallet?

The Court: Stearns.

Mr. Neville: Stearns, rather.

The Court: The court has already ruled that any fair interpretation of that part of the Stone contract, which is on page three——

Mr. Neville (Interposing): Yes, your Honor.

The Court (Continuing): —of the Stone contract, can only refer to the patents that are or may be controlled by Besser.

Mr. Neville: My question is asked, your Honor, regardless of the interpretation we gave to that contract. Now,

[fol. 2137] I know that there is a differentiation in thought on the part of your Honor and the Government, but my question does not present that problem that we had when we last discussed the contract itself.

The Court: I confess that as it is written, as that paragraph is written, and through a strained interpretation, it might include the three block plain pallet machine, but that is not the construction I put on it at all, and I don't think that there would be very many courts that would put that construction on it, because you must read it from the four corners.

Mr. Babcock: And your Honor recalls that Mr. Besser testified there was not that intent.

The Court: Yes.

Mr. Neville: Well, my question is asked, however, without reviewing that particular part, or without injecting that particular part.

The Court: I think it does, in spite of your intent not to. I will have the question asked again, if you so desire, and let's see if it does.

By Mr. Neville:

Q. Just answer the question, Mr. Besser.

The Court: Read it.

(Question read by the Reporter as follows:

"Q. How do you interpret that part of the contract [fol. 2138] which takes the Stearns Manufacturing Company out of production of the three-at-a-time machines, plain pallet?")

Mr. Babcock: I submit the question calls for a legal conclusion.

The Court: I agree with you. How does he——

Mr. Neville (Interposing): It says so in its terms, your Honor.

The Court: It does not say so. You say it does and I am telling you now it does not.

Mr. Neville: But, your Honor——

The Court: And no court will ever rule that it does. No one will ever say that that prevents them, prevents

anybody, Stearns or anybody else, from the making of a three pallet—three block simple pallet machine. Now, I have said that time and time again, and it is the last time it is going to be permitted from the Government or from the court.

Now, I do not put the interpretation on the second part of page three that you do.

Mr. Neville: That is correct.

The Court: All right. And I am right. At least, I think I am right. You can't take a part of the contract, or three or four words. And even if they intended to do that, they couldn't get away with that in this contract, because the [fol. 2139] contract says—it begins with "non-exclusive licenses." Non-exclusive licenses. Not on something that they haven't got.

As a matter of fact, I think it was testified to in the Lith-I-Bar case that if the Lith-I-Bar did not vibrate the mold box free from the feed box, or if the original Lith-I-Bar, or Lith-I-Bar machine maintained the space—no, had the pallet hug the—had the mold hug the feed box, that there would be no violation of the Gelbman patents.

Now, I am not going to spend a lot of time on something that the court is telling you now, I rule against you on your interpretation of that part of the contract.

Mr. Neville: Yes, your Honor. But I tried to make it clear a while ago that my question did not inject the question of patents into the discussion. My question is this: Does the witness—has the witness a desire, either under the patents or otherwise—to exclude others from the manufacture of three-at-a-time plain pallet machines?

The Court: He has already said "No" to that. He has already said "No".

Mr. Neville: Then I asked——

The Court (Interposing): What his "desires" may be. You know, what his intentions are and what his acts are are something entirely different.

[fol. 2140] Mr. Neville: I used the expression "intent", your Honor.

The Court: He has answered that. What is the next question? I will permit the next question.

Mr. Neville: The next question was, did you not mani-

fest that intention when you entered into the Stone agreement?

The Court: He already said "No".

Mr. Neville: All right. That is when we had the discussion.

The Court: No, no. That wasn't the question at all. The question was something entirely different. You asked him how he accounted for something in the contract. . .

Mr. Babcock: How he interpreted the contract.

The Court: Yes. It is immaterial and I sustain the objection.

I think we had better close here, but I wanted to ask Mr. Besser one question.

Mr. Besser, you said that there were made in the United States in 1947, and in 1948 and 1949, there were made or turned out—or, yes, made, over one billion concrete blocks per year. That is right?

A. Yes, sir.

The Court: And I think the figure for 1947 was [fol. 2141] 1,021,000,000 or so?

Mr. Neville: 1,042,000,000, approximately.

The Court: All right. So that your answer was verified by the Government report. And here is an article that evidently has your approval. It has a picture of you sitting at the desk there, pictures of your plant, and I take it for granted that is your father right up above; is that right?

A. Yes, sir.

The Court: That is right. I took it for granted. He is watching you there. You say in this article, "based on the ultra-conservative figure of 2,000 operating hours per average machine per year, it is evident that the total annual output of Besser block machines must be considerably in excess of one billion units."

If only one billion units, block units were made a year, and you have enough machines out to make that—and I take it for granted they are used, most of them, if they are out—you are practically making all the blocks that were made, or you practically made all the concrete blocks

by your machines that were made in 1947, 1948 and 1949, isn't that true, if that statement is correct?

A. Yes, sir; it would look that way there, sir.

The Court: Well?

Mr. Babcock: Before the court——

[fol. 2142] The Court (Interposing): I haven't got time. I will give you a chance. I will give you a chance. I mean some other time. But I just wanted to make sure I got his interpretation, and the witness has been very fair about it, if that statement is true and his other statement is true, why——

Mr. Babcock (Interposing): Your Honor misunderstands. What I started to say, before we adjourn, may I state on the record my objection to Exhibit 182?

The Court: Is there some objection?

Mr. Babcock: Yes, your Honor.

The Court: What is it?

Mr. Babcock: I object to the document being received in evidence because it is incompetent, and I invite the court's attention to the fact that the very first thing they designate it as being or containing a summary separately showing the statistics for industries, for geographic areas, on which somebody has attempted to make a summary based on employment payrolls, size, distribution of establishments, inventories, capital expenditures, and they go on to describe it purely as somebody's computation from other documents.

We do not have the other documents available. We went through the experience in the last couple of days of what a summary may be, and how there may be errors [fol. 2143] in the conclusions, and certainly if there is going to be any summary used we ought to have available the documents upon which the summary is based.

The Court: It is rather remarkable that that summary agreed with the testimony of your own witness, so I think we will let it in on that, if for no other reason.

Mr. Babcock: On that fact alone?

The Court: Yes. On that fact alone, for whatever it stands for. But it does corroborate the man who knows the block business.

Mr. Babcock: On that fact, yes.

[fol. 2144] By Mr. Neville:

Q. I just have two or three more questions of Mr. Besser. Yesterday, Mr. Besser, I asked you, is it not your intention to eliminate from the field other manufacturers of three-at-a-time plain pallet machines, and I believe that your answer was "No"?

A. That is right.

Q. I followed that with the question, did you not manifest such an intent by entering into the Stone agreement. The answer likewise, I believe, was "No"?

A. That is right.

Q. I ask you now, when you made overtures to Lith-I-Bar Company, either yourself or through your associates, to grant a license to the Lith-I-Bar Company to make two-at-a-time plain pallet machines, were you not manifesting [fol. 2145] again your intent to eliminate a competitor from the manufacturing of three-at-a-time plain pallet machines?

A. No, sir; positively not.

Q. What were you doing when you made that offer to Lith-I-Bar?

A. Simply proposing to give a license for patents on the late Besser developments.

Q. You knew, of course, that——

A. (Interposing) Nothing beyond that.

Q. You knew, of course, that Lith-I-Bar was already the manufacturer of three-at-a-time plain pallet machines, didn't you?

A. Yes.

Q. And your offer of a license to manufacture two-at-a-time plain pallet machines, of course, would have involved the discontinuance on the part of Lith-I-Bar of the manufacture of three-at-a-time plain pallet machines?

A. Not necessarily. Only the discontinuance of the later Besser developments, patent developments, on the three-at-a-time.

Q. I see. Do you recall testifying, Mr. Besser—and if I am wrong, please correct me—that you offered a license to the Gocorp Corporation to manufacture a two-at-a-time plain pallet machine?

Mr. Babcock: If Mr. Besser recalls, all right. But I don't recall that he ever gave such testimony.

[fol. 2146] Mr. Neville: I have asked him now. If I am wrong, he will correct me.

The Court: You may answer, Mr. Besser.

A. Yes; that is right.

By Mr. Neville:

Q. When you made that offer, were you not manifesting an intent to eliminate a competitor from the manufacture of three-at-a-time plain pallet machines?

A. No, sir. Postively not. As I just stated——

Q. (Interposing) Are you through with your answer?

The Court: What is that?

Mr. Neville: I asked Mr. Besser if he had finished with his answer.

A. The only thing in connection with the three-at-a-time was that they would not use the latest patented developments of the Besser Company, which would soon be their property anyway, as the patents ran out in a few years.

By Mr. Neville:

Q. In any event, whether it was your purpose to protect the patents or not, Mr. Besser, the offers contemplated eliminating these different companies from the manufacture of three-at-a-time plain pallet machines, did they not?

A. No, sir; they did not.

Mr. Neville: That is all.

[fol. 2147] Cross-examination.

By Mr. DeGree:

Q. Mr. Besser, what was the date, as close as you can remember it, when Besser Manufacturing Company obtained the Scott patent?

A. That would be in the summer of 1947.

The Court: I didn't get that question. What was the date?

Mr. DeGree: The date when Mr. Besser acquired the Scott patent.

The Court: Oh, yes.

A. The summer of 1947.

By Mr. DeGree:

Q. I see. Now, I believe you testified on direct examination that there had been no basic change in your machine from approximately 1939, except for various parts?

A. I said it was the same basic model.

Q. The same basic model?

A. With improvements from year to year.

Q. And the improvements were mostly parts, were they not, such as the front pallet feed and the rear pallet feed?

A. Yes.

Q. Yes.

A. Things of that nature.

[fol. 2148] Q. Now, from the time that the Stearns Manufacturing Company manufactured the plain pallet machine, you were thoroughly familiar with the construction of that, were you not?

A. Yes.

Q. All right. Now, you have, on your direct examination, made the statement that in your opinion the Stearns Model 15 was infringing upon the Besser patents.

A. Yes.

Q. I understand—correct me if I am wrong—that the Besser patents you refer to are the Scott patent and the Wellnitz patent?

A. Yes.

Q. Can you tell, in a word, or very briefly, what there is in the Scott patent or the Wellnitz patent that Stearns is infringing on?

A. Yes. The resiliently mounted mold, with vibration, and with means for ejecting the finished blocks.

Q. Is there anything in the Wellnitz patent that the Stearns Manufacturing Company is infringing?

A. Yes.

Q. In your opinion?

A. Yes, sir; very definitely.

Q. And, in a word, what is that?

A. That is the automatic height control of the block.

[fol. 2149] Mr. DeGree: That is all.

Mr. Henry: No further questions, your Honor.

The Court: All right. Did you use the resiliently mounted mold back in 1940, 1941 and 1942?

A. Yes, sir.

The Court: What is that?

A. Yes, sir.

The Court: You were infringing, then, on the Scott patent?

A. Yes, sir.

The Court: And you made a settlement with them in 1947; is that right?

A. Yes, sir.

The Court: That is, if the Scott patent is a good patent?

A. Yes, sir.

The Court: All right. That seems to be a business of infringing, doesn't it, all the way around? Is there an automatic method or means now of automatically setting the height of the block? Is that the—what is the name of that patent?

A. The Wellnitz patent.

The Court: The Wellnitz patent. Is that what that does?

[fol. 2150] A. Yes, sir.

The Court: It automatically sets the height of that block?

A. Yes, sir. That is an electrical control.

The Court: Yes.

A. Of the height. When that head come down, the vibration under pressure, then the machine stops until the height is down.

The Court: Is that on the order of a swinging door that opens and closes, so that when the height is clear then it automatically shuts off?

A. The electric eye?

The Court: The electric eye?

A. A little bit that way.

The Court: Does the Government question the statement made by Mr. Besser that the blocks do not cost any more today than they did ten years ago? Have you looked that up? He said that, didn't he?

Mr. Neville: Yes, he did. We have no reason to question it right now, your Honor.

The Court: You have no reason.

(Witness excused.)

[fol. 2151] The Court: All right, gentlemen, call the next witness?

Mr. Babcock: We have no further testimony to offer, your Honor, except in connection with the charts, which, as your Honor knows, are in the process of re-preparation by accountants for both sides.

The Court: All right.

Mr. Babcock: And our suggestion is that we consider a date when we may return with the accountants and prove the charts, unless we find among the attorneys that we can stipulate in the meantime as to the charts.

Mr. Neville: That sounds like a plausible suggestion, your Honor.

The Court: It is all right with me. Have you got any other or further testimony to put on today?

Mr. Neville: No; we are through.

Mr. Babcock: I assure your Honor that when the chart question is straightened out, we are prepared to rest for Besser Company and Mr. Besser.

The Court: Are you going to have any rebuttal?

Mr. Neville: No, your Honor.

The Court: This whole case may rest a good deal on these [fols. 2152-2172] charts, may it not?

Mr. Babcock: I think they will be enlightening in the court's consideration of the matter.

[fol. 2173] Detroit, Michigan,
Friday, July 7, 1950.

PROCEEDINGS

The Court: All right, gentlemen. At what point have you arrived now?

Mr. Babcock: We have arrived, as I understand it, at the point where the accountants for both sides have checked the figures and secured an agreement on the accuracy of the figures. We are offering to your Honor this morning some testimony of our accountant as to his computation of the totals, his arithmetical computation of the totals of the figures which have been agreed to be accurate.

The Court: All right.

Mr. Babcock: And to offer our charts.

The Court: All right. Are you the accountants?

Mr. Makell: Yes, sir.

The Court: What is that?

Mr. Makell: Yes, your Honor.

Mr. Speer: This is the FBI agent, your Honor, Agent Berglund, who prepared the charts for us.

The Court: Yes. All right. Have you got a copy of the chart so I can see it?

[fol. 2174] Mr. Henry: Just a moment, your Honor. I am getting it together. May Mr. Makell be sworn?

JACK MAKELL, a witness called on behalf of the Defendants Besser Manufacturing Company and Jesse H. Besser, having been first duly sworn by the Clerk, testified as follows:

Direct examination.

By Mr. Henry:

Mr. Henry: May I say on the record that the defendants propose to offer five charts, the first of which is a chart showing the number of blocks that can be produced from machines manufactured in 1946, '47 and '48 by the tamper method.

The second chart is a composite statement, similar statement, as to blocks that can be manufactured on vibrating machines.

The third exhibit will be a broken down statement as to Stearns Manufacturing Company.

The fourth, as to Besser Manufacturing Company.

And the fifth, a summary of the first four, showing the total number of blocks manufactured in the industry between other manufacturers, Stearns and Besser, and the percentage of each, both as to tampers, vibration, and all [fol. 2175] blocks.

Those are the five exhibits that I will put in in the order that I have stated.

The Court: Is that the group of charts that you people also want, or have you got some additional?

Mr. Speer: Our chart, as to the figures in it, your Honor, we don't have it in five different charts. It is all in the one. I might say I understood--perhaps I was in error, but I thought we had agreed on these, Mr. Babcock—I mean the figures in the charts, and that all we were going to do here today was to offer the charts.

Mr. Babcock: I am perfectly willing to follow that procedure. I just thought best, perhaps, to have Mr. Makell testify to the accuracy of his mathematical computations and counts.

Mr. Speer: No.

The Court: That isn't necessary.

Mr. Babcock: We are perfectly willing to offer the charts.

The Court: That isn't the question. That isn't the question. We are putting in testimony, but it was the way I think the court suggested so as to avoid unnecessary——

Mr. Babcock (Interposing): We are perfectly willing [fol. 2176] to offer them and mark them.

The Court: Is that the same way you grouped them before?

Mr. Henry: Substantially, yes.

The Court: Yes. Now, may I ask this: This includes the blocks made for tamping—incidentally, do you refer to them as tampers? Is that right, or did I misunderstand you?

Mr. Henry: That is correct, your Honor. The heading of the first exhibit is "Composite Statement Compiled from Depositions and Oral Testimony Concrete Block Making Machines, Tamper Type."

The Court: Tamper type. Well I can understand that.

Mr. Henry: And the next one is the vibrating type.

The Court: Yes. I got you.

Mr. Henry: Then the next one——

The Court (Interposing): The tamper type. Now, so that we don't misunderstand each other, you haven't gotten away from some of our previous understandings? The tamper type machines you are talking about here are machines that are exclusively tampers; that is, there is no vibration?

Mr. Henry: That is correct.

[fol. 2177] The Court: Of the mold, at any time?

Mr. Henry: That is correct, your Honor.

The Court: The vibration type not only includes the so-called vibration type of the Gelbman patent, but any kind of vibration and any kind of tamping or pressure that might be applied after vibration or during vibration; is that true? Is that the correct understanding of that?

Mr. Henry: Yes, your Honor.

The Court: All right. Now, is it agreed between all of us that the testimony, or the evidence to this point, shows that the best machine of the Besser group, that is, the three-pallet super-machine makes about 6,000—can make about 6,000 blocks a day? That is, it has three blocks per cycle and four cycles in a minute. Is that right?

Mr. Henry: Well, yes, your Honor.

Mr. Stark: Three blocks per pallet per cycle.

The Court: It has about four cycles per minute, a little bit more, which makes the number of blocks it can produce about 6,000 a day.

And the best tamper machine there is on the market, that I had before me here, would or could make, and does make, as I understand it, about 5200 blocks a day, and those are cored pallet, are they not?

[fol. 2178] Mr. Henry: Well, your Honor, that was the way it appeared on the original exhibit as to the Stearns Jolt-Crete machine.

The Court: Yes.

Mr. Henry: But we have re-classified the blocks from the Stearns Jolt-Crete cored pallet machine to a vibration machine.

The Court: You mean because of the Jolt?

Mr. Henry: Yes.

The Court: You have typed it as a vibrator?

Mr. Henry: Yes, your Honor.

The Court: Well, how many blocks can you make by the best tamper machine that you have classified? How many could you make in an eight hour day?

Mr. Henry: Three hundred per hour, 2400 as shown on this exhibit.

The Court: All right. You kind of let me down there,

didn't you, between the time I wrote my last opinion and this one? Because I noted in my opinion to the effect that there was a tamper machine on the market, without naming it, that makes 5200 blocks a day.

Mr. Henry: I think your Honor has in mind Mr. Besser's [fol. 2179] testimony that his tamping machine was capable of making——

Mr. Speer (Interposing): 3600 a day.

Mr. Henry (Continuing): —3600 a day.

The Court: Well, but wait a minute now, please. Right in this court room, I wouldn't have gone away with that, in my opinion—and I don't ask you to accept my opinion, you understand that— but in my opinion didn't I mention somewhere in a note that a tamping machine could make 5200 blocks a day?

Mr. Henry: That one was the Jolt-Crete. We really considered it a tamper at that time.

The Court: I want that in the record. I don't want it to appear, if this case ever goes up—I mean the other case ever goes up, that the unfamiliarity of the Judge with the case is evident and then you go on to show that there isn't any such tamping machine making 5200 blocks a day. At that time that I wrote that opinion, the tamping machine that you informed me of, did make 5200 blocks a day, and you have re-classified that now because of the jolt.

Mr. Henry: That is correct.

The Court: And the jolt puts it in the class of a vibrator. That is right, isn't it? Am I right on that?

[fol. 2180] Mr. Henry: Yes, your Honor, you are right.

The Court: Am I right, Mr. Besser, on that?

Mr. Besser: Yes, sir.

The Court: That is a thing that could be taken advantage of—not that it would by the attorneys here—but if it went up to the Court of Appeals—if it does go up, I don't know; as I said I think neither side seems to be satisfied with it, so I guess it must be just about right—but if it does go up I don't want it even intimated that I didn't know or hadn't been told this, because at that time we classified that as a tamper.

Mr. Henry: That is correct, your Honor.

The Court: All right. Now, I want to ask one more

question, to see if we can start out on an even keel here this morning.

Is it admitted that the vibrating machine that uses vibration during pressure is a better block than a tamping machine block, for example? Is that admitted, or is that just a claim?

I mean, of course, I know this: That, at least, the information given by Mr. Besser is that that is a better block and the claim of the Gelbmans is that it is a better block. That is one of the features, that it presses that down and makes it more uniform, a more uniform block. That is [fol. 2181] true, isn't it?

Mr. Henry: Yes, your Honor. I think the vibrator—the vibration block would be classified as a better block. But in that connection I do want it to appear that the block made by the tamping machine is a block useful for the same purposes.

The Court: Oh, yes.

Mr. Henry: And is the same size.

The Court: It may not be as good looking. It may have marks in it that indicate in some cases filling, but with the modern tamping machine you don't have to do as you did previously in the trade, fill and tamp, and then fill and tamp it, so you had five operations. That isn't done with any machine, now, is it, Mr. Besser? Or is it?

Mr. Besser: On the tamping machines, it is still that way.

The Court: It still would be that way?

Mr. Besser: Yes.

The Court: Automatically?

Mr. Besser: Yes.

The Court: And can you see the different lines?

Mr. Besser: To some extent.

The Court: You can look at a block and tell right away [fol. 2182] whether it is a tamped block or a vibrated block?

Mr. Besser: Depending considerably on how the mold is maintained. The mold will wear a little more quickly with the tamping and that would show on the block.

The Court: Those are all cored pallet, anyway, aren't they?

Mr. Besser: Both, that way. The Besser tamper was a plain pallet tamper. The Stearns was a cored pallet tamper.

The Court: Yes; I know that. All right. There is a difference, of course. They are used for the same purpose, are they not?

Mr. Besser: Yes, sir.

The Court: But, for example, on the say up home, going up to Saginaw last week, they are building a very beautiful home, and as I looked across at it it seemed to me that they were using concrete block for the basement, and from where I looked it looked like a very finely finished block. Are they finishing them now on the outside much better than they did, with glaze and——

Mr. Besser (Interposing): In some cases.

The Court: I see. They don't come out like that. That is something that is put on afterwards?

Mr. Besser: Yes, sir.

[fol. 2183] The Court: Could you take one of the tamped blocks and do that to it?

Mr. Besser: Yes.

The Court: All right.

Mr. Babcock: May I just make note of one item on the record, please. When your Honor was referring to the opinion, you were referring to the opinion written in the patent suit.

The Court: Yes; yes. Well, I think it is well to have that correction there.

Mr. Henry: Mr. Besser suggest- to me that his own home, as an illustration, which is in one of the exhibits, is tamped block with a glazed face on it.

The Court: Is that right?

Mr. Henry: Yes.

The Court: Who is your Saginaw man? Or don't you have any up there? Not that I wanted to put one up, but I just wanted to take a look. I think I will go over and take a look at that over the week end.

Mr. Besser: A concern out near the Chevrolet foundry, the K & D Company, on Tenth Street there.

The Court: On Tenth Street?

Mr. Besser: Yes.

The Court: Is that one of your machines?

[fol. 2184] Mr. Besser: Yes. Right near the street there.

Mr. Henry: Mark this exhibit.

(Whereupon a Chart of Composite Statement Compiled from Depositions and Testimony was marked by the Reporter for identication as Defendant's Exhibit 183.)

Mr. Henry: The first of the group of exhibits has been marked 183, and is a composite statement compiled from the depositions and oral testimony, concrete block making machines of the tamping type. This exhibit shows that the machines made in 1946 have a productivity capacity of 342,289,200 blocks. Machines made in 1947, 271,636,800 blocks. Machines manufactured in 1948, 102,951,600 blocks. A total productive capacity commencing with the 1st of January, 1949, of 916,877,600.

The Court: Is that 916 million? It looks like 716 to me.

Mr. Henry: Did I say 916? 716 million.

The Court: I thought you said 9.

Mr. Henry: 716,877,600.

The Court: Wait until I take a look at some of these names.

Mr. Henry: Your Honor——

The Court (Interposing): Concrete Equipment Company of Holland went out of business, is that it, in 1947? That is, they went out of the tamper business, anyway?

[fol. 2185] Mr. Henry: That is the concern that was connected with the next item, W. E. Dunn. Their operations were consolidated.

The Court: I see. Have we depositions in here from all these people?

Mr. Speer: Yes, your Honor.

The Court: And does that practically represent all of the people who were in the tamping business, as far as you know?

Mr. Speer: Yes; yes, it does, your Honor.

The Court: All right. This is very clear, gives a very clear picture as far as the court can see. I see a number 1 up here in the corner and then the number 183. What is the number 183?

Mr. Babcock: That is the exhibit number.

The Court: Your exhibit number?

Mr. Babcock: Yes, your Honor.

The Court: Is it all ready to be introduced as an exhibit?

Mr. Speer: Yes.

The Court: Sort of a joint exhibit now, isn't it?

Mr. Speer: Well, as your Honor stated earlier this morning, this is a rather odd way of introducing evidence. I suppose it could be called a joint exhibit.

[fol. 2186] The Court: Let's ——

Mr. Speer (Interposing): However, our chart which we intend to offer——

The Court (Interposing): What is that?

Mr. Speer: We have a chart prepared, too, your Honor, which we intend to offer.

The Court: All right.

Mr. Speer: Which incorporates this same information.

The Court: All right. Using the same figures, but you go by a different method. You don't believe these reflect a true picture in this manner?

Mr. Speer: Yes; that is true.

The Court: All right. You have that right.

Mr. Henry: Exhibit 184.

(Whereupon composite chart of vibrating type machines was marked by the Reporter for identification as Defendant's Exhibit 184.)

The Court: All right. What is that next exhibit?

Mr. Henry: Exhibit 184, copy of which I have handed to the court and counsel, and the accountant, their accountant is familiar with it.

The Court: May I see it, gentlemen? I want to follow [fol. 2187] it if I can. Are you going to give me all of them? I had 183, and this is 184.

Mr. Babcock: Three sheets.

The Court: Oh, I see. All right. That is all right.

Mr. Henry: Exhibit 184 is a composite statement compiled from depositions and oral testimony of concrete block machines, concrete block making machines of the vibrator type and is similar in form to Exhibit 183. This exhibit consists of three sheets and shows the block production

capacity for the year 1946, based on three hundred eight-hour days, of 1,120,722,000. For the year 1947, 386,376,000. 1948, 354,174,400.

The Court: 170, I think that is.

Mr. Henry: 354,170,400. A total of 1,861,268,400 blocks. Both Exhibits 183 and 184 are exclusive of Stearns and Besser.

The Court: Yes.

Mr. Henry: Production.

The Court: I wondered. All right.

Mr. Henry: This is 185.

(Whereupon *of* production figures of Stearns Manufacturing Company machines was thereupon marked by the Reporter for identification as Defendant's Exhibit 185.)

[fol. 2188] Mr. Henry: The next Exhibit, No. 185, is a statement covering the block capacity and showing the quantity of machines manufactured and sold and the production capacity per hour and the production capacity per three-hundred eight-hour days, divided between tampers and vibrators, and is exclusively figures relating to the Stearns Manufacturing Company.

The Court: May I ask again when the so-called purchase of the Stearns was made by the Besser interests? Was it in——

Mr. Babcock (Interposing): Spring of 1948.

The Court: Spring of 1948.

Mr. Speer: March of 1948.

The Court: All right.

Mr. Henry: This exhibit shows for the year 1946, as to tampers, block production capacity of 140,400,000. Block production capacity of vibration machinery, which is Jolt-Crete, 102,432,000. The comparable figures for 1947 are tamper production capacity 79,200,000, vibrator capacity 116,928,000. And for 1948, tampers 18,480,000; vibration machinery 59,616,000. A total for the tampers of 238,080,000 and for the vibration machinery 278,976,000.

The Court: Didn't the Stearns people make any machinery that is a vibrator, that is outside of the Jolt-Crete?

[fol. 2189] Mr. Henry: Not in those three years.

The Court: They didn't during those three years?

Mr. Henry: No, your Honor.

The Court: Do they make any plain pallet machines?

Mr. Henry: Yes, your Honor.

The Court: In 1946, '47 and '48?

Mr. Henry: No, your Honor.

The Court: They did not?

Mr. Henry: No.

The Court: Did they in 1943, '44 and '45?

Mr. Henry: No, your Honor.

The Court: Didn't they have the joint right to use the Gelbman patent at that time?

Mr. Henry: Yes, your Honor.

The Court: But they didn't? They weren't making any plain pallet machines at that time?

Mr. Henry: Just a minute, now. Let's ask Mr. Besser.

Mr. Besser: No, sir. The Besser original plain pallet patent ran out in 1946 and the Stearns started after that on plain pallet. They didn't get going, though, for about two years.

The Court: Wait a minute, now. Just give me that again, Mr. Besser, please.

[fol. 2190] Mr. Besser: The Besser original plain pallet patent as originally stated ran out in 1946.

The Court: Then they started to make it?

Mr. Besser: Yes, sir. They did a couple of years development work on it.

The Court: I see.

Mr. Henry: I think I can clear what your Honor wants. The last line on the Exhibit 185 is the Model 15.

The Court: Yes.

Mr. Henry: That is the plain pallet machine.

The Court: Do they use the so-called Scott vibrating mold?

Mr. Henry: I believe so.

The Court: Or is that all just jolt?

Mr. Besser: No, they use Scott, too.

The Court: I see.

Mr. Besser: Scott and Gelbman.

The Court: The jolt machine doesn't use Scott, does it?

Mr. Besser: No, sir; that is the difference.

Mr. Henry: So I should correct my statement, your Honor.

The Court: All right.

[fol. 2191] Mr. Henry: To reflect the Model 15, none of which were built in 1946, 32 of which were built in 1947, and 18 in 1948, all of which appears on the line under vibrators, Model 15.

The Court: Well, there is something wrong with the accounting here. Number 15 shows that during 1946 they built no machines, but the machines had a production possibility of 720 blocks a day.

Mr. Besser: Per hour.

The Court: Yes. Per hour. That is quite a remarkable thing. That is like a flying saucer. I just would like to get in on that one. You see what I mean?

Witness Makell: Well, if they had been built, that is what their production capacity would have been. That is the only answer I could give.

Mr. Babcock: The figure is not used in the totals of the computation, however, your Honor.

The Court: No. I can see that. All right. May I just take a moment here.

(Short intermission.)

Mr. Henry: Exhibit 186.

(Whereupon chart showing production capacity of Besser Manufacturing Company machines was marked by the [fol. 2192] Reporter for identification as Defendant's Exhibit 186.)

The Court: All right, gentlemen, if you are ready.

Mr. Henry: The next exhibit, your Honor, Exhibit 186, is a comparable compilation by years of the productive block capacity of the machinery manufactured by the Besser Manufacturing Company during the years 1946, 1947 and 1948. As this statement shows, and in conformity with the testimony, there were no tamping machines manufactured by Besser in those three years; it was all vibration machinery. Victory Vibrapack, Super-Vibrapack and Super-Vibrapack V3R, which is the return pallet.

The Court: I see.

Mr. Henry: And the Victory Vibrapack, as is shown in

the legend at the left, have a productive capacity of 250 blocks per hour, and the Super-Vibrapack 600 per hour.

The Court: I don't see that. Where do you get that figure?

Mr. Henry: On the left hand column, above the figures under "vibrators" the capacity is shown for each. Here, your Honor (indicating).

The Court: I beg pardon. I see it. The Victory Vibrapack 250, the Super 600 and the V3R return pallet 750.

Is the V3R a plain pallet machine, too?

[fol. 2193] Mr. Besser: Yes, sir.

The Court: But the other, the Super-Vibrapack machine, has a master pallet that stands right out from the front, all the way.

Mr. Besser: Yes; still a three at a time.

The Court: Yes. I know that. But they stand out from the front, don't they?

Mr. Besser: Yes, sir.

The Court: All right.

Mr. Henry: I would like to ask the witness some questions, your Honor.

The Court: All right.

By Mr. Henry:

Q. Mr. Makell, in Exhibit 186, copy of which I hand you, will you state whether or not the machines manufactured in each of the three years included machinery sold to the foreign market?

By Witness Makell:

A. Yes, they do.

Q. And do you know the number of each model of machine for each of the three years sold out of the United States?

A. Would you like me to read them to you?

Q. First answer, have you the figures?

A. Yes.

Q. Do you know?

A. Yes.

[fol. 2194] Q. All right. State on the record how many

of each of the models in each of the years were sold out of the United States?

A. In 1946, 10 Super-Vibrapacks, 2 Victory Vibrapacks. In 1947, 42 Super-Vibrapacks and 3 Victory Vibrapacks. In 1948, 11 Super-Vibrapacks and 2 Victory Vibrapacks.

The Court: Where do you see that?

Mr. Henry: That doesn't appear, because this statement shows the productive capacity of all machinery manufactured.

The Court: No matter where they were going?

Mr. Henry: Wherever they were going.

The Court: I see.

By Mr. Henry:

Q. Have you made a compilation or computation of the block production capacity of those machines that were shipped out of the country?

A. Yes.

Q. Foreign orders?

A. I have; yes.

Q. How many blocks?

A. For the three year period, 94,920,000 blocks.

A. And that 94,920,000 blocks is included in your total of 682,200,000 blocks; is that correct?

A. In the total of 682,200,000 blocks, yes.

Mr. Henry: I have one more Exhibit.

[fol. 2195] (Whereupon a chart consolidating the information on the four previous exhibits was marked for identification by the Reporter as Defendant's Exhibit 187.)

Mr. Henry: Your Honor, Exhibit 187 is a consolidation of the preceding four charts or exhibits, and it shows the annual production capacity of all machines manufactured and sold in the years 1946, 1947 and 1948, with the headings under "Tampers" of "Other Manufacturers", which is Exhibit 183, and "Stearns" which is Exhibit 185. Under Vibrators, "Other Manufacturers" which is Exhibit 184, "Besser" which is Exhibit 186, and "Stearns" which is the same Exhibit 184. Beneath that are the totals for the three years.

Beneath the totals are percentages, first the percentage

of vibrators to total of vibrators and tampers by years and the three-year average; next the percentage of vibrator capacity divided between "Other Manufacturers", "Stearns" and "Besser", and the final percentage table is the percentage of the total production of tampers and vibrators divided between "Other Manufacturers," "Besser" and "Stearns".

The Court: Considering Besser has the controlling interest in Stearns for the time being, the Besser interests in 1948 had—wait a minute. 1948? Yes, 1948.—had about 32 per cent of all of the business including tampers and [fol. 2196] vibrators; is that right?

Mr. Henry: Yes.

The Court: Capacity, I am speaking about.

Mr. Henry: Besser and Stearns machines, together, were accountable for a production capacity of 32 percent of all the blocks made in the industry.

The Court: And in 1947, when Besser and Stearns were two separate institutions, unquestionably, Besser had 25 per cent and Stearns had 17 per cent, which would give them a total of 42 per cent. They lost 10 per cent in there; am I right on that?

Mr. Henry: Those were the percentages for 1947.

The Court: I see. All right. All right.

Mr. Henry: I don't think it would be helpful to encumber the record by reading these figures in.

The Court: I don't think so. They are in here. You can consider them read and they may be used by either side or the court.

Mr. Henry: Yes. That is all, Mr. Makell.

(Witness excused.)

Mr. Henry: That is all, your Honor.

The Court: Do you desire to ask any questions?

Mr. Speer: No, your Honor.

[fol. 2197] The Court: I didn't think so.

Mr. Speer: No, no questions.

Mr. Babcock: With that, your Honor, the defense of the Besser Manufacturing Company and Mr. Besser rest their case.

The Court: All right. We will give the Government the right to put in its charts.

Mr. Speer: Would you mark those, please.

(Charts were thereupon marked Plaintiff's Exhibits 188, 189 and 190 for identification.)

The Court: Are you ready?

Mr. Speer: Yes, your Honor. First of all, I want to say, I want to offer an apology that we don't have photostats made of these exhibits.

The Court: You can have them made?

Mr. Speer: Have them made afterwards.

The Court: You have some I can look at?

Mr. Speer: Yes, your Honor.

The Court: All right.

Mr. Speer: The Agent was here until after working hours last night. We didn't get them photostated.

Anyway, I might say to your Honor that I wish to offer the exhibit, offer Exhibit 188, and the information contained therein was taken from the same interrogatories and also from figures furnished to us by the Besser Company? [fol. 2198] The Court: Well, now, wait a minute. You mean figures furnished you recently?

Mr. Speer: Yes.

The Court: You haven't combined the figures that you got a year or two ago, whatever the figures were, with today?

Mr. Speer: No. Those figures are out, your Honor. This chart is based on figures which were given to us by the auditors of the company and upon which both of us have agreed.

The Court: Well, now, do you want to direct my attention to anything in particular here?

Mr. Speer: Oh, yes; I do.

The Court: All right. Take the year 1946.

Mr. Speer: 1946. I would like to direct your attention to the percentage of the dollar value of all block machines produced and the percentage of them controlled by Besser and Stearsn.

The Court: Well, what is that? I want to see it.

Mr. Speer: I don't have it.

The Court: Just call the item off.

Mr. Speer: I don't have one.

The Court: You don't have an extra copy?

[fol. 2199] Mr. Speer: No, your Honor. That is all we have at the time.

The Court: Do you disagree with this summary that is provided in their Exhibit 187? Their 187?

Mr. Speer: We say, your Honor, that those figures are correct, as taken from the interrogatories. But we contend that that does not give a true and accurate picture of the actual blocks which were actually produced.

The Court: You mean, the machines there were?

Mr. Speer: No. The charts, your Honor, only indicate the block production capacity. Our chart includes that and, in addition, the dollar value of the industry.

The Court: All right.

Mr. Speer: Perhaps I didn't understand you.

The Court: Do you question their Exhibit 187? Does it give me a true picture of what they claim it is, the block making capacity of the machines manufactured in those years?

Mr. Speer: Yes, your Honor, it does. But——

The Court: All right. Never mind the "buts". I will give you a chance on the "buts" in a minute. You have added to that the dollar value of the Besser machines for those three years?

Mr. Speer: Of those and all of the machines.

[fol. 2200] The Court: Yes. I said "all of the machines"; certainly.

Mr. Speer: Yes, your Honor.

The Court: And I notice you say in the year 1946 there were "A. Miscellaneous Companies". What do you mean by "Miscellaneous Companies"? Don't you mean those companies that you got the depositions from?

Mr. Speer: Yes. Those are all of the ones, outside of and exclusive of Besser and Stearns.

The Court: All right. Let me see if I understand this. You will readily recognize whether or not I understand it.

In 1946, if I read this correctly, the dollar value of the machines made was as follows:

The companies outside of Stearns and Besser had 46.3

per cent of the dollar value in that year. Stearns had 11.1 and Besser 42.6 per cent. Together. Now, that was vibrating machines only. That was the vibrating machines only. According to that—(to the FBI Agent Bergland): You had better come up here.

Mr. Speer: Yes.

The Court: Make sure I am reading this correctly. Just look over my shoulder, if you will.

On your vibrating machines, and of the total business of [fol. 2201] that year, the vibrating machines, in dollar value, did 79.6 per cent; is that true?

Agent Bergland: That is right.

The Court: All right. Now, let's get to the tamping for the year 1946.

The dollar value of the outside firms on the tamping machines, the outside firms had 65.8 per cent dollar value. Stearns 34.2 per cent dollar value. Besser no per cent dollar value. And the tampers did 20.4 per cent of the dollar value of the business that year.

Well, there is given here the sum total. Do you want me to read that in there? The sum total for that year?

Mr. Speer: What is that, your Honor?

The Court: Well, I will read it.

Mr. Speer: Oh, yes, your Honor. That is important, too.

The Court: Now, the total for that year of vibrating and tamping showed the dollar value of the outside concerns at 50.3 per cent, Stearns had 15.8 per cent, and Besser in that year had 33.9 per cent.

In 1947, the same figures, beginning with vibrating, the out of—I was going to say the "out of town companies," but I mean outside of—well, I will use the word you have used, "miscellaneous companies". In the vibrating alone [fol. 2202] the miscellaneous companies had 25.5 per cent in 1947. Stearns 17.3 per cent and Besser 57.2 per cent. And in 1947 the dollar value of the vibrating machines was 83.6 per cent of the entire business.

In tamping, the miscellaneous companies had 69.8 per cent, that year, on the tamping business. Stearns 30.2 per cent and Besser none. The tamping business took a 16.4 per cent slice of the whole.

Total, the miscellaneous companies had dropped from

50.3 in 1946 to 32.8 in 1947. Stearns Manufacturing Company had grown from 15.8 per cent of the total to 19.4 per cent. And Besser had grown from 33.9 per cent to 47.8 per cent.

In 1948, the output of miscellaneous companies had 31.0 of the vibrating business. This is all dollar values. The Stearns Manufacturing Company had 12.3 per cent vibrators. The Besser had 56.7 per cent.

In the tamping——

Mr. Speer (Interposing): If the court please, excuse me. Would you care to state what percentage of the entire industry the vibrators composed?

The Court: I neglected that.

Mr. Speer: Vibrating.

The Court: Now, the vibrating represented 91.8 per cent [fol. 2203] of the dollar value of the entire business.

But the miscellaneous companies had jumped from 25 per cent to 31 per cent at that time, in that year. But if you considered Stearns and Besser together, they had 68—69 per cent of the business dollar value that year. Did I give that correctly?

Tamping. The miscellaneous companies had 79.4 per cent. Stearns had 20.6 per cent. Besser none. The tamping represented only 8.2 per cent of the business. In three years, it had dropped from 20.4 to 8.2 per cent of the total, in dollar value.

Total. In 1948, the miscellaneous companies had 35 per cent of the business, dollar value. Stearns had 12.9 per cent of the business. And Besser had 52.1 per cent of the business. If you consider Besser as Stearns in 1948, they had 65 per cent of the business, dollar value.

Now, is there anything else here to which you may direct my attention? Of course, I expect that if you haven't given them copies of those charts that you are going to give copies to them.

Mr. Speer: Yes, we are. Just as soon as we get the opportunity.

The Court: What else do you want to direct my attention to?

[fol. 2204] Mr. Speer: That is all on that particular sheet.

The Court: All right. Have I fairly stated the Government's position?

Mr. Speer: Yes. Yes, your Honor.

The Court: On this. And without emphasizing. I haven't tried to emphasize, but you can't help when you read these things to emphasize even when you don't intend to.

Mr. Babcock: Has that been marked an exhibit?

Mr. Speer: Yes, Mr. Babcock. That is 188. And I might say that these other exhibits, 189 and 190, are the work papers from which 188 was prepared.

The Court: Well——

Mr. Speer (Interposing): I don't see any purpose in——

The Court (Interposing): You can put them in, if you desire.

Mr. Speer: They are in.

The Court: If you don't, they haven't asked for the other work papers, and I take it for granted—did these men work together in any way?

Mr. Babcock: I don't think they did, in the preparation of this. May I see 188?

The Court: Oh, certainly. Take a look at it.

Mr. Babcock: Before attempting a judgment on the ques-
[fols. 2205-2210] tion of putting in the work papers. I think, for the record, that the work papers should be in. The other papers, such as the work papers, should go in so that we may have copies of them and study them.

The Court: No objection?

Mr. Speer: No, your Honor.

The Court: All right.

Mr. Speer: We offered them. I take it they are in now.

The Court: They may be received.

Mr. Speer: If the court please, as I began to state a little earlier, I began with the preposition "but", and you told me that that could come after a while.

Now, I might say that the charts offered by the defendants contain figures which are accurate—that is agreed to—but it is of only the potential block production capacity of the block machines. However, if your Honor will recall, the Government offered figures from the Department of

Commerce, stating that in the year 1946, I believe it was——

The Court (Interposing): Isn't that argument?

Mr. Speer: Yes, it is argument, your Honor.

The Court: All right. I think you had better confine it to that, because that just calls for something else.

Mr. Speer: Then I believe that that concludes our case, your Honor.

[fol. 2211] IN UNITED STATES DISTRICT COURT

Civil No. 8144

UNITED STATES OF AMERICA, Plaintiff,

vs.

BESSER MANUFACTURING COMPANY, STEARNS MANUFACTURING COMPANY, INC., JESSE H. BESSER, LOUIS GELBMAN, AND HAMLIN F. ANDRUS, Defendants

OPINION OF THE COURT—January 30, 1951

The government brings this action under Section 4 of the Sherman Anti-Trust Act, Ch. 647, Sec. 4, 26 Statute 209; 15 U. S. C. Sec. 4, charging that defendants conspired to, and did, create a monopoly in the manufacture of concrete block making machines in violation of Sections 1 and 2 of the Act. Defendants are Besser Manufacturing Company and Stearns Manufacturing Company, Inc., producers of concrete block making machines, Jesse H. Besser, who owns 99 per cent of the Besser Manufacturing Company (his wife 1 per cent) and Louis Gelbman and Hamlin F. Andrus, who own important patent rights used in the machines produced.

It is first necessary, therefore, to determine whether the facts prove that a monopoly has been created.

Besser Manufacturing Company (hereinafter called "Besser") is not only a pioneer but today admittedly holds a dominant position in manufacturing concrete block making machines. The company was founded by the father of Jesse H. Besser at Alpena, Michigan in 1897 as a stave and shingle mill and in 1904 expanded into the concrete block making machine business. At that time each step

in the making of concrete blocks was entirely by hand beginning with the proper mix being shoveled into forms, tamped and then taken out. One machine could produce 150 blocks per day. Since then the industry has gone [fol. 2212] through various stages from "hand" to the "power tamper" (developed by Besser in 1909—capacity 450 blocks per day); the automatic feeder in 1914 (capacity 1800 blocks per day) until 1924 when the Besser plain pallet stripper tamper was invented and one machine was capable of producing 3600 blocks one at-a-time in an 8 hour day. This patent, issued in 1929—and this fact becomes important—expired in 1946. Besser also later purchased the Scott patent rights applied for in 1927 and granted in 1938. Scott as decided by this court (Andrus v. Whitman, 93 Fed. Supp. 383) was a patent covering vibration of the mix in the form.

In 1939 came the Gelbman-Andrus patents with their coordinated vibration and tamping machines that received the mix into the vibrating form followed by automatic pressure. With the present Besser Super Vibrapac it is possible for one machine to make over 6000 standard size 8" x 8" x 16" blocks in one 8 hour day. But there are still concrete block making machines of the hand tamping type being manufactured, utilized and a few sold. Still others are semi-automatic.

So if we are to consider the production possibilities of all concrete block making machines that were being manufactured by the 50 odd concerns for the years 1946-7-8 the figures are as follows:**

	All Other Manufacturers			Besser and Stearns		
1946	Tampers	—	Vibrators	Tampers	—	Vibrators
	334		1048	140		356
Total		1382		Total	496	
1947	266		351	79		407
Total		617		Total	486	
1948	101		331	18		195
Total		432		Total	213	

**In million blocks per year.

Defendants insist that this "production capacity" should be the yardstick to determine whether the Besser-Stearns [fol. 2213] combined companies have a monopoly and not the "dollar value" of those machines as contended by the government.

On the other hand, the government insists that the use of dollar value is the normal, reasonable and correct method of measuring industry position particularly where the high production automatic machines of the vibrator type assume such a controlling position in that industry.

It points to sales figures demonstrating the importance of the vibrator type machine, which show that in 1946 vibrator machine sales represented 79.6% of total dollar industry sales; in 1947, 83.6%; and in 1948, 91.8%. Of this latter total, Besser and Stearns controlled 69%. To the government these figures become even more revealing when it is considered that a substantial part of the industry to which defendants refer, is not in competition with companies manufacturing the high production machines, for it claims that these low production machines afford no more competition than do hand shovels to large powerful excavating equipment. It reasons that "dollar value" of the machines manufactured should be the yardstick and if we consider this formula as a basis to determine whether the Stearns-Besser combination has a monopoly in the concrete block making machine industry we learn the following:

In Dollar Sales of Entire Industry

	Besser and Stearns	The 53 Other Manufacturers
1946	49.7%	50.3%
1947	67.2%	32.8%
1948	65%	35%

Note: In 1946 Besser secretly purchased 13,000 shares of Stearns stock, its chief competitor, and in 1948 succeeded in buying 74,000 shares more. Besser then held 87,000 of the 198,833.5 shares of Stearns stock outstanding and forthwith elected three out of the five men on the Stearns board.

[fol. 2214] The evidence further shows that among the 50 odd companies which divided the 35 per cent of dollar sales in 1948—

Lith-I-Bar had	7.8	per cent of the whole and
J. W. Appley	5.9	" " " " "

leaving the other 50 odd companies to divide the remaining 21.3 per cent.

The question is whether the court should consider "dollar value" or "production capacity" and here defendants insist that the bill of complaint eliminates any possibility of dollar value because it uses the word "production" which defendants interpret as meaning the "number" of blocks that can be made by those machines.

The court does not decide whether defendants' control of 33 per cent of the output possibilities from all machines produced constitutes a monopoly but incidentally it was held in United States v. Reading Co., 253 U. S. 26 that 33⅓ per cent of the total output of anthracite coal carried by defendant was sufficient to be a monopoly and in United States v. Lehigh Valley R. R. Co., 254 U. S. 255 the figure of 18.84 per cent. In any event we hold to no such narrow interpretation of the word "production." Nor has the plaintiff so limited itself, for in paragraph 14 of the complaint it charges defendants with restraints and monopoly in interstate commerce of concrete block machinery. "Commerce" is the business of buying and selling of commodities for money, W. W. Montague & Co. v. Lowry, 115 F. 27, Aff. 193 U. S. 38; U. S. v. Swift & Co., 122 F. 529; and here the commodity to which the government has reference is the concrete block machine, not its end product. But to this court "production" may mean either "production capacity" or "dollar value" dependent upon the commodity and here we determine that dollar value may be the measuring gauge. In this deduction we are fortified by decisions of our courts where dollar value has frequently been used, U. S. v. U. S. Gypsum Co., 333 U. S. 364, but more particularly in U. S. v. American Can Company, 87 F. Supp. 18, [fol. 2215] where the court considered that defendant had a monopoly on tin plate because it manufactured more than 200 million dollars worth of cans out of a total tin plate

worth upwards of 500 million dollars. In fact "dollar value" is used throughout that opinion.

We also note with interest page 115, monograph No. 21, "Investigation of Concentration of Economic Power," Temporary National Economic Committee (76th Congress, 3rd Session); and Department of Commerce Report (Census of Manufacturers) to House of Representatives Subcommittee on Study of Monopoly power (Celler committee) dated December 1, 1949, where "dollar value" was used in inquiring into the existence of monopoly power and control.

When two closely related corporations have 65 per cent of the dollar value of any industry and the balance is divided between over 50 other manufacturers with the nearest competitor having less than 8 per cent of the whole, we believe that such a combination has to all intents and purposes a monopoly within the meaning of the law. Add to this the fact that it-s the big automatics that are important, not the hand tampers or the semi-automatics, and we find the position of Besser-Stearns in the industry is overwhelming. It has the power in its field to control the prices—meeting the test of the rule laid down in American Tobacco Co. v. U. S. 328, U. S. 781 as well as that found in U. S. v. American Naval Stores Co., 172 Fed. 455—

> "The popular meaning of 'monopoly' at the present day seems to be the sole power (*or a power largely in excess of that possessed by others*) of dealing in some particular commodity, or at some particular market or place, or of carrying on some particular business." (Emphasis ours)

We do not conceive that the Sherman Act anticipates that no deterring steps can be taken until a 100 per cent monopoly has become a "fait accompli."

> "It is not essential that the result of the combination be a complete monopoly; it is sufficient if it merely tends to that end and to deprive the public of the advantages which flow from free competition." U. S. v. E. C. Knight Co., 156 U. S. 16.

[fol. 2216] The Clayton Act (Section 7) 15 U. S. C. 18 aims to strike down a monopoly at its inception, when the

first step is taken—Arrow-Hart & Hegeman Electric Co. v. Federal Trade Commission, 65 F. 2d 336, 340; the Sherman Act after it has become more virile.

A committee of the Judiciary of the Senate in its report accompanying the Clayton Act, dated July 22, 1914, said:

> "Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the act of July 2, 1890 (the Sherman Act) or other existing antitrust acts and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation." (1949 Cong. Rec. 11730).

We hold that Besser controls Stearns and that the Besser-Stearns alignment created a monopoly.

Legality

We come then to the issue of whether this particular monopoly is illegal and we start with the oft repeated holding that the Sherman Act must be given a reasonable construction to accomplish its purpose. U. S. v. Union Pacific R. R. Co., 226 U. S. 61. "Bigness" as such, is not prohibited, U. S. v. U. S. Steel Corporation, 251 U. S. 417; U. S. v. Paramount Pictures, 334 U. S. 172, although the courts have said that monopolistic power of itself constitutes an evil and is to be condemned whether the acts creating it have been lawful or unlawful. U/S. v. Griffith, 334 U. S. 100; Schine Theatres v. United States, 334 U. S. 110; U. S. v. Paramount Pictures, supra.

The rule, however, is that there must be the existence of power

> "to exclude competition when it is desired to do so" if "coupled with the purpose or intent to exercise that power."
>
> American Tobacco Co. v. U. S., supra;
> U. S. v. Griffith, supra 107;
> U. S. v. Patten, 226 U. S. 525-543; and
> U. S. v. Aluminum Company of America, 148 F. 416 at 432

or the intent to bring about the forbidden act, to-wit, the [fol. 2217] monopoly. U. S. v. Aluminum Company of America, supra.

Power and intent.

As for intent—since this is only a state of mind rarely expressed or written down for the scrutiny of others—the courts generally say that all persons

> "must be held to have intended the necessary and direct consequences of their acts and cannot be heard to say the contrary."
>
> U. S. v. Masonite Corp., 316 U. S. 275 and cases cited.
>
> U. S. v. Patten, supra 543; U. S. v. Griffith, supra.

History of Besser

Let us then follow development of Besser up to the time this suit was started. We mention this because defendants at one point in their briefs argue strenuously that what has happened since that day cannot be taken into consideration by this court, while later therein they cite their own acts, after suit filed, aimed at purging themselves of any possible taint of monopoly. But at this point this court is interested only in the status of the alleged Besser combination as of the day of suit.

Consolidated Concrete Machinery Corporation

In 1929 the chief competitor of Besser was Consolidated Concrete Machinery Corporation world's largest producer of concrete block machinery units and running Besser a hard race for number one position in dollar sales. One E. F. Olsen was its president and the evidence is conclusive that Consolidated Concrete Machinery Corporation was in distress having taken many steps to preserve its life by manufacturing other products.

It had lost $33,040.50 for the year ending May 31, 1928,
" " " 37,000.00 " " " " May 31, 1929,
" " " 180,000.00 " " " " May 31, 1930,

and in 1931 Besser bought a controlling interest in Consolidated

> "at the request (Besser's testimony) of one of Consolidated's stockholders who had loaned it some money."

Besser then revamped Consolidated's board of directors by naming four of its seven members and in 1932 the company was dissolved; what was left of the plant moved to [fol. 2218] Alpena and its real estate sold.

The government contends that here was the first step in the design of Besser to accomplish its monopoly.

We cannot agree with this conclusion.

Our memory reverts to the years 1929, 1930 and 1931 and Consolidated only went the way of many other companies that might have survived if there had been no depression. If Besser, closely held, efficiently managed, and with its payroll limited in the high brackets, was able to continue business and buy out a competitor at that time we can see no objection.

Brownhoist

The court takes the same position regarding purchase by Besser of the Brownhoist block making equipment, inventory and other assets in 1935. Only an infinitesimal part of the Brownhoist business was devoted to concrete block machine manufacture and Brownhoist was moving back to Bay City from Cleveland where the operation of such a business could be a thorn in Besser's side right in its own backyard. Bay City is the first large city in the vicinity of Alpena. Of course we do not contend that one may, with impunity, remove all such thorns but there can easily develop unfair competition by a company operating a "sideline" that cripples a legitimate business wherein the "sideline" is the main object of its existence. To hold its elimination of such possible menace by purchase, rather than pushing the infringement suit it had threatened, was wrong, might encourage a philosophy that could destroy rather than help free enterprise and the ultimate development of our economic life. In our opinion it cannot be successfully reasoned that these two acquisitions—Consolidated and Brownhoist—were attempts by Besser to promote its position to a monopoly of this industry.

[fol. 2219] We therefore see nothing illegal about the Brownhoist transaction.

But must the charges fall completely because plaintiff's allegation of 1931 as the beginning date of the controversy or monopoly, has been refuted?

We know of no rule that limits the government to proof of the exact date that attempt or realization of the monopoly began. The government must, of course, be held within the ambit of its charge and we believe that 1942 specifically included in the bill of complaint, was within that ambit. Here we find what this court believes to be the most important development of the Besser empire for in 1942 was when Besser and Stearns agreed to control the Gelbman-Andrus patents which contract we will discuss later.

But continuing we learn that by 1946 there was a building boom in the United States which is still unsatisfied. Shortage of steel and other construction materials made concrete blocks more desirable and hence more salable. In addition they had been improved in style, attractiveness, efficiency and stability. The hand of fate and the business acumen of Besser had disposed of its chief competitor, Consolidated, back in 1931, but as there is always at least one automobile on the road ahead, no matter how many you overtake, there is likewise always a chief competitor to give you concern. In the instant case there were two main road blocks against Besser realizing its exclusive place in the sun—Stephen Flam, Inc. of California and Stearns Manufacturing Company of Adrian, Michigan.

The Flam Sale

Back in 1938, Besser had made a contract with Stephen Flam, Inc. of California, whereby Besser was given exclusive rights not only under Flam's existing patents but also under

> "any apparatus, machinery and devices which may be equipped with any type of vibrating or jolting devices other than as disclosed and claimed in said patents"

[fol. 2220] such rights to be exercised throughout the United States except that Flam retained the right to manufacture in nine western states.

Then in 1946 Besser bought out Flam completely, for $385,000.00 and in that year the conspiracy and monopoly undeniably began to show substance. The reasonable deduction is that Flam was giving Besser too much competition in nine states reserved to it. Flam was then fourth

in dollar sales in the United States so Besser decided to remove the fly in the ointment. It purchased Flam's exclusive licenses, had Flam agree to stay out of the concrete block machine making business for 8 years and to make sure that it did, it gave Flam a job for 5 years. Then it went further—it got exclusive rights to any future patents Flam might get during the 5 years he was working for Besser.

The Besser-Stearns Andrus-Gelbman Contract

This deal was the climax:

Besser's customer, Bell, had been sued in 1941 by co-defendants Gelbman and Andrus for alleged infringement of the Gelbman-Andrus patents then licensed only to Stearns. As a result of the Bell suit an agreement was entered into December 7, 1942, between the inventors and the two separate concerns, Besser and Stearns, whereby Besser, Stearns and the inventors were to live in peace and harmony. Stearns and Besser were each given the right to use the Gelbman and Andrus patents—but exclusively to them—and it was agreed that they were to have the benefit of, and right to use, any and all future improvements and patents covering concrete block making machines that might come from the fertile minds of either Andrus or Gelbman or both.

But this contract also contained a provision that not only prohibited the patentees giving anyone else a license, it also prevented either Besser or Stearns from joining Gelbman and Andrus in giving other prospective licensees the right to use any of the patents covered without the [fol. 2221] others' consent.

The above and Flam agreements are bitterly attacked by the government as illegal and the main overt acts in the monopolistic achievement.

Let us concentrate on the above Besser-Stearns-Gelbman-Andrus 1942 contract.

Unquestionably its purpose was to make certain that these two giants of the industry didn't battle each other over patents any more. But is there anything in the agreement itself frowned upon in the light of recent decisions of our Supreme Court? Does control of a patent give the

patentee or licensee the rights contended for by defendants either solely or together?

Granting that an exclusive license may be valid, Crown Co. v. Nye Tool Works, 261 U. S. 24-37; U. S. v. Gen. Elec. Co., 272 U. S. 476-489, the Supreme Court has recognized certain limitations, and where such a license has for its purpose the suppressing of competition, it has been held invalid.

> "The Sherman law is a limitation of rights, rights which may be pushed to evil consequences and therefore restrained." Standard Sanitary Mfg. Co. v. U. S. 226 U. S. 20-49.

We believe that the contract under question goes further than is necessary to protect the patent monopoly of Gelbman and Andrus. It may well be that an exclusive license to one party would be valid, but here the patentees have joined hands with the two largest competitors in the industry and by terms of their agreement have virtually made it impossible for others to obtain rights under those patents. The contract even gives Stearns and Besser the power to restrict competition—present and future—by requiring their joint consent before licensing others. It is this combination requiring collective action that primarily invalidates the agreement. We believe it clear that the parties intended this contract to be a means whereby control of the industry could be acquired and competition eliminated. For what other reason would Besser or Stearns want the consent of the other before approving a licensee suggested [fol. 2222] by the patentees? And where it is apparent, as it is here, that the contract is to eliminate competition, it must be held illegal. As the court stated in U. S. v. Parker-Rust-Proof Co., 61 F. Supp. 805, 813:

> "The primary purpose for entering into this contract was to eliminate present competition and prevent future competition. The Anti-Trust Acts condemn a contract entered into for the purpose of eliminating competition that exists as well as a contract preventing the development of future competition."

Still these contracts go further. The intent to restrain trade and the illegality is further augmented and evidenced by the provision in both the four-way agreement of 1942 and the Flam purchase contract granting exclusive rights to Besser and Stearns of all improvements to the existing patents and to inventions still unborn. Such conditions while not illegal per se cannot be justified as necessary to the enjoyment of or ancillary to the patent rights conveyed, U. S. v. National Lead Co., 63 Fed. Supp. 513, 524; U. S. v. General Electric Co., 80 F. Supp. 989, 1005; Transparent Wrap Machine Corp. v. Stokes & Smith Co., 329 U. S. 637, and read in conjunction with the rest of the contract provisions and other acts herein enumerated, makes the conclusion inescapable that the Besser-Stearns group had and achieved an obvious objective that cannot be reconciled with the restrictions of the Sherman Anti-Trust Act.

These agreements are in our opinion fatal to defendants and as of the day of the trial were the wrongful acts of not only Besser in the Flam contract but in the December 1942 agreement of all other defendants including Gelbman and Andrus. The latter took advantage of that contract and were active participants in threatening with suits those who supposedly violated their patents by infringement. Gelbman and Andrus were anxious not to protect their patent rights but to protect their contract with Besser and Stearns. And it all stems back to 1942 when Gelbman and Andrus entered into this agreement with Besser and Stearns. Then was the real beginning of the fruition of [fol. 2223] the monopoly, resulting from a conspiracy to the parties to that agreement to accomplish an illegal objective.

We pass now to 1946. Up to this point Besser apparently hadn't done anything about the Stearns Manufacturing Company, probably because Besser owned the plain pallet patents expiring that very year, and partly because Stearns was devoting itself to the Jolt-Crete type of machines. But when it was learned that the Stearns Company was planning on manufacturing a plain pallet concrete block making machine that's when Besser became interested. That's when Besser through its agent secretly purchased a good share of the Stearns stock and finally in 1948 secured

sufficient of that stock so that out of 198,833.5 shares Besser owned 87,000.00. Besser then put its own men on the board and we find it hard to believe that Besser didn't use any influence on its three directors. Perhaps it wasn't necessary. Perhaps satisfactory results were being obtained without pressure and if the figment of separate entities could be maintained so much the better. In any event, in 1948 Besser's hold on its second chief competitor became, to all intents and purposes, complete.

Then followed real activity by Besser and members of its organization, some of it before Besser had gobbled up Stearns. The little fellows were in the way and what appears to have been a deliberate campaign to wipe out all remaining competition started.

Besser tried to buy out Go-Corp founded by Olsen after he left Stearns, and continued this activity right up to the time of the hearings in this case.

There was testimony undenied, that Park, vice-president of Besser, tried to buy Lith-I Bar and that Besser

> "considered it imperative that the Lith-I Bar Company be out of business."

Besser offered jobs to Milewski of Lith-I Bar, to Olsen and [fol. 2224] his son, as it had done previously to Stephen Flam.

Then one Millard Warren (1947) built two or three block machines that Besser claimed infringed on its patents. Warren yielded to pressure, threats, and being offered "pay" without leaving his own business.

Others, Darden, Ralph Samuelson, Hanneman, John B. Lagarde, Bernard Flam, son of Stephen, all felt the persuasion of the Besser arguments. Besser brought influence on a material supply source of Darden that curtailed the Warren output since Darden was building the Warren machine. Practically all these men got out of their own business, generally impelled by threats of law suits, being given a job, pressure on customers, or all three, and usually Besser picked up their then patents with a mortgage on the fruits of their genius for years to come.

It attempted to limit Appley to "cored pallet" machines that can make 2 blocks at a time and Appley signed the

contract prepared by Besser. A cored pallet (2 at a time) machine incidentally has a maximum output of 4800 blocks per day but costs the producer about 5 times as much to operate as the plain pallet machine.

The proof further showed that Besser personally indicated his attitude towards competitors by his letter to Gelbman, December 21, 1946, saying:

> "About the worst thing that could happen to this industry would be to have it wide open so that anybody and everybody could make machines and thus have no control on quality and no opportunity for anyone to do anything very important."

There were other letters that denote Besser's objective to accomplish the elimination of almost every competitor through

(1) recklessly made threats of suit, illegal under Maytag Co. v. Meadows Mfg. Co., 35 Fed. 2d 403; Dittgen v. Racine Paper Goods Co., 164 Fed. 89; U. S. v. Patterson, 205 F. 292;

[fol. 2225] (2) purchase of assets, illegal under—
U. S. v. Union Pacific R. R. Co., supra;
U. S. v. Reading Co., 253 U. S. 26;
U. S. v. Lehigh Valley, R. R. Co., 254 U. S. 255

and

(3) covenants not to compete, illegal under
Schine Theatres v. U. S., supra;
Shawnee Compress Co. v. Anderson, 209 U. S. 423, 434;
U. S. v. American Tobacco Co., 221 U. S. 106.

It further appears that there were two or three instances where suit was threatened involving machines that agents of defendants had never even seen. The threat of a law suit for infringement should be bona fide and one asserting the exclusive right granted by the United States should not indiscriminately abuse that right. At least an examination should be made of the charged machine and then a law suit if necessary or at least negotiations started.

Knack v. Kane, 34 F. 46;

Adriance, Platt & Co. v. National Harrow Co., 121 Fed. 827;
U. S. v. Patterson, supra;
Dittgen v. Racine Paper Goods Co., supra.

Such a statement as made by Olsen, then president of Stearns, to Darden in the presence of Gelbman and Besser that

> "there is only about $700,000.00 gross business normally in this business; we are able to take care of that, the Besser Manufacturing Company and the Stearns Manufacturing Company; there isn't any room for your company" or

the Stearns letter to Gelbman (copy to Mr. Besser) referring to Darden's audacity in daring to compete in the concrete block machine industry—

> "Stories are persistent to the effect that Darden is doing quite a lot of business and is rather rapidly expanding his organization. It might be easier to knock his ears down now than later,"

have no place in the economic struggle of business, large or small, in this country nor have any of the other acts testified to against defendant Besser.

Then one further fact. Defendant Besser had during the [fol. 2226] years in question developed a leasing system, which of itself is not to be condemned, but which nevertheless adds to the realization of a complete monopoly. As improvements have been made in these units they have become larger, heavier and more expensive. They run as high as $50,000.00 each and of course there will be no stampede to buy machines at this price. It is far beyond the reach of the small manufacturer. So Besser began the leasing system paid for at the capacity of the machine at 1 cent a block. This is possibly as economical as these blocks can be made by hand or by other automatics and the ultimate effect on the existence of small companies can easily be visualized. A great deal of this springs from the grip that the Besser-Stearns combination got on the industry during the cruicial period—1946-1948—when Bes-

ser started getting its control over Stearns, just when the plain pallet patent of Besser was about to expire and Stearns had indicated that it was going to make plain pallet machines. Stearns, standing alone, could have then become even a greater competitor of Besser because it still had the right to use the Gelbman and Andrus patents; but Stearns—controlled—presented opportunities that Besser could not resist.

So all this was stopped by Besser. Regardless of whether it actually exercised control over Stearns, it was in a position to do so and could have been interested in Stearns for no other reason.

While it must be admitted that not all of these acts are prohibited, nevertheless, we must view them in the broad panorama of other acts and their association with each other to note, not only the effect—but to pierce the veil for evidence of intent.

U. S. v. Patten, supra;
Swift & Company v. U. S., 196 U. S. 375, 396;
U. S. v. Paramount Pictures, supra;
American Tobacco Co. v. U. S., supra 809;
Montague & Co. v. Lowry, 193 U. S. 38;
Fashion Guild v. Trade Commission, 312 U. S. 457; and
Associated Press v. U. S., 326 U. S. 1.

[fol. 2227] It is clear then that the intent of Besser—with its Stearns control—to dominate this industry by monopoly is obvious and that the result of the Gelbman-Andrus-Besser-Stearns conspiracy was to restrict competitors which latter is illegal under the Sherman Act. (above citations)

And here is another instance that we believe speaks volumes.

The Stone Contract

When the hearings started in this case this court was surprised to find that there had been a falling out between certain stockholders of the Stearns Company and Besser. We soon learned, however, that just a month or so previous Besser had made a contract by which one, Stone, was to

purchase part and eventually all Besser shares in the Stearns Company thus purging Besser of all taint of the monopoly that it claimed did not exist. But the contract provides so many possibilities of this interest reverting back to Besser that we have some hesitancy in accepting at face value Besser's protestations, that Stone came into the picture just because he, Stone, "likes to turn an honest dollar" and had suddenly become enamored by the concrete block making machine and Aglite businesses.

Nor are we overly impressed with the sudden conversion of certain stockholders of Stearns who now favor the government's action. It is apparent that they are not interested in adopting the government's viewpoint from any altruism, but, having failed to purchase the Stearns' stock from Besser, are now determined that Stone won't become dominant in their company. They are aware also that if Stone's agreement with Besser prevails, Stearns will lose some of its patent rights; it will be obliged to recognize the validity of other Besser patents; it will also admit that it had no right to use certain patents Stearns has been using for years; it will be limited to the manufacture of two at-a-time pallet machines; it may have troubles on its own patents with Besser and, finally, Stearns will be saddled with the Aglite business that is promoted by Besser [fol. 2228] to increase the sources where concrete block men may get their material, now limited.

Which impels us to inquire

> "Why, if defendant Besser considers itself free from violation of either the Clayton or Sherman Anti-Trust laws—is it so anxious at this time to apparently divest itself of its Stearns connection?"

To this court it is a practical admission that Besser not only has a monopoly, but knows that it has one and is seeking to superficially cleanse itself of all taint of monopoly while retaining all its benefits.

A Good Monopoly

May we not further examine what effect Besser's combination has had on the price of blocks—not on block making machines—but on the blocks themselves? Here the

court was again surprised to learn that blocks cost practically the same now as they did 15 years ago—about 16 or 17 cents each. At first blush therefore it appears that this is a "good monopoly."

Admittedly Besser personally has profited and Besser personally has done much for this industry, but the price of blocks today compared to 15 years ago is due—for one reason—to the tough fiber of the competition, although limited, that refused to give up and second because the present Besser machines can make over 6000 blocks per day as against 3600, 15 years ago. But then there is no assurance that this will continue to be a so-called good monopoly. Besser management may possibly change. Even under Besser the pressure on competitors has risen considerably in the last three years. If this continues for the next three years in the same ratio it can hardly be expected to be hailed as a good monopoly under any reasoning. Furthermore, it might lower its lease agreement terms tomorrow and those who use Besser machines can sell blocks at less. Then what happens to the little competitors is what happens in every price war—they finally "fold their tents" like the Arabs.

[fol. 2229] But it is now generally recognized that no trust or monopoly obtained by illegal means should be permitted to exist whether it is good or bad. See

U. S. v. Crescent Amusement Co., 323 U. S. 173, 187, 188;
U. S. v. Griffith, supra, 107; and
American Tobacco Co. v. U. S., supra, 811;

The statute does not differentiate. As stated in U. S. v. Aluminum Co. of America, supra, 527:

> "Be that as it may, that was not the way that Congress chose; it did not condone 'good trusts' and condemn 'bad' ones; it forbad all."

Conclusion

We conclude that the defendants, Besser, Stearns, Andrus and Gelbman have combined and conspired to restrain and to monopolize interstate trade and commerce in con-

crete block machines in violation of Sections 1 and 2 of the Sherman Act, and that Besser Manufacturing Co. and Jesse N. Besser have attempted to monopolize and have monopolized said trade and commerce in violation of Section 2 of the Act.

We hold, therefore, that this court must bring Besser's activities within the restrictions of the Sherman Act by the following steps:

First, that the Besser interest must dispose of its holdings in the Stearns Manufacturing Company, Inc.;

Second, that the Gelbman-Andrus patents listed in the December 7, 1942 agreement, plus all improvements and inventions made subsequently and which come within the terms of said agreement, be made available to everyone in the industry on the same terms;

Third, that all lessees of Besser machines may at their option withdraw as a party to such leases providing said option is exercised by July 1, 1951, Besser to notify each lessee of his right of withdrawal; and

Fourth, that each of the parties to that December 7, 1942 contract be and is hereby enjoined from entering into a like agreement with each other or any other person, cor- [fol. 2230] poration or combination.

Since defendants now claim that they want to dispose of their Stearns interest and since Besser, according to defendants' brief page 28, is willing to remove all restrictions on use of the Gelbman-Andrus patents, the order of this court should not impose any great hardship except that there must be no conditions attached to disposal of the Stearns stock. When this is done, sanctioned by the approval of this court, the purposes of this action will have been accomplished.

Frank A. Picard, United States District Judge.

Dated: January 30, 1951.

[fol. 2281] IN UNITED STATES DISTRICT COURT

[Title omitted]

FINAL JUDGMENT PROPOSED BY BESSER MANUFACTURING COMPANY AND JESSE H. BESSER

The above entitled cause having come on for hearing upon the issues made by the Complaint of the Plaintiff and by the several Answers thereto of each and all of the several Defendants, and the Court having heard the evidence, and upon conclusion of the evidence extended to the several parties to the litigation full opportunity to prepare and file with this Court Briefs, and having duly considered the pleadings, the evidence and all of the arguments and statements made by the various parties in their respective Briefs, and having filed an Opinion in writing, now, therefore, in conformity with said Opinion,

It is adjudged and decreed that the Defendants, Besser Manufacturing Company, Jesse H. Besser, Stearns Manufacturing Company, Inc., Louis Gelbman and Hamlin F. Andrus, have combined and conspired to restrain and to monopolize interstate trade and commerce in concrete block machines, and that Defendants Besser Manufacturing Com-
[fol. 2232] pany and Jesse H. Besser have attempted to monopolize and have monopolized interstate trade and commerce in concrete block machines contrary to the Acts of Congress in such case made and provided.

It is further ordered, adjudged and decreed that Besser Manufacturing Company and Jesse H. Besser dispose of the holdings of Besser Manufacturing Company in the Stearns Manufacturing Company, Inc.

It is further ordered, adjudged and decreed that all patents listed in the Agreement made December 7, 1942 between Besser Manufacturing Company, Stearns Manufacturing Company, Inc., Louis Gelbman and Hamlin F. Andrus, plus all improvements and inventions made subsequently and which come within the terms of said Agreement, be made available to everyone in the industry on the same terms.

It is further ordered, adjudged and decreed that all persons, firms, corporations, partnerships and associations

occupying the position of lessees in any lease of concrete block machinery manufactured by Besser Manufacturing Company, and in which Besser Manufacturing Company is lessor, may at the option of said lessee withdraw as a party to such lease provided that said option is exercised in writing not later than July 1, 1951.

It is further ordered, adjudged and decreed that Besser Manufacturing Company give notice to each and every of said lessees of the foregoing right to withdraw as a party to such lease.

It is further ordered, adjudged and decreed that all parties to said exclusive License Agreement dated December 7, 1942, to-wit: Besser Manufacturing Company, Stearns Manufacturing Company, Inc., Louis Gelbman and Hamlin F. Andrus, be, and they hereby are, enjoined and restrained from entering into a like Agreement with each other or with any other person, corporation or combination.

—— ——, United States District Judge.

[fol. 2233] In United States District Court

[Title omitted]

Final Judgment Proposed by Government—Filed March 16, 1951

Plaintiff, United States of America, filed its Complaint herein on April 28, 1949, and defendants answered denying the substantive allegations thereof. The cause came on for trial May 16, 1950, and was completed June 23, 1950. The Court filed its Opinion on January 30, 1951, finding that the defendants have violated Sections 1 and 2 of the Sherman Act. The Court hereby adopts said Opinion as its findings of facts and conclusions of law.

Now, therefore, it is hereby ordered, adjudged and decreed as follows:

I

Defendants Besser Manufacturing Company, Stearns Manufacturing Company, Inc., Louis Gelbman, Hamlin F. Andrus and Jesse H. Besser have combined and conspired

to unreasonably restrain, and to monopolize, trade and commerce in concrete block making machines in violation of Sections 1 and 2 of the Sherman Act; and defendants Besser Manufacturing Company and Jesse H. Besser have attempted to monopolize and have monopolized said trade [fol. 2234] and commerce in violation of Section 2 of the Sherman Act.

II

As used in this Final Judgment:

(A) "Besser Company" means Besser Manufacturing Company;

(B) "Stearns" means Stearns Manufacturing Company, Inc.;

(C) "Besser" means Jesse H. Besser;

(D) "Gelbman" means Louis Gelbman;

(E) "Andrus" means Hamlin F. Andrus;

(F) "Patents" means United States Letters Patent and applications therefor, and all reissues, divisions, continuations or extensions thereof, and patents issued upon said applications;

(G) "Person" means any individual, partnership, firm, corporation, association, trustee or any other business or legal entity.

III

The provisions of the Final Judgment applicable to any defendant shall apply to such defendant, its subsidiaries, successors, assigns, and each of its officers, directors, agents, employees and any other person acting under, through or for such defendant.

IV

(A) Within sixty (60) days following the entry of this Final Judgment, defendants Besser Company and Besser shall present to this Court for approval their plan for divesting themselves, by July 1, 1951, of all stock holdings and other interests, direct or indirect, in defendant Stearns.

(B) Defendants Besser Company and Besser are hereby ordered and directed to cancel and terminate any and all contracts, agreements and understandings between said

defendants, or either of them, and any other person, calling for the disposition of any of the capital stock of de-
[fol. 2235] fendant Stearns, where such contracts, agreements or understandings were entered into prior to entry of this Final Judgment. Defendants Besser Company and Besser are hereby enjoined and restrained from adhering to, enforcing or claiming any rights under any of the aforesaid contracts, agreements or understandings.

V

Defendants Besser Company and Besser are each enjoined and restrained from:

(A) Acquiring, directly and indirectly, by purchase, merger, consolidation or otherwise after entry of this Final Judgment, and from holding or exercising after such acquisition ownership or control of, the business, physical assets or good will, or any part thereof, or any capital stock or securities of any person engaged in the manufacture, sale or distribution of concrete block making machines until after said defendant has, upon reasonable notice to the Attorney General and an opportunity on the part of the latter to be heard, shown to this Court that such acquisition would not substantially lessen competition in the manufacture, sale or distribution of concrete block making machines;

(B) Causing, authorizing or knowingly permitting any officer, director, agent or employee to serve as an officer, director, agent or employee of any other person engaged in the manufacture of concrete block making machines.

VI

(A) The license agreement to which defendants Gelbman, Andrus, Stearns and Besser Company are parties, dated December 7, 1942, is adjudged to be unlawful under Sections 1 and 2 of the Sherman Act. Said license agreement is hereby declared null and void and defendants are hereby
[fol. 2236] jointly and severally enjoined and restrained from the further preformance or enforcement of any of the provisions of said license agreement and any contracts,

agreements or understandings amendatory thereof or supplemental thereto.

(B) Defendants are jointly and severally enjoined and restrained from conveying or receiving any patent rights under any license, contract, agreement or understanding like the above-described December 7, 1942 license agreement, or which gives the licensee or licensees control over the number of licenses issued or to be issued.

VII

(A) Defendants Gelbman, Andrus, Besser Company and Besser are each ordered and directed to grant to any applicant therefor a nonexclusive license to make, use and vend concrete block making machinery under any, some or all patents and patent applications pertaining to concrete block making machinery now owned or controlled by the defendant, or which are issued or applied for within ten years from the entry of this Final Judgment, and each of said defendants is hereby enjoined and restrained from making any sale or other disposition of any of said patents or patent applications which deprives it of the power or authority to grant such licenses, unless it sells, transfers or assigns such patents and patent applications and requires as a condition of such sale, transfer or assignment that the purchaser, transferee or assignee shall observe the requirements of this Section VII, and the purchaser, transferee or assignee shall file with this Court prior to consummation of said transaction, an undertaking to be bound by the provisions of this Section VII.

(B) Defendants Gelbman, Andrus, Besser Company and Besser are hereby enjoined and restrained from including any restrictions or condition whatsoever in any license or sublicense granted by or pursuant to the provisions of this [fol. 2237] Section VII except that (1) the license may be non-transferable; (2) a reasonable non-discriminatory royalty may be charged; (3) reasonable provision may be made for periodic inspection of the books and records of the licensee by an independent auditor or any person acceptable to the licensee, who shall report to the licensor only the amount of the royalty due and payable; (4) reasonable provision may be made for cancellation of the license upon

failure of the license to pay the royalties or to permit the inspection of its books and records as hereinabove provided; and (5) the license must provide that the licensee may cancel the license at any time after one (1) year from the initial date thereof by giving thirty days' notice in writing to the licensor.

(C) Upon receipt of a written request for a license under the provisions of this Section VII, the defendant shall advise the applicant in writing of the royalty which it deems reasonable for the patent or patents to which the request pertains. If the parties are unable to agree upon a reasonable royalty within sixty (60) days from the date such request for the license was received by the defendant, the applicant therefor may forthwith apply to this Court for the determination of a reasonable royalty, and said defendant shall, upon receipt of notice of the filing of such application, promptly give notice thereof to the Attorney General. In any such proceeding, the burden of proof shall be on the said defendant to establish the reasonableness of the royalty requested, and the reasonable royalty rates, if any, determined by the Court shall apply to the applicant and all other licensees under the same patent or patents. Pending the completion of negotiations or any such proceeding, the applicant shall have the right to make, use and vend concrete block machinery under the patents to which its application pertains without payment of royalty or other compensation, as above provided, but subject to [fol. 2238] the provisions of subsection (D) of this Section VII.

(D) Where the applicant has the right to make, use and vend concrete block machinery under subsection (C) of this Section VII, said applicant or said defendant may apply to this Court to fix an interim royalty rate pending final determination of what constitutes a reasonable royalty. If the Court fixes such interim royalty rate, said defendant shall then issue and the applicant shall accept a license providing for the periodic payment of royalties at such interim rate from the date of the filing of such application by the applicant. If the applicant fails to accept such license or fails to pay the interim royalty in accordance therewith, such action shall be ground for the dis-

missal of his application, and his rights under subsection (C) shall terminate. Where an interim license or sublicense has been issued pursuant to this subsection, reasonable royalty rates, if any, as finally determined by this Court, shall be retroactive for the applicant and all other licensees under the same patent or patents to the date the applicant files his application with the Court.

(E) Nothing herein shall prevent any applicant from attacking in the aforesaid proceedings or in any other controversy, the validity or scope of any of the patents, nor shall this Final Judgment be construed as importing any validity or value to any of the said patents.

VIII

(A) Defendant Besser Company is hereby ordered and directed, within thirty (30) days from the entry of this Final Judgment to notify each person presently leasing a concrete block making machine from said defendant that the lessee may, at its option,

(1) terminate the said lease agreement at any time prior to July 1, 1952, or

(2) continue under the terms of the lease, or

[fol. 2239] (3) purchase at any time prior to July 1, 1952, the machine or machines leased, and accessory equipment used therewith, such purchase to be in accordance with subsection (B) of this Section VIII;

(B) Defendant Besser Company is hereby ordered and directed to sell to any present lessee, electing to purchase machines under subsection (A) above, any, some or all of the concrete block making machines and accessory equipment now leased. The sales price and the terms and conditions of sale of any concrete block making machinery and accessory equipment sold pursuant to this Judgment shall be reasonable, uniform and non-discriminatory but said sales price shall make due allowance for the amount of rental paid and shall not exceed the depreciated value of the machine or machines and accessory equipment as carried on the books of the defendant Besser Company.

(C) Defendant Besser Company is hereby ordered and directed to sell to any existing lessee or purchaser under

this Section VIII, of concrete block making machinery and accessory equipment of said defendant, repair parts upon reasonable, uniform and non-discriminatory prices, terms and conditions of sale.

IX

Defendants are hereby jointly ordered and directed to cause to be published in the trade journals "Concrete", "Pit and Quarry" and "Rock Products" the terms of this Final Judgment, and defendants shall share equally in the expense of said publications.

X

Defendants are jointly and severally enjoined and restrained from entering into, adhering to or claiming any rights under any contract, agreement or understanding with any person engaged in the development or manufacture of concrete block making machinery which has the purpose or effect of preventing such person, or any other person from competing with defendants or any of them in the development, manufacture or sale of concrete block making machinery.

[fol. 2240]

XI

Each of the defendants is enjoined and restrained from compelling, coercing or influencing any person to refrain from manufacturing concrete block making machinery or supplying steel or other materials, used in the manufacture of said machines, to any manufacturer of such machines.

XII

For the purpose of securing compliance with this Final Judgment duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General, or an Assistant Attorney General, and on reasonable notice to the defendant, made to its principal office, be permitted (1) access during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant relating to any matters contained in this Final Judgment, and (2)

subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of said defendants, who may have counsel present, regarding any such matters. For the purpose of securing compliance with this Judgment said defendant, upon written request of the Attorney General, or an Assistant Attorney General, shall submit such written reports with respect to any of the matters contained in this Final Judgment as may from time to time be necessary for the purpose of enforcement of said Judgment. No information obtained by the means provided in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of such Department, except in the course of legal proceedings in which the United States is a party for the purpose of securing compliance with this Judgment, or as otherwise required by law.

XIII

Jurisdiction is retained for the purpose of enabling any of the parties to this Judgment to apply to the Court at any time for such further orders and directions as may be [fol. 2241] necessary or appropriate for the construction or carrying out of this Judgment, or the modification thereof, or the enforcement of compliance therewith and for punishment or violation thereof.

Dated: ——.

——, United States District Judge.

[fol. 2242] IN UNITED STATES DISTRICT COURT

[Title omitted]

TRANSCRIPT OF PROCEEDINGS

Proceedings had in the above-entitled matter before the Hon. Frank A. Picard, District Judge, at Detroit, Michigan, on Monday, March 19, 1951, and Tuesday, April 3, 1951.

APPEARANCES:

John Neville, Esq., William E. Speer, Esq., Marcus A. Hollabaugh, Esq., Appearing on behalf of the Government.

John W. Babcock, Esq., Appearing on behalf of Besser Mfg. Co.

Carl Henry, Esq., Appearing on behalf of Jesse H. Besser.

Edward DeGree, Esq., Appearing on behalf of Stearns Mfg. Co.

Morris Gelbman, Esq., Appearing on behalf of Louis Gelbman.

Leo Goreff, Esq., Appearing on behalf of Hamlin F. Andrus.

Frank J. Leverance, Jr., Esq., Appearing on behalf of Lith-I-Bar.

[fol. 2243]

Detroit, Michigan
Monday, March 19, 1951

Morning Session

The Court: Gentlemen, I have just been shown the proposed judgments. I have been anxious to get this case out of the way, and I didn't think it would take this long. Wait a minute, I don't have the proposed judgment of the Besser Manufacturing Company in here.

The Clerk of the Court: Yes, it should be there.

Mr. Babcock: There is a copy of it attached to the proof of service, your Honor.

The Court: Oh, yes, I see. I didn't see it before. I haven't looked at it, but I will give you a chance to put on the record the Government's objection to the proposed judgment that is suggested by——

Mr. Babcock: Besser Manufacturing Company and Mr. Jesse H. Besser.

Mr. Neville: With your Honor's permission, I would like [fols. 2244-2249] to introduce at this time a colleague of mine from Washington, Mr. Marcus A. Hollabaugh, who is Chief of the Special Litigation Division of the Antitrust Division. Mr. Hollabaugh is a member of the District of Columbia Bar, and I move that he be allowed to present the Government's position.

The Court: All right. What are the objections, if any, to the proposed judgment that is suggested by the defendant?

I have been waiting for the Government and the defendant to get together. As a matter of fact, I think this opinion is how old.

Mr. Hollabaugh: It was entered on January 20, your Honor.

The Court: I think that two months is enough for somebody to get together or to present some kind of a judgment. [fol. 2250] Mr. Hollabaugh: Paragraph 4 contains the provision considered essential to carry out the Court's order, that the defendants Besser Company and Besser shall present to the Court for its approval their plan of divestiture of their holdings in defendant Stearns.

The Court: Did I say 60 days in the opinion?

Mr. Hollabaugh: I believe you did, sir.

The Court: Well, is 60 days enough?

Mr. Hollabaugh: Considering that only a stock divestiture is required——

The Court: I know, but you have got to get somebody to buy it, you know. I am not going to send him out on the street to stand on the corner and sell it.

Mr. Hollabaugh: Your Honor, perhaps I could say it this way: As far as the Government is concerned, if 60 [fols. 2251-2339] days did not prove to be a sufficient time, we would not object to an extension of say perhaps 30 days or something of that sort.

[fol. 2340] The Court: You want to put on some evidence.

Mr. Hollabaugh: That is right.

The Court: Are you through with this?

Mr. Hollabaugh: No, your Honor. I wanted to offer two other points.

The Court: All right. I will permit him to say a word or two, and if you people want to put on some evidence [fol. 2341] some other time, I will let you do it.

Mr. Babcock: May I say this, if your Honor please, by way of stating in a general objection to the Government proceeding in this manner, that if the purpose of this testimony of a lessee is to give the Court evidence of the thinking or the attitude of that part of the general public composed of lessees, then it seems to me to be unfair.

The Court: I won't take it for that at all.

Mr. Babcock: Unless the Government brought in all the lessees and heard the testimony of all of them.

The Court: That is right. But he is going to show me that at least there is one man that wants to buy it.

Mr. Babcock: Then I will place on the record, if I may, please, my objection; that such testimony is immaterial and irrelevant standing alone. It would be the opinion and the thinking of just one man out of several hundred.

The Court: All right, you may take the testimony.

[fol. 2342] Walter Pachota was thereupon called as a witness on behalf of the Government, and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Speer:

Q. Would you state to the Court, Mr. Pachota, your present occupation?

Mr. Babcock: May I have the witness' exact name, please?

A. Walter Pachota.

The Court: All right, make it brief.

Mr. Speer: Yes, your Honor.

By Mr. Speer:

Q. Would you state your occupation or business?
A. The owner of the Best Block Company.
Q. Is that here in Detroit, sir?
A. It is in Plymouth.
Q. It is in Plymouth?
A. City of Livonia.
Q. Did you appear here today upon our request?
A. Yes, sir.
Q. Now, what kind of a concrete block machine do you use in your business?
A. Besser.
Q. A Besser machine. Could you tell us approximately when that machine was installed?
[fol. 2343] A. The latter part of August, about August 1948.
The Court: What kind of a machine is it?
A. It is a Besser machine.
The Court: I know that, but there are several of them.
A. Super Vibrapac.
The Court: That turns out about 6,000 blocks a day.
A. 6,000, yes, sir.
The Court: All right. Let's move along. I am not interested in making blocks. All I want to find out is the point that counsel has raised here.

By Mr. Speer (Continuing):

Q. Mr. Pachota, do you own that particular block machine?
A. No, I lease it.
Q. At the time it was installed, did you attempt to buy it from the Besser Company?

Mr. Babcock: I object, if your Honor please.
The Court: Sustain the objection.
Mr. Hollabaugh: May I ask, your Honor, what the basis of the objection is.
The Court: Well, you may state it, but I can see a basis for it.
Mr. Hollabaugh: I would like it for the record.
Mr. Babcock: Obviously it calls for a conclusion from

the witness as to what his negotiations on the contract [fol. 2344] were; and the sole purpose of putting this witness on the stand was to give testimony as to the reason why he would like to buy rather than make a lease.

The Court: Well, I don't know as the first part is a good objection; but the second part, the reason he was put on the stand, was to tell me he doesn't want to go ahead leasing the machine any longer, and he would like to buy one, but if he can't buy one, if there isn't some arrangement made whereby he can buy one, then he will have to continue leasing it. Isn't that the whole thing, if he wants to stay in business?

Mr. Hollabaugh: Yes; of course, that he wants to stay in business; that he is presently a lessee; that if he had the right at this moment, assuming that the sales price of the machine were reasonable, that he would like to buy a machine.

The Court: Yes, that's all; not what his intentions were the day he leased it. That is immaterial, and that is the question.

Mr. Hollabaugh: May I rephrase it then? May I ask this gentleman if he asked the Besser Company if he could buy the machine?

The Court: Well, we know that he couldn't buy the machine at that time.

Mr. Hollabaugh: Very well, I will withdraw the question.

[fol. 2345] The Court: —because that was stated in the old record, that they leased these machines and didn't sell them.

Mr. Hollabaugh: Well, I will withdraw the question, your Honor.

The Court: All right.

By Mr. Speer (Continuing):

Q. If a choice were offered to you, Mr. Pachota, at the present time, would you buy the Besser machine which you have at your place of business?

A. If the price was reasonable, yes, yes; always have been in favor of a purchase.

Q. Is your company at the present time financially able to buy this machine?

A. Yes, sir.

Mr. Speer: That is all I have.

The Court: Suppose you didn't buy the machine, or they wouldn't sell it to you, and you couldn't get any other machine of a like kind, what would you have to do?

A. You mean as far as keeping the lease or not?

The Court: No, no. What would you have to do? Would you have to go out of business or continue leasing it; isn't that right?

A. That is right.

The Court: And you want to stay in business, don't you?

A. That is right.

[fol. 2346] The Court: All right. Any questions, Mr. Babcock?

Mr. Babcock: Yes, your Honor.

The Court: All right.

Cross-examination.

By Mr. Babcock:

Q. Now, you have told us, Mr. Pachota, that you appeared here at Government request. When were you first contacted by a representative of the Government?

A. A month ago or so.

Q. What was the name of the man who contacted you?

A. Mr. Speer.

Q. Did he come out to your place of business?

A. Called me.

Q. My question is did he come out to your place of business?

A. No, sir.

Q. He contacted you by telephone?

A. Right.

Q. Did he ask you whether you were happy with your lease?

A. I don't recall if he did ask me that.

Q. Suppose you tell us what you recall of your conversation with him.

A. The only questions—well, I haven't given it a thought. It has been sometime ago. They asked if we had a lease, and also if there were any others in the vicinity that had leased equipment besides ourselves, and they [fol. 2347] asked me the reasons for the lease or why we took the lease, if we had any choice of purchase and things like that, things of that sort.

Q. Have you talked with any representative of the Government since then and today?

A. Yes, I have talked to them on Friday.

Q. Where?

A. Here in the Federal Building.

Q. What was the subject of your conversation then?

A. Same subjects as previously.

Q. Now, assuming that the reasonable price of that machine were to be determined at $50,000, would your company be in a position to pay cash for it?

A. It wouldn't be clear enough to give you an answer to that one.

Mr. Hollabaugh: I object to that line of questioning, your Honor, because if his company doesn't have the $50,000 now, they can borrow it. All that concerns the Besser Company is that they have the purchase price as of the day they are supposed to have it. He has stated his company would be able to buy one.

The Court: That doesn't mean they have got to have the cash.

Mr. Hollabaugh: It may be he could borrow it, if he had to.

The Court: He still might be able to borrow and not [fol. 2348] have 5 cents in cash. I don't see anything unfair about the question.

Mr. Babcock: Did you answer the question, Mr. Pachota?

The Court: He said he couldn't answer it; he said he couldn't tell. Will you read that back.

(The answer referred to was then read by the reporter.)

By Mr. Babcock (Continuing):

Q. You are not able to tell us whether your company could buy the machine at $50,000 for cash, and pay cash

for it, if that were determined to be the reasonable price?

A. The only thing I can tell you offhand is that Besser has $10,000 of our money right now.

Q. Pardon me. Just a minute. I just want to be sure that I understand clearly your previous answer, which was, as I understand it, that you are not able to tell us whether your company could buy the machine and pay cash for it, if the reasonable price were determined to be $50,000.

A. That is what I want to find out; if that money in there would be applied on that or not,

Q. Never mind that.

A. That is what I want to get clear.

Q. Never mind that.

Mr. Hollabaugh: What do you mean "never mind that". [fol. 2349] After all, he has paid Besser how much money?

The Court: Your witness—and the question is fair.

A. Yes, I will give you an answer.

By Mr. Babcock:

Q. You could buy it?

A. Yes, sir.

The Court: If that was determined to be the fair price.

Mr. Babcock: Yes, your Honor.

By Mr. Babcock (Continuing):

Q. Now, what do you consider to be a reasonable price for that machine?

The Court: Wait a minute. We are not going into that at all at this time.

Mr. Babcock: I am not going into it with the question of inquiring as to what is a reasonable price; but the witness on direct examination testified "I would buy the machine if the price is reasonable."

The Court: I don't think he has to have in mind what he thinks is a reasonable price right now at all.

Mr. Babcock: But, suppose, your Honor, that he testifies the reasonable price of that machine is $20,000, and later on, on a further inquiry, the Court determines that $50,000 is a reasonable price for it. Obviously, this witness' testimony isn't worth putting him on the stand.

The Court: That isn't true at all. As a matter of fact, I don't think the witness was needed. Well, I let you put [fol. 2350] him on, that's all there is to it. Do you have any other questions?

Mr. Hollabaugh: That is all.

The Court: All I found out from this man is that if he could have the reasonable price of the machine, he would buy it; but he is more anxious to find out how much of that $10,000 that he has paid in rent——

Mr. Hollabaugh (Interposing): Can be applied.

The Court: Yes.

A. Not in rent. Don't get me wrong. That is money that is on advance deposit.

The Court: Oh, I see.

A. Not rental money.

The Court: You mean they have had $10,000 of your money for how long?

A. Twelve and a half thousand since we got the machine.

The Court: Is that to guarantee payment of the rental?

A. It is what you call an advance deposit on the equipment.

The Court: And you pay royalty besides that. What is it, a cent a block?

A. A cent and a half until a certain amount is paid off, and then it reduces back to a cent.

The Court: I will get the lease at the proper time. I think I ought to have one of the leases before me.

[fols. 2351-2356] Mr. Hollabaugh: Mr. Pachota, do you have your license with you?

A. Yes.

The Court: I don't want it now, but I will want a copy of that lease.

Mr. Neville: I might point out, your Honor, that there is a lease in evidence in the case.

The Court: All right, I will look at it, gentlemen.

(Witness excused.)

The Court: I know, at least I feel that I know, that some of these men that lease that property would like to buy it, if they could buy it; right?

Mr. Hollabaugh: Exactly.

The Court: That's all there is to it; and yet what they think is right and what I think is right and what the company thinks is right might be three entirely different things. [fol. 2357] The Court: All right; let's get on with the next one. You said you want to put some testimony on.

Mr. Hollabaugh: I said that we are prepared to do so. I think it would be a good idea to put on one of these men.

The Court: I hope it is of more service to the Court. The other witness hasn't added anything to my knowledge of the matter.

Mr. Hollabaugh: Your Honor, in that way it will be in the transcript. I don't suggest an appeal, but in the event that should occur, from that point of view, your Honor, I think we ought to do it.

The Court: All right. Every member of the Court of [fol. 2358] Appeals and every member of the Supreme Court would say "Certainly there must be somebody who leases the machine that would like to buy it." Here is one, anyway. You have got him on the record. I will let you put the other one on, if you want to. You want to show that Lith-I-Bar couldn't deliver a machine before a certain date.

Mr. Hollabaugh: That is right. And unless the Court is willing to take judicial notice—well, you couldn't.

The Court: I couldn't, except that I know they can't, although I don't know how much critical material is in the machine.

Mr. Hollabaugh: All right.

The Court: Put him on.

Mr. Babcock: May the record show that I object to this procedure. I object to the taking of this testimony, because it is unfair to the defendants in this case to proceed in this manner without advance notice of what was intended and an opportunity to meet it being made available. I think the testimony is entirely immaterial and irrelevant and incompetent, particularly in view of the fact, as the Court has already pointed out in his comment, that the Besser Company cannot be held responsible for the present unusual and unnatural conditions in the industry; and to even think of proceeding against them

on such a basis would be pure penalty and punitive action.
[fol. 2359] The Court: All right. It is overruled.

FRANK E. MILEWSKI was thereupon called as a witness on behalf of the Government, and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Speer:

Q. Do you at the present time have any concrete block machines in stock at your factory?

A. No, sir.

The Court: Let's get the capacity of their machine. What is their machine; is that a 6,000-capacity?

A. Makes two sizes.

The Court: We are talking about your best machine. You don't lease any machines now, do you?

A. No, sir.

The Court: Your biggest machine compares to the Vibrapac, or whatever you want to call it?

A. It does.

The Court: 6,000?

A. Yes.

The Court: All right.

By Mr. Speer:

Q. Then for the purpose of this discussion, we will talk only about that particular machine, Mr. Milewski.

A. Yes.

[fol. 2360] Q. With the present inventory of steel and other materials at your plant, approximately how many of these machines can you fabricate?

A. Machines of that size, possibly 30.

Q. About 30. Now, under ordinary conditions, how many of those machines can you produce each month?

A. In that size, about 6.

Q. Now, have you given any instructions to your employees with respect to the taking of orders for these block machines?

A. I have.

Q. What are those instructions?

A. Saturday, this past Saturday, I sent out a memorandum not to make any promises for deliveries any earlier than August.

Q. Now, at the present time, sir, what is your experience in obtaining steel and other materials going into the manufacture of these machines?

A. It is constantly slowing up.

Q. It is because of those conditions that you issued these instructions?

A. Well, because we are sold out. I mean the capacity, the productive capacity up to that time was sold out, was committed.

Mr. Speer: That is all.

The Court: Any questions, Mr. Babcock?

Mr. Babcock: Yes, your Honor.

The Court: All right.

[fol. 2361] Cross-examination.

By Mr. Babcock:

Q. In the manufacture of your machine, Mr. Milewski, do you use electric motors?

A. Yes, sir.

Q. Is that one of the items that is short?

A. Yes, sir.

Q. And you purchase those installations on your machine; you don't make those yourself?

A. We do, sir.

Q. In the manufacture of your machine, do you use hydraulic equipment?

A. No, sir.

Q. What other items are used in connection with the production or the assembly of your machine that are short besides steel and electric motors?

A. Well, steel and electrical equipment are the components that we build the machine out of.

Q. And no other particular items that are short at the present time?

A. Well, we sell an air compressor, for instance, with the machine, that we do not manufacture.

Q. As far as you can remember, at the moment, there are no other materials other than steel and electric motors. that are short?

A. We use some hose in air lines, tubing, fittings.

[fol. 2362] Q. By hose, you mean rubber hose?

A. Well, it is a woven fiber and rubber.

Q. Something other than metallic?

A. That is right.

Q. And those are short at the present time?

A. They are slowing up.

Q. Anything else?

A. That would be about all.

Q. Those are what you contemplated when in answer to Mr. Speer's question you said in effect that steel and other materials were slowing up in procurement?

A. That is right.

Q. And those are items that you buy?

A. That is right.

Q. It is because you can't buy them from some other source that they are short?

A. The supply is diminishing and deliveries are slowing up.

Q. But I mean it is because you can't buy them from some other source that they are slowing up, the deliveries are slowing up?

A. Well, I don't quite get your point, Mr. Babcock. Those items are naturally bought from the people that make them. When you say from some other source——

Q. (Interposing) And the people that make them are unable to supply them to you?

A. That is right.

[fol. 2363] Mr. Babcock: That is all.

(Witness excused.)

The Court: Call the next witness.

Mr. Babcock: May I have on the record the benefit of the same objection to this testimony that I have to Mr. Milewski's?

The Court: You may. Same ruling.

EUGENE F. OLSEN was thereupon called as a witness on behalf of the Government, and having been first duly sworn, testified as follows:

Direct examination.

By Mr. Speer:

Q. Mr. Olsen, it is true, is it not, that during the years '41 through '45, the period of the war, that you were associated with the Stearns Company?

A. Yes.

Q. Could you tell us approximately the number of block machines produced by the Stearns Company during that period?

A. I couldn't tell you from memory, no, not even approximately.

The Court: Never mind what it was then. Let's find out about today.

Mr. Speer: All right, your Honor.

The Court: —because if you go back to that war, you [fol. 2364] can go back to 1917, and it was still different then.

By Mr. Speer (Continuing):

Q. At the present time, Mr. Olsen, at the Gene Olsen Corporation, do you have any of these concrete block machines in stock?

A. No.

Q. With the present inventory of steel and other materials, about how many machines can you produce?

A. Approximately 5. You are speaking only of these larger machines?

The Court: You make the 6,000 block?

A. Yes, sir.

By Mr. Speer:

Q. That is right. We understand each other on that. Now, under ordinary conditions, Mr. Olsen, how many of those big machines can your company produce in a month?

A. Approximately 4.

Q. 4 machines a month. Now, what has been your experience today in obtaining steel and other materials for your block machines?

A. It is increasingly difficult.

Q. Now, at the time one of these large block machines is sold, does your company also sell to the purchaser the steel pallets?

A. Usually.

Q. Approximately what is the number of pallets that you give or rather that you sell with each block machine?

A. 2200.

Q. 2200 pallets, and those are made of steel?

[fol. 2365] A. Right.

Q. Are they not, Mr. Olsen?

A. Right.

The Court: Any other questions?

By Mr. Speer:

Q. Mr. Olsen, in the event that you received an order for one of these big block machines today, what is the earliest possible date that such a machine could be de-delivered?

A. Assuming we could get the component parts, which we do not make, and that we could get the pallets, we could make delivery in late May or early June.

By Mr. Neville:

Q. What is the earliest possible date, Mr. Olsen, that you would promise delivery on a machine today?

A. I won't make any promise, because we have no promise on these pallets, for instance. It is 85,000 lbs. of steel in one machine.

Q. If you were asked for a delivery date, could you give any indication at all?

A. I would say not before June is the way I would put it.

The Court: Any questions, Mr. Babcock?

Mr. Babcock: Yes.

The Court: Go ahead.

[fol. 2366] Cross-examination.

By Mr. Babcock:

Q. Your company is the Gene Olsen Corporation?

A. Yes.

Q. When was that organized, Mr. Olsen?

A. Summer of '48.

Q. When did your company get into production?

A. Late fall of '48.

Q. How many machines did you manufacture and sell in 1948, of the type you have been mentioning?

A. I believe none in '48.

Q. How many in 1949?

A. I would be guessing on that one. If you wish, I could give you the total to date.

Q. All right. What is the total to date?

A. Approximately 30.

Q. And in your best judgment, approximately how many of those were made in 1949?

A. Perhaps 20. I beg your pardon, perhaps 10.

Q. 10 in '49, and approximately 20 in 1950?

A. That wouldn't be far off.

Q. Your company also manufacture a machine that is a 6 block capacity, does it not?

A. That is right.

Q. How many of those have you manufactured and put out?

[fol. 2367] The Court: What is that, 12,000?

A. One.

Mr. Babcock: Yes, your Honor.

By Mr. Babcock (Continuing):

Q. When was that manufacture completed and the machine sold?

A. In 1950.

Q. Now, in the assembly of your machine, you use electric motors?

A. Yes, sir.

Q. You buy those from some outside source?

A. Yes.

Q. And that is one of the short items?

A. Yes.

Q. You also use hydraulic equipment in your machine, do you not?

A. Yes.

Q. You buy that from some outside source?

A. Right.

Q. That is one of the short items?

A. Yes.

Q. And the steel—those are the principal items you had in mind in hesitating about promising a delivery?

A. No. 1 are the steel pallets. We could worry our way past more machines than we can hope to get pallets.

Q. But aside from the steel pallets, the motors and the hydraulic equipment and the steel for the machine itself are the three principal items?

[fols. 2368-2428] A. At pretty even rates; everything is difficult.

Q. Do you know of any machine made for the production of concrete blocks that doesn't use a pallet?

A. That doesn't use any pallet?

Q. Yes.

A. No.

Q. This pallet you are speaking of, that is so important, is the so-called plain pallet in the industry, isn't it?

A. That is what I have referred to, yes.

Mr. Babcock: I think that is all.

The Court: All right. You may step down.

(Witness excused.)

[fol. 2429] IN UNITED STATES DISTRICT COURT

[File endorsement omitted.]

Civil Action No. 8144

UNITED STATES OF AMERICA, Plaintiff,

v.

BESSER MANUFACTURING COMPANY, STEARNS MANUFACTURING COMPANY, INC., JESSE H. BESSER, LOUIS GELBMAN and HAMLIN F. ANDRUS, Defendants

AMENDED FINAL JUDGMENT PROPOSED BY GOVERNMENT—Filed March 26, 1951

Plaintiff, United States of America, filed its Complaint herein on April 28, 1949, and defendants answered denying the substantive allegations thereof. The cause came on for trial May 16, 1950, and was completed June 23, 1950. The Court filed its Opinion January 30, 1951, finding that the defendants have violated Sections 1 and 2 of the Sherman Act. The Court hereby adopts said Opinion as its findings of facts and conclusions of law.

Now, therefore, it is hereby ordered, adjudged and decreed as follows:

I

Defendants Besser Manufacturing Company, Stearns Manufacturing Company, Inc., Louis Gelbman, Hamlin F. Andrus and Jesse H. Besser have combined and conspired to unreasonably restrain, and to monopolize, trade and commerce in concrete block making machines in violation of Sections 1 and 2 of the Sherman Act; and defendants Besser Manufacturing Company and Jesse H. Besser have attempted to monopolize and have monopolized said trade and commerce in violation of Section 2 of the Sherman Act.

II

As used in this Final Judgment:

(A) "Besser Company" means Besser Manufacturing Company;

(B) "Stearns" means Stearns Manufacturing Company, Inc.;

(C) "Besser' means Jesse H. Besser;

[fol. 2430] (D) "Gelbman" means Louis Gelbman;

(E) "Andrus" means Hamlin F. Andrus;

(F) "Patents" means United States Letters Patent and applications therefor, and all reissues, divisions, continuations or extensions thereof, and patents issued upon said applications;

(G) "Person" means any individual, partnership, firm, corporation, association, trustee or any other business or legal entity.

III

The provisions of this Final Judgment applicable to any defendant shall apply to such defendant, its subsidiaries, successors, assigns, and each of its officers, directors, agents, employees and any other person acting under, through or for such defendant.

IV

(A) Within sixty (60) days following the entry of this Final Judgment, defendants Besser Company shall present to this Court for approval their plan for divesting themselves, by July 1, 1951, of all stock holdings and other interests, direct or indirect, in defendant Stearns.

(B) Defendants Besser Company and Besser are hereby ordered and directed to cancel and terminate any and all contracts, agreements and understandings between said defendants, or either of them, and any other person, calling for the disposition of any of the capital stock of defendant Stearns, where such contracts, agreements or understandings were entered into prior to entry of this Final Judgment. Defendants Besser Company and Besser are hereby enjoined and restrained from adhering to, enforcing or claiming any rights under any of the aforesaid contracts, agreements or understandings.

V

Defendants Besser Company and Besser are each enjoined and restrained from:

(A) Acquiring, directly or indirectly, by purchase, merger, consolidation or otherwise after entry of this final Judgment, and from holding or exercising after such acquisition ownership or control of, the business, physical assets or good will, or any part thereof, or any capital stock or securities of any person engaged [fol. 2431] in the manufacture, sale or distribution of concrete block making machines until after said defendant has, upon reasonable notice to the Attorney General and an opportunity on the part of the latter to be heard, shown to this Court that such acquisition would not substantially lessen competition in the manufacture, sale or distribution of concrete block making machines;

(B) Causing, authorizing or knowingly permitting any officer, director, agent or employee to serve as an officer, director, agent or employee of any other person engaged in the manufacture of concrete block making machines.

VI

(A) The license agreement to which defendants Gelbman, Andrus, Stearns and Besser Company are parties, dated December 7, 1942, is adjudged to be unlawful under sections 1 and 2 of the Sherman Act and is hereby declared null and void.

(B) Defendants are jointly and severally enjoined and restrained from conveying or receiving any patent rights under any license, contract, agreement or understanding which gives the licensee or licensees control over the number of licenses issued or to be issued, or which has the same unlawful purpose and effect as the aforedescribed license agreement of December 7, 1942.

(C) Except for now pending appeals and proceedings pursuant thereto *Andrus and Gelbman* v. *Whitman; Andrus and Gelbman* v. *Wenzel, et al; Besser Manufacturing Company* v. *Whitman;* defendants Besser Company, Besser, Gelbman and Andrus are enjoined and restrained from

instituting or threatening to institute, or maintaining or continuing any action, suit or proceeding for acts of infringement of any patent referred to in Section VII (A) of this Judgment occurring prior to the date of this Judgment.

[fol. 2432] VII

(A) Defendants Gelbman, Andrus, Besser Company and Besser are each ordered and directed to grant to any applicant therefor a nonexclusive license to make, use and vend concrete block making machinery under any, some or all patents and patent applications pertaining to concrete block making machinery now owned or controlled by the defendant, or which are issued or applied for within ten years from the entry of this Final Judgment, and each of said defendants is hereby enjoined and restrained from making any sale or other disposition of any of said patents or patent applications which deprives it of the power or authority to grant such license, unless it sells, transfers or assigns such patents and patent applications and requires as a condition of such sale, transfer or assignment that the purchaser, transferee or assignee shall observe the requirements of this Section VII, and the purchaser, transferee or assignee shall file with this Court prior to consummation of said transaction, an understanding to be bound by the provisions of this Section VII. The reference to an "undertaking" shall not be construed as requiring the posting of a bond.

(B) Defendants Gelbman, Andrus, Besser Company and Besser are hereby enjoined and restrained from including any restriction or condition whatsoever in any license or sublicense granted by or pursuant to the provisions of this Section VII except that (1) the license may be nontransferable; (2) a reasonable non-discriminatory royalty may be charged; (3) reasonable provision may be made for periodic inspection of the books and records of the licensee by an independent auditor or any person acceptable to the licensee, who shall report to the licensor only the amount of the royalty due and payable; (4) reasonable provision may be made for cancellation of the license upon failure of the licensee to pay the royalties or to permit the

inspection of its books and records as hereinabove provided; and (5) the license must provide that the licensee may cancel the license at any time after one (1) year from the initial date thereof by giving thirty days' notice in writing to the licensor.

[fol. 2433] (C) Upon receipt of a written request for a license under the provisions of this Section VII, the defendant shall advise the applicant in writing of the royalty which it deems reasonable for the patent or patents to which the request pertains. If the parties are unable to agree upon a reasonable royalty within sixty (60) days from the date such request for the license was received by the defendant, the applicant therefor may forthwith apply to this Court for the determination of a reasonable royalty, and said defendant shall, upon receipt of notice of the filing of such application, promptly give notice thereof to the Attorney General. The reasonable royalty rate or rates determined by the Court shall apply to the applicant and all other licensees under the same patent or patents. Pending the completion of negotiations or any such proceeding, the applicant shall have the right to make, use and vend concrete block machinery under the patents to which its application pertains without payment of royalty or other compensation, as above provided, but subject to the provisions of subsection (D) of this Section VII.

(D) Where the applicant has the right to make, use and vend concrete block machinery under subsection (C) of this Section VII, said applicant or said defendant may apply to this Court to fix an interim royalty rate pending final determination of what constitutes a reasonable royalty. If the Court fixes such interim royalty rate, said defendant shall then issue and the applicant shall accept a license providing for the periodic payment of royalties at such interim rate from the date of the filing of such application by the applicant. If the applicant fails to accept such license or fails to pay the interim royalty in accordance therewith, such action shall be ground for the dismissal of his application, and his rights under subsection (C) shall terminate. Where an interim license or sublicense has been issued pursuant to this subsection,

reasonable royalty rates, if any, as finally determined by this Court, shall be retroactive for the applicant and all other licensees under the same patent or patents to the date the applicant files his application with the Court.

(E) Nothing herein shall prevent any applicant from attacking in the aforesaid proceedings, the validity or scope of any of the patents, nor shall this Final Judgment be construed as importing any validity or value to any of the said patents.

[fol. 2434] VIII

(A) Defendant Besser Company is hereby ordered and directed, within thirty (30) days from the entry of this Final Judgment to notify each person presently leasing a concrete block making machine from said defendant that the lessee may, at its option,

(1) terminate the said lease agreement at any time prior to July 1, 1952, or

(2) continue under the terms of the lease, or

(3) purchase at any time prior to July 1, 1952, the machine or machines leased, and accessory equipment used therewith, such purchase to be in accordance with subsection (B) of this Section VIII.

(B) Defendant Besser Company is hereby ordered and directed to sell to any present lessee, electing to purchase machines under subsection (A) above, any, some or all of the concrete block making machines and accessory equipment now leased. The sales price and the terms and conditions of sale of any concrete block making machinery and accessory equipment sold pursuant to this Judgment shall be reasonable, uniform and non-discriminatory but said sales price shall make due allowance for the amount of rental paid and shall not exceed the depreciated value of the machine or machines and accessory equipment as carried on the books of the defendant Besser Company.

(C) Defendant Besser Company is hereby ordered and directed to sell to any existing lessee or purchaser under this Section VIII, of concrete block making machinery and accessory equipment of said defendant, repair parts upon

reasonable, uniform and non-discriminatory prices, terms and conditions of sale.

IX

Defendants are jointly and severally enjoined and restrained from entering into, adhering to or claiming any rights under any contract, agreement or understanding with any person presently or hereinafter engaged in the development or manufacture of concrete block making machinery which has the purpose or effect of preventing such person, or any other person from competing with defendants or any of them in the development, manufacture or sale of concrete block making machinery.

[fols. 2435-2539]

X

Each of the defendants is enjoined and restrained from compelling, coercing or influencing any person to refrain from manufacturing concrete block making machinery or supplying steel or other materials, used in the manufacture of said machines, to any manufacturer of such machines.

XI

For the purpose of securing compliance with this Final Judgment duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General, or an Assistant Attorney General, and on reasonable notice to the defendant, made to its principal office, be permitted (1) access during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant relating to any matters contained in this Final Judgment, and (2) subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of said defendants, who may have counsel present, regarding any such matters. No information obtained by the means provided in this Paragraph shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of such Department, except in the course of legal proceedings in which the United States is a party for the

purpose of securing compliance with this Judgment, or as otherwise required by law.

XII

Jurisdiction is retained for the purpose of enabling any of the parties to this Judgment to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Judgment, or the modification thereof, or the enforcement of compliance therewith and for punishment or violation thereof.

—— ——, United States District Judge.

Dated: —— ——.

[fol. 2540] In United States District Court

Civil Action No. 8144

United States of America, Plaintiff,

vs.

Besser Manufacturing Company, Stearns Manufacturing Company, Inc., Jesse H. Besser, Louis Gelbman and Hamlin F. Andrus, Defendants

Final Judgment—April 12, 1951

Plaintiff, United States of America, filed its complaint herein on April 28, 1949, and defendants answered denying the substantive allegations thereof. The cause came on for trial May 16, 1950, and was completed June 23, 1950. The court filed its opinion January 30, 1951, finding that the defendants have violated Sections 1 and 2 of the Sherman Act. The court hereby adopts said opinion as its findings of facts and conclusions of law.

Now, therefore, it is hereby ordered, adjudged and decreed as follows:

I

Defendants Besser Manufacturing Company, Stearns Manufacturing Company, Inc., Louis Gelbman, Hamlin F.

Andrus and Jesse H. Besser have combined and conspired to unreasonably restrain, and to monopolize, trade and commerce in concrete block making machines in violation of Sections 1 and 2 of the Sherman Act; and defendants Besser Manufacturing Company and Jesse H. Besser have attempted to monopolize and have monopolized said trade and commerce in violation of Section 2 of the Sherman Act.

II

As used in this final judgment:

(A) "Besser Company" means Besser Manufacturing Company;

(B) "Stearns" means Stearns Manufacturing Company, Inc.;

[fol. 2541] (C) "Besser" means Jesse H. Besser;

(D) "Gelbman" means Louis Gelbman;

(E) "Andrus" means Hamlin F. Andrus;

(F) "Patents" means United States Letters Patent and applications therefor, and all reissues, divisions, continuations or extensions thereof, and patents issued upon said applications;

(G) "Person" means any individual, partnership, firm, corporation, association, trustee or any other business or legal entity.

III

The provisions of this final judgment applicable to any defendant shall apply to such defendant, its subsidiaries, successors, assigns, and each of its officers, directors, agents, employees and any other person acting under, through or for such defendant.

IV

(A) Within sixty (60) days following the entry of this final judgment, defendants Besser Company and Besser shall present to this court for approval their plan for divesting themselves, by July 1, 1951, of all stock holdings and other interests, direct or indirect, in defendant Stearns.

(B) Defendants Besser Company and Besser are hereby ordered and directed to cancel and terminate any and all contracts, agreements and understandings between said

defendants or either of them, and any other person, calling for the disposition of any of the capital stock of defendant Stearns, where such contracts, agreements or understandings were entered into prior to entry of this final judgment. Defendants Besser Company and Besser are hereby enjoined and restrained from adhering to, enforcing or claiming any rights under any of the aforesaid contracts, agreements or understandings.

V

Defendants Besser Company and Besser are each enjoined and restrained from

[fol. 2542] (A) Acquiring, directly or indirectly, by purchase, merger, consolidation or otherwise after entry of this final judgment, and from holding or exercising after such acquisition ownership or control of, the business, physical assets or good will, or any part thereof, or any capital stock or securities of any person engaged in the manufacture, sale or distribution of concrete block making machines until after said defendant has, upon reasonable notice to the Attorney General and an opportunity on the part of the latter to be heard, shown to this court that such acquisition would not substantially lessen competition in the manufacture, sale or distribution of concrete block making machines;

(B) Causing, authorizing or knowingly permitting any officer, director, agent or employee to serve as an officer, director, agent or employee of any other person engaged in the manufacture of concrete block making machines.

VI

(A) The license agreement to which defendants Gelbman, Andrus, Stearns and Besser Company are parties, dated December 7, 1942, is adjudged to be unlawful under Sections 1 and 2 of the Sherman Act and is hereby declared null and void.

(B) Defendants are jointly and severally enjoined and restrained from conveying or receiving any patent rights under any license, contract, agreement or understanding

which gives the licensee or licensees control over the number of licenses issued or to be issued, or which has the same unlawful purpose and effect as the afore-described license agreement of December 7, 1942.

(C) Except for now pending actions, appeals and proceedings pursuant thereto in *Andrus and Gelbman* v. *Whitman; Andrus and Gelbman* v. *Wenzel, et al; Besser Manufacturing Company* v. *Whitman;* defendants Besser Company, Besser, Gelbman and Andrus are enjoined and restrained from instituting or threatening to institute, or maintaining or continuing any action, suit or proceeding for acts of infringement of any patent referred to in Sec- [fol. 2543] tion VII (A) of this judgment occurring prior to the date of this judgment.

VII

(A) Defendants Gelbman, Andrus, Besser Company and Besser are each ordered and directed to grant to any applicant therefor a non-exclusive license to make, use and vend concrete block making machinery under any, some or all patents and patent applications pertaining to concrete block making machinery now owned or controlled by the defendant, or which are issued or applied for within ten years from the entry of this final judgment, and each of said defendants is hereby enjoined and restrained from making any sale or other disposition of any of said patents or patent applications which deprives it of the power or authority to grant such licenses, unless it sells, transfers or assigns such patents and patent applications and requires as a condition of such sale, transfer or assignment that the purchaser, transferee or assignee shall observe the requirements of this Section VII, and the purchaser, transferee or assignee shall file with this court prior to consummation of said transaction, an undertaking to be bound by the provisions of this Section VII. The reference to an "undertaking" shall not be construed as requiring the posting of a bond.

(B) Defendants Gelbman, Andrus, Besser Company and Besser are hereby enjoined and restrained from including any restrictions or condition whatsoever in any license or sublicense granted by or pursuant to the provisions of this

Section VII and in order to arrive at a fair royalty price for the use of the various patents, present and future, as above enumerated, and the form and contents of the royalty contracts—

1. Said plaintiff government and said defendants Gelbman and Andrus, shall on or before April 21, 1951, each select two persons, which said four persons so selected shall act as a committee to determine such fair royalty prices and the form and contents of the royalty contracts; provided, however, that if they are unable to so agree on [fol. 2544] or before May 5, 1951, then said four persons so selected may then select and appoint a fifth person to act with them as the fifth member of said committee; and provided further that if said four are unable to agree upon the fifth member by at least a three to one vote, on or before May 12, 1951, then such questions and points not agreed upon shall forthwith be referred to this court which shall then have the right to act as the fifth member himself or select another person in his stead to aid in making the final decision; and

2. It is further ordered that the same method and manner shall be used in arriving at a fair royalty price and the form and contents of the royalty contracts covering the patents, present and future, as move enumerated, owned and/or controlled by defendants Besser Manufacturing Company and Jesse H. Besser and when arrived at shall be filed as provided in sub-paragraph (C) following.

(C) It is further ordered that said final royalty prices together with the form and contents of the royalty agreement, when determined, shall be forthwith filed by the government with the United States District Court Clerk and upon so filing will then become a part of this judgment just as though it were now included herein.

(D) Nothing herein shall prevent any applicant from attacking in the aforesaid proceedings, the validity or scope of any of the patents, nor shall this final judgment be construed as importing any validity or value to any of the said patents.

VIII

(A) Defendant Besser Company is hereby ordered and directed, within thirty (30) days from the entry of this final judgment to notify each person presently leasing a concrete block making machine from said defendant that the lessee may, at its option,

[fol. 2545] (1) terminate the said lease agreement at any time prior to January 1, 1953, or

(2) continue under the terms of the lease, or

(3) enter into an agreement to purchase the machine or machines leased, and the accessory equipment used, as mutually satisfactory to the parties concerned;

provided, however, that the provisions of sub-sections 1 and 2 of this sub-paragraph (A) shall be contingent upon said lessee making his election in writing on or before October 1, 1952.

(B) Defendant Besser Company is hereby ordered and directed to sell to any existing lessee or purchaser under this Section VIII, of concrete block making machinery and accessory equipment of said defendant, repair parts upon reasonable, uniform and non-discriminatory prices, terms and conditions of sale.

IX

Defendants are jointly and severally enjoined and restrained from entering into, adhering to or claiming any rights under any contract, agreement or understanding with any person presently or hereinafter engaged in the development or manufacture of concrete block making machinery which has the purpose or effect of preventing such person, or any other person from competing with defendants or any of them in the development, manufacture or sale of concrete block making machinery.

X

Each of the defendants is enjoined and restrained from compelling, coercing or influencing any person to refrain from manufacturing concrete block making machinery or supplying steel or other materials, used in the manufacture of said machines, to any manufacturer of such machines.

XI

For the purpose of securing compliance with this final judgment duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General, or an Assistant Attorney General, and on rea- [fol. 2546] sonable notice to the defendant, made to its principal office, be permitted (1) access during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant relating to any matters contained in this final judgment, and (2) subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of said defendants, who may have counsel present, regarding any such matters. No information obtained by the means provided in this paragraph shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of such Department, except in the course of legal proceedings in which the United States is a party for the purpose of securing compliance with this judgment, or as otherwise required by law.

XII

Jurisdiction is retained for the purpose of enabling any of the parties to this judgment to apply to the court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this judgment, or the modification thereof, or the enforcement of compliance therewith and for punishment or violation thereof.

XIII

Judgment is entered against the defendants for all taxable costs to be taxed in this proceeding.

Frank A. Picard, United States District Judge.

Dated: April 12, 1951.

[fol. 2547] IN UNITED STATES DISTRICT COURT

[Title omitted]

DESIGNATION OF COMMITTEE MEMBERS PURSUANT TO SECTION VII OF FINAL JUDGMENT—April 23, 1951

Sub-paragraph (B) of Paragraph VII of the Final Judgment entered April 12, 1951 directs the government to select, on or before April 21, 1951, two persons who shall sit as a committee with two representatives appointed by defendants Gelbman and Andrus to determine fair royalty prices and the form and contents of the royalty contracts. Sub-paragraph (B) (2) establishes the same procedure for determination of fair royalty prices and form and contents of royalty contracts covering patents held by defendants Besser Company and Besser. Sub-paragraph (C) directs the government to file with this Court the forms and contents of royalty contracts and fair royalty prices when so determined.

Acting pursuant to Section VII the government submits the names of Roy Darden and E. F. Olsen or their attorneys, to serve on the committee to determine the rate of royalties and the form and contents of the royalty contract. The selection of these two persons has been made after a poll of a representative number of prospective licensees to ascertain whom they desire to serve upon the committee as their representatives.

[fol. 2548] It is our understanding that this designation of Messrs. Darden and Olsen, or their attorneys, constitutes all that is required of the government until such time as the committee determines the royalty rates and prepares a form of License agreement. It is believed that this is the interpretation which the Court intended to be placed upon this Section for the following reasons:

1. The Department has no special knowledge of the value of the patents and is not equipped to undertake the performance of the function of determining rates of royalties.

2. Because of tradition, policy, limitations on authority, and operating set-up, the Department of Justice has consistently sought to avoid participation in private matters such as those here involved.

3. The holders of the patents here involved and the prospective licensees are better equipped to work out, through private negotiations, a form of license and rate of royalties. The prospective licensee is in the best position to know the value of the patents to him, his need for a license under them and the amount he is willing and able to pay for such a license.

4. Finally, as the agency charged with the enforcement of the antitrust laws, the Department must of necessity remain in position to bring acts of non-compliance with the judgment to the attention of the Court. As such the Department should not be placed in a position which would interfere with the discharge of this duty and responsibility.

In view of these considerations, of which this Court is fully aware, we do not interpret the provisions of Section VII as requiring the government to direct, guide and control the actions and decisions of Messrs. Darden and Olsen. We think the proper construction is that the Government shall simply serve as the conduit whereby the names of two persons (who, in this instance, are themselves prospective licensees and designees of other prospective licensees) are submitted to the Court. Messrs. Darden and Olsen have been selected on that basis and it is contemplated by the [fol. 2549] government that they or their attorneys, acting for them, shall serve on the committee on their own behalf and as agents of the other prospective licensees and not as agents of the Department of Justice.

Respectfully submitted, /s/ H. G. Morison, Assistant Attorney General, /s/ Marcus A. Hollabaugh, /s/ John W. Neville, /s/ William E. Speer, Special Assistants to the Attorney General.

Date: April 23, 1951.

[fol. 2550] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPORT OF GELBMAN-ANDRUS "ROYALTY COMMITTEE" AND APPENDICES THERETO—May 3, 1951

On May 2 and May 3, 1951, Louis Gelbman and Edward F. McGee, accompanied by Leo Goreff, their attorney, met with Eugene F. Olsen and Roy W. Darden and Vernon H. Doane, attorney for Roy W. Darden, at Detroit, Michigan. The said Gelbman and McGee had been designated in accordance with paragraph VII (b) 1 of the Final Judgment dated April 12, 1951, in the above entitled action to represent the defendants Louis Gelbman and Hamlin F. Andrus; the said Eugene F. Olsen and Roy W. Darden, had been designated under the same paragraph by the United States Government to represent potential licensees.

The designees were successful in arriving at a fair royalty price and the form and contents of a royalty contract which would be applicable to prospective licensees desiring a license under nine (9) patents owned by defendants Louis Gelbman and Hamlin F. Andrus and relating to block making machines. Those nine patents are enumerated in Schedule A attached to the form of license agreement. The royalty prices and form and contents of the royalty contract are set forth in the attached form license agreement.

The designees found it impossible to arrive at a fair royalty price or terms or conditions of a royalty contract which would be applicable to prospective licensees desiring a license of less than all of the nine patents enumerated in Schedule A in the form of license agreement. The possible [fol. 2551] combinations or permutations of patents within that group are so great as to preclude the designees from arriving at any terms or conditions which would be applicable to licenses of less than all of the nine patents.

The designees feel and recommend that prospective licensee desiring a license of less than all of the nine (9) patents enumerated in Schedule A be permitted to negotiate with the defendants Louis Gelbman and Hamlin F. Andrus for the desired license.

The designees found it impossible to arrive at a fair royalty price or terms and conditions for a license agreement involving Gelbman's patent No. 2467203 of April 12, 1949, relating to "Pallet Charging", and Gelbman's patent No. 2502940 of April 4, 1950 relating to "Auto Claye". These two patents relate to equipment which has never been built or operated. Tremendous investments would be required to build such equipment and there is no present basis for ascertaining whether such equipment would be practical or operative.

The designees feel and recommend that prospective licensees desiring licenses under these two patents be permitted to negotiate for such licenses with the defendants Louis Gelbman and Hamlin F. Andrus.

The attached form of proposed license agreement was concurred in by the designees of the defendants Louis Gelbman and Hamlin F. Andrus without prejudice to the rights of such defendants to appeal from the Judgment in the above action, or take such steps with respect thereto as such defendants deem advisable.

Pursuant to paragraph VII (C) of the Final Judgment dated April 12, 1951, in the above action, this memorandum and the attached form of license agreement is being submitted to and filed with the Department of Justice for filing with this Honorable Court.

Louis Gelbman, Edward F. McGee, Eugene F. Olsen, Roy W. Darden.

Dated: Detroit, Michigan, May 3, 1951.

[fol. 2552] Agreement made and entered into this ..... day of ....., 1951, by and between Louis Gelbman and Hamlin F. Andrus, respectively residing at 140 Eliot Avenue, Yonkers, New York, and North Street, Greenwich, Connecticut (hereinafter referred to as "licensors"), and ..... Corporation, having its office at ....., in the City of ....., State of ..... (hereinafter referred to as "licensee"),

Witnesseth:

Whereas, the licensors are the owners of all the right, title and interest in and to Letters Patent of the United States, as set forth in the schedule annexed hereto and made part hereof and labelled "Schedule A"; and

Whereas, the licensee is desirous of obtaining a license, non-exclusive and non-assignable, to manufacture in the United States of America and to sell or use in the United States of America and the territories thereof and elswhere, embodying and employing all or part of the inventions described in the aforesaid Letters Patent, and any reissues thereof,

Now therefore, in consideration of the sum of One ($1.00) Dollar and other good and valuable considerations, by each of the parties to the other paid, receipt whereof is hereby acknowledged, the parties hereto have agreed and do hereby covenant and agree as follows:

First: Subject to the due performance of all the terms, covenants and conditions of this agreement on the part of the licensee agreed to be performed hereunder, the licensors have given and granted, and by these presents do give and grant unto the licensee, upon the terms and conditions and with the limitations herein set forth, a non-exclusive and non-assignable right to manufacture in the United States of America at the licensee's factory or factories operated under the licensee's exclusive control located in the City of _____, State of _____, and at such other places located within the United States as the licensee may hereafter designate to the licensors [fol. 2553] in writing, and to sell, use, or otherwise dispose of throughout the United States of America and its territorial possessions, or elsewhere machines and apparatus embo*y*ding and employing all or part of the inventions or improvements set forth, described and claimed in the aforesaid Letters Patent, as set forth in Schedule A annexed hereto.

The term of this license shall extend until the expiration date of the Letters Patent or any renewals or reissues thereof last to expire unless this license is sooner terminated as hereinafter provided. Licensors shall notify

licensee in writing sixty (60) days in advance of the expiration date of each licensed patent to give licensee an opportunity to consider termination of this agreement as provided in Paragraph Eighth.

Second: The licensee agrees and covenants to pay to the licensors during the continuance of this agreement a license fee or royalty computed as follows on each machine which is manufactured, or sold or leased or otherwise disposed of by the licensee which comes within the scope of the claims of any or all of said Letters Patent and which is made or sold or otherwise disposed of in the United States of America:—

$50.00 on each machine with mold box to make one at a time of 12" width by 18" length units and any other size or combination of units in this size mold box.

$112.50 on each machine with mold box to make two at a time of 8" width by 18" length units and any other size or combination of units in this size mold box.

$187.50 on each machine with mold box to make three at a time of 8" width by 18" length units and any other size or combination of units in this size mold box.

$50.00 additional for each 8" x 18" section exceeding three at a time on each machine.

The licensee shall pay to the licensors simultaneously with the execution and delivery of this license the sum of Six hundred twenty-five ($625.00) Dollars, which said sum shall be applied and credited to the royalties due or to become due by the manufacture or sale or use or other disposition of machines as herein provided.

The licensee agrees to pay to the licensors a minimum annual royalty of Six hundred twenty-five ($625.00) Dol- [fol. 2554] lars during each and every license year, commencing with the date hereof. This minimum royalty, after the first license year, shall be payable in equal quarterly payments of One hundred fifty-six and 25/100 ($156.25) Dollars, in advance, commencing with the second license year.

Any royalty payment in excess of Six hundred twenty-five ($625.00) Dollars during any license year may be ap-

plied toward meeting the minimum royalty for the succeeding year or years until exhausted.

Third: The licensee agrees to make written reports to the licensors, under oath, quarterly, within fifteen (15) days after the first day of each month following such quarter, during the term of this agreement, addressed to the licensors at the City of ....., State of ....., stating the number and descriptions of all machines manufactured, sold or otherwise disposed of, coming within the scope of the claims of any or all of said Letters Patent, such reports to itemize the number and type of all such machines manufactured, sold or otherwise disposed of during the preceding quarter, the first of which reports to be made as of ..... and to include all such machines manufactured or sold or otherwise disposed of since the date hereof up to that date, each subsequent report to include all such machines manufactured, sold or otherwise disposed of during the preceding quarter, and simultaneously with the making of each such report, to pay to the licensor any excess royalties over the already paid minimum advance royalties for such quantities at the rate specified in Paragraph Second for machines.

Fourth: The licensee agrees to mark all of the machines manufactured, put out and licensed hereunder with the following words, "Licensed under the following U. S. Letters Patent" followed by the applicable patent numbers.

Fifth: The licensee agrees to keep full, accurate and complete books of account, records, data and memoranda respecting the said business and showing the number and kind of licensed machines manufactured or sold or otherwise disposed of under the license herein granted in sufficient detail to enable the royalties payable hereunder by the [fol. 2555] licensee to be determined, and further agrees to permit the licensors or their representatives to inspect the books and records of the licensee's operations under this license, which books of account shall be kept at the licensee's place of business; and said books and the premises where such licensee's business is carried, insofar as may be necessary shall, at all reasonable times within the period of this licence and within ninety days from any surrender, cancellation or termination of this license, be open

to the inspection of the licensors or their representatives, who shall be at liberty to make copies of, or extracts from, said books of account. Said representative may communicate to the licensors the result of his investigation, but except as hereinafter provided said representative shall not copy names of customers of licensee. However, in any instance or instances where the licensors are desirous of checking the sales to a particular customer or customers of the licensee for the purpose of verifying the licensee's report or records, the representative may copy the name or names of the particular customer or customers and communicate the details thereof to the licensors.

Sixth: If the licensee shall become insolvent or shall make an assignment for the benefit of creditors or proceedings in voluntary or involuntary bankruptcy, or for extension arrangement, composition or reorganization, shall be instituted on behalf of, or against the licensee, or a receiver or trustee of the licensee's property shall be appointed, the license herein granted shall terminate forthwith, but the licensors shall recover royalties on machines, and in case of any such termination of right, title and interest in and to the license covered by this agreement shall then and thereby forthwith revert to and become vested in the licensors.

Seventh: If the licensee shall default in rendering reports or payment of royalties as herein provided, or in performance of any other terms and conditions of this agreement, it shall be lawful for the licensors to cancel this agreement after expiration of thirty (30) days from written notice, of such default given to the licensee by the licensors and failure of the licensee to overcome such de-
[fol. 2556] fault during such thirty (30) day period.

Eighth: The licensee may surrender or terminate this license at any time after one (1) year from date hereof on thirty (30) days written notice to the licensors by completing or executing a surrender of license in the form hereto attached, together with a sworn statement of final account and returning the same by registered mail to the licensors.

Termination of this license shall not prevent the owners of any machines on which royalties have been paid to the

licensors from continuing its use of such machines without further payment of royalties.

Ninth: Upon any surrender, cancellation or termination of this license all unpaid royalties on operations under this license shall accrue and become immediately due and payable for all of the licensed products on hand or in the course of manufacture, whether or not sold or otherwise disposed of.

Tenth: The surrender, cancellation or termination of this license shall in no way affect the liability of the licensee for any sums of money accruing or becoming due or payable prior to the date such surrender, cancellation or termination becomes effective and shall be without prejudice to any rights of the licensors for the recovery of any monies due them hereunder.

Eleventh: The failure to exercise any right or to terminate this agreement for any breach, shall not be deemed a waiver of the right to do so for persistence by the licensee in a breach of continuing nature or for any subsequent or other breach.

Twelfth: Any notice by either party under this agreement may be served by enclosing the same in a post prepaid wrapper, registered mail, addressed to the other party or its receiver or trustee in bankruptcy, or successor or assignee at its or their last known address, and depositing the same in any post office.

Thirteenth: This agreement is entered into pursuant to the provisions of a certain judgment dated April 12th, 1951 made and entered in the United States District Court for the Eastern District of Michigan, Southern Division, in an action entitled "United States of America, plaintiff, vs. [fol. 2557] Besser Manufacturing Company, Stearns Manufacturing Company, Inc., Jesse H. Besser, Louis Gelbman and Hamlin F. Andrus, defendants," and is in all respects subject thereto and any amendment or modification thereof upon appeal, if any, or otherwise.

Fourteenth: This agreement shall be binding upon and enure to the benefit of the successors or assigns of the licensors; also it shall be binding upon and enure to the benefit of the successors of the entire business of the licen-

see, but the licensee may not assign or sub-license without the written consent first received of the licensors.

In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

—— ——, —— ——, Licensors, —— ——, By—— ——, Licensee.

Witnesses: —— ——, —— ——.

[fol. 2558] Statement of surrender of license by licensee

Know all men by these presents, that ..... of ....., described in the license and herein called "Licensee", does hereby surrender and terminate the annexed license dated ..... between Louis Gelbman and Hamlin F. Andrus, as licensors, and the undersigned, in accordance with the terms thereof, as of ....., 195....

—— ——, Licensee.

Dated: .....

[fol. 2559] Schedule "A"

Patent Number	Date	Description
2,003,632	June 4, 1935	Sliding Vibrator
2,069,880	February 9, 1937	Roll Over
2,336,780	January 9, 1945	Method of Making Block
2,029,365	February 4, 1936	Feed Drawer Agitators
2,251,447	August 5, 1941	Vibrating Mechanism
2,269,955	January 13, 1942	Rocker Mold
2,275,675	March 10, 1942	Track System, Feed Drawer
2,360,122	October 10, 1944	Air Brick Machine
2,431,034	November 18, 1947	DualPlace Vibration

[fol. 2560] IN UNITED STATES DISTRICT COURT

[Title omitted]

TRANSCRIPT OF PROCEEDINGS

Transcript of proceedings on Motion for Stay of Execution in the above-entitled cause before Honorable Frank A. Picard, District Judge, at Detroit, Michigan, on Tuesday, May 8, 1951, at 11 o'clock A. M.

APPEARANCES:

John W. Neville, Esq., Assistant United States Attorney, 733 Federal Building, Detroit 26, Michigan, Appearing on behalf of the Plaintiff.

John W. Babcock, Esq., 2280 Penobscot Building, Detroit 26, Michigan, Appearing on behalf of the Defendants.

[fol. 2561]

Detroit, Michigan.
Tuesday, May 8, 1951.
11 o'clock A. M.

Mr. Nelville: The Government objects to the application for a stay.

The Court: Have you anything further, Mr. Babcock?

[fol. 2562] Mr. Babcock: Well, I have nothing further, except that, as we set forth in full in the affidavit in support of the Motion for Stay, your Honor——

The Court (Interposing): May I ask if the Besser Company has appointed the two men to decide what the fair price would be for the patents involved in this lawsuit?

Mr. Neville: So far as the Government knows, they have not done so——

The Court: May I ask if the defendant Besser has now appointed the arbitrators or the members of the committee [fol. 2563] that are suggested in Paragraph VII(B).

Mr. Babcock: Yes, your Honor. I would be very glad to answer your Honor's question.

The Court: Yes.

Mr. Babcock: It is not at all because of any disrespect or any desire or intent upon the part of Besser Manufacturing Company to disregard or disobey the Court's judgment, but we had determined definitely upon taking an

appeal from the entire Paragraph VII, and we felt that it would be a contradictory position to take to appeal, claiming that the Court's order in that connection was erroneous, and at the same time take the steps that would be in compliance, and we are confronted under the Rules, the Court Rules, with the necessity of preparing an assignment of errors for filing along with our formal application for leave to appeal, and since we are burdened with that I feel it will take just a little time and will probably require our constant effort up until the expiration of our time for appeal, which is June 11, so that this is merely an application for a temporary stay of judgment until we can perfect the application, formal application for appeal and the assignment of errors.

The Court: Well, is that the information that you gave me the other day over the telephone? As to why you did not comply with the order? Is that the reason?

Mr. Babcock: As my memory serves me, that is it, your [fol. 2564] Honor.

The Court: My memory is not in accord with that, Mr. Babcock. My memory is that I was informed that you did not understand that you were to appoint any two arbitrators, and that for that reason you hadn't appointed any.

Mr. Babcock: Oh, I beg pardon.

The Court (To Mr. Neville): Was that the reason given to you?

Mr. Neville: The reason given to me was that there was no time limit within which they had to appoint the nominees, and therefore that they were definitely——

The Court (Interposing): The time limitation is set out here very plainly.

I say that there are two sets of patents involved, one of Andrus and the other of Besser. I say that the Andrus people and the Government shall get together on or before April 21, each select two persons, which said four persons, so selected, shall act as a committee to determine such fair royalty prices, and then I say if they are unable to agree by May 5th then they are to select the fifth person, and if they are unable to agree upon the fifth member by at least a 3-to-1 vote by May 12, then they shall appoint or let the Court appoint a fifth person or act himself.

And then I say:

> "It is further ordered that the same method and [fol. 2565] manner shall be used in arriving at a fair royalty price and the form and contents of the royalty contracts covering the patents—

And so forth.

> "—owned and/or controlled by the defendants Besser Manufacturing Company and Jesse H. Besser—"

There is no excuse in the Court's mind or way of thinking why the Besser people did not at that time appoint two arbitrators.

Now you give a reason that would have appealed to me last week, if it had been given last week. It was not given last week.

I was told that you couldn't understand the judgment, and I told you over the phone that if you couldn't understand the judgment it was because you and your associate counsel had not desired to understand the judgment and that you were purposely seeking not to understand it, which did not aid matters any.

But I suggested and I suggest now, that without prejudice to your case, so that we may have the price, the fair price on these patents set now, that you appoint two, and that they act with the Government, and I will specifically provide that it will not prejudice your case one bit.

If you had done it, perhaps, without taking it up with the Court, I think there might have been a question of your prejudicing your case, so that the reason given today is a good one, but the reason given last week was not good. [fol. 2566] Now, if this had been the only part of the judgment that the defendant did not understand, or if there was some question about whether you had or had not told the Court what I claim you did tell him, I would be willing to say that I had misunderstood.

But Paragraph VIII was, for some reason or other, misread by yourself, evidently Mr. Henry and the members of the defendant company, and when I directed your attention to the fact that I was not ordering what you thought I had ordered, that these people had no right to buy your

machines at any price fixed by the Government, the lease could not be fixed by the Government—the words "as mutually satisfactory to the parties concerned" are written right in the judgment.

How you could misunderstand that, I don't know, except having misunderstood on part you misunderstood the other.

Now, if you want to do that, if you want to have these people sit so you can go to the Court of Appeals with the judgment, and part of the judgment is—these prices are said to be part of the judgment; isn't that correct, in there?

Mr. Neville: The prices, your Honor, in the——

The Court (Interposing): Yes. I see in there some place where—we don't have to re-word it. Do you have it? (Reading):

> [fol. 2567] "It is further ordered that said final royalty prices together with the form and contents of the royalty agreement, when determined, shall be forthwith filed by the Government with the United States District Court Clerk and upon so filing will then become a part of this judgment just as though it were now included herein."

That is final.

I will, at least temporarily, refuse any stay. I would reconsider it if the defendant company desires to do what the Court thinks it ought to do—select your committee, fix your price, let them attach, and then the Court will aid you in every way that it possibly can to go up to the Court of Appeals.

I will go out of my way, as I always have, to give you the benefit of exceptions that weren't taken, of exhibits that weren't put in, because I am interested in justice and not seeing whether this Court is affirmed or not by the Court of Appeals.

Mr. Babcock: Well, under these circumstances, if the Court please, in view of the Court's assurance that it is done with the understanding that there is absolutely no prejudice to our position on our appeal, and simply have presented our views here, that we feel that it would be taking a contradictory position, but under those circum-

stances, with the definite understanding of complete lack of prejudice, I will formally, here and now, on the record, [fol. 2568] make the nominations of Jesse H. Besser and John Stark.

The Court: Is there any objection to that?

Mr. Neville: Those nominees are acceptable.

The Court: All right, then. It won't be necessary to hear this, and just as soon as that comes in, I am inclined, on the state of the evidence before me, to give you a stay as requested.

I can't see any objection to a stay, can you?

Mr. Babcock: Does that mean, your Honor, that these nominees are now going to confer with the Government nominees to complete the work in agreeing to——

The Court (Interposing): That is the way I understand it.

Mr. Babcock (Continuing): The fair royalties and the form of contract.

The Court: Get together right now and settle it in the manner that is outlined in the judgment. If they can't finally get together, the Court will act, and my knowledge of the concrete building block machines, or the patents, has increased 1000 per cent in the last year. I will be able to make a good selection.

Mr. Babcock: I have another professional obligation that is going to occupy considerable time this afternoon, [fol. 2569] but I will be glad to confirm, in a formal written document, the formal nominations I have just made, by filing it tomorrow.

The Court: Of course, I don't want any delaying tactics. I don't think you do with this.

Mr. Babcock: No, your Honor.

The Court: With this matter of monopoly hanging over your heads, and the building business the way it is. I don't suppose you want that.

Mr. Babcock: We will progress just as rapidly as we can with this appeal.

The Court: I anticipate that that will be done. Are you assured now that the judgment provides that there is no compulsory method outlined in the judgment, or any com-

pulsion in the judgment itself, that you have got to sell or lease to anyone?

Mr. Babcock: I am sure that is your Honor's opinion or interpretation of it.

The Court: Do you gentlemen still insist that the interpretation you place on it—do you still have that idea or did you miss something at the time?

Mr. Babcock: I think not, your Honor. We are still of the same opinion, after considering your Honor's explanation and views about it.

[fol. 2570] The Court: Well, that gives me more faith in my judgment.

Mr. Babcock: Is there anything contingent or dependent now upon our order of stay?

The Court: I will act on the order of stay. My inclination now is that I will act favorably on the order of stay but only after defendant has shown more evidence of cooperating with the Court and the judgment.

Mr. Babcock: Do you mean by the filing of written nominations confirming the oral nominations I have made?

The Court: Going through the process that is provided in Paragraph VII. If they can't get together—just to appoint them, if they never meet, what good is that? I want the prices set.

Mr. Babcock: Then it depends upon the committee meeting.

The Court: It depends upon the meeting, and it doesn't depend upon them agreeing with the Government, that is true. But if they don't—the other people have already made their appointment, haven't they?

Mr. Neville: They have already completed their work.

The Court: Yes. Four of them got together and hit upon the contract price and everything.

Now, if they don't agree, why, we will follow the machinery that is outlined in the judgment, and as soon as that is completed my inclination is to allow a stay of [fols. 2571-2572] proceedings, but the Court is not making any promises of any kind.

Mr. Babcock: I understand. But you are at the present time deciding that you will withhold action on the stay?

The Court: That is right.

Mr. Babcock: Until after that committee has met.

The Court: After the committee has completed its work. Not only meeting. I meet the members of your committee almost every day, and they are fine gentlemen, but just meeting doesn't mean anything.

I want some action.

All right.

[fol. 2573] In United States District Court

[Title omitted]

Designation of Committee Members Pursuant to Section VII of Final Judgment—May 9, 1951

Defendants Besser Manufacturing Company and Jesse H. Besser have heretofore objected to designating the individuals to act as members of the Committee provided for in Paragraph VII of the Final Judgment of the Court in the cause above entitled upon the grounds that:

1. a direction that "the same method and manner shall be used" is not a specification of time or dates within which or upon which such "method and manner" is to be used, and with appeal from this paragraph and others in this judgment determined upon, the specification of such time or dates should await the result of such appeal; and
2. because of defendants' appeal, defendants would be placing themselves in contradictory positions by claiming in their appeal that the Court's Judgment could not validly in law order such procedure and should not properly in discretion order such procedure, and defendants would be deprived of legal rights in appeal by being compelled to comply, [fol. 2574] within the time provided by law for appeal, with provisions of the Court's judgment from which the appeal is being perfected.

Said defendants still insist that they have a right to have said provisions of said Judgment stayed to permit them to perfect their appeal in a manner orderly and in accord with

Court Rules governing appeals and without the danger of having their appeal become moot because the particular provision of the Judgment from which an appeal will be perfected had been performed under compulsion before said appeal could be perfected, and hence said defendants make this designation of committee members under vigorous protest.

Said defendants acknowledge the assurance on May 8, 1951, by the Honorable Trial Court that any action taken by them by way of designation of committee members and any action performed by said committee members in the work of said Committee will be without prejudice to any rights of said defendants on appeal and with such assurance that no prejudice of any kind will result, do hereby respectfully withdraw the name of Jesse H. Besser from the nominees stated in open Court on May 8, 1951, and do hereby submit as nominees, Mr. Marx Rosenthaler and Mr. John Stark as members of said Committee.

Besser Manufacturing Company, By: John W. Babcock, Its' Attorney, Jesse H. Besser, By: Carl R. Henry, His Attorney.

Dated at Detroit, Michigan, this 9th day of May, A. D., 1951.

[fol. 2575] In United States District Court

[Title omitted]

Transcript of Proceedings

Transcript of proceedings in chambers in the above-entitled cause, before Honorable Frank A. Picard, District Judge, at Detroit, Michigan, on Wednesday, May 23, 1951, at 9 o'clock A. M.

Appearances:

John W. Neville, Esq., Assistant United States Attorney, 733 Federal Building, Detroit 26, Michigan, Appearing on behalf of the Plaintiff.

Gene F. Olsen, Adrian, Michigan.

Roy W. Darden, Atlanta, Georgia, Representatives of United States of America on Committee to determine fair [fol. 2576] royalty prices and form of Royalty Contracts.

M. J. Rosenthaler, Alpena, Michigan, Representative of Besser Manufacturing Company on Committee to determine fair royalty prices and form of Royalty Contracts.

E. J. Balluff, 3355 Penobscot Building, Detroit 26, Michigan, Appearing on behalf of Gene F. Olsen.

Vernon H. Doane, Appearing on behalf of Roy W. Darden.

[fol. 2577]

Detroit, Michigan,
Wednesday, May 23, 1951.
9 o'clock A. M.

The Court: Present at this time are the two members of the committee select to arrive at a fair royalty price and form and contents of royalty contracts, covering patents, present and future, owned and/or controlled by defendants Besser Manufacturing Company and Mr. Jesse H. Besser.

I am informed—and also the representative of the committee of the Besser Manufacturing Company and Mr. Jesse H. Besser.

The representatives selected by the Government are—

Mr. Olsen: Gene F. Olsen, Adrian.

Mr. Darden: Roy W. Darden, Atlanta, Georgia.

The Court: And representing Besser Manufacturing Company are——

Mr. Rosenthaler: M. J. Rosenthaler, Alpena.

Mr. Neville: He is the only representative of Besser that is here. The other representative is not here.

The Court: Who are you gentlemen?

Mr. Olsen: Counsel for the committee representing Industry.

The Court: You are who?

Mr. Balluff: E. J. Balluff. I am of counsel representing [fol. 2578] Mr. Olsen.

The Court: You are the only one represented, then?

Mr. Rosenthaler: I am the only one representing Besser Manufacturing Company.

Mr. Balluff: He is the only one representing Besser Manufacturing Company. Mr. Starck was present at the meet-

ings yesterday and day before, as representative of Besser, but he is not here this morning.

The Court: Is he coming?

Mr. Rosenthaler: They called me at 11 o'clock yesterday and told me of your meeting, but Mr. Starck had left and I was unable to find him.

The Court: Well, up at Alpena?

Mr. Rosenthaler: I know. I hadn't got in contact with him yesterday afternoon.

The Court: Did you notify them, to tell them to be here?

Mr. Rosenthaler: I notified the Besser people.

The Court: I see.

Well, give your names, gentlemen, will you.

Mr. Balluff: E. J. Balluff, as counsel for Mr. Olsen.

Mr. Doane: Vernon H. Doane, attorney for Roy Darden.

The Court: Whose idea was it to have counsel in these cases?

[fol. 2579] Mr. Olsen: We figured we would need counsel to draw the agreement.

The Court: That is all right, to draw the agreement, but they have nothing to do with this royalty.

Mr. Olsen: They do not.

The Court: Have you had counsel present?

Mr. Olsen: Mr. Starck is an attorney.

The Court: That is right. All right.

Mr. Rosenthaler: He was acting as a member of the committee, and he is counsel.

The Court: Oh, so he has the right to have counsel, that is, as to drawing the contract, but I suppose——

Mr. Neville (Interposing): I think the Order reads either the committeemen or their attorneys are authorized to negotiate.

The Court: The attorneys referred to are the attorneys for the Government.

Mr. Neville: I think the Order is a little broader than that. At least on paper.

The Court: Well, the parties inform the Court that they have been unable to reach a fair royalty price or the form of or contents of the royalty contracts. And they have so reported to the Court.

And, by virtue of and by the authority of the judgment entered in this matter, this Court has now designated him- [fol. 2580] self as the fifth member to attempt to make a final disposition.

All right, gentlemen. What have you—what is your idea about the various patents? What are they and what do you think they——

Mr. Olsen (Interposing): We think there are three patents that should be treated separately, known generally as the Wellnitz patent, the Scott patent and the Besser patent, which is a patent which relates to core ventilation. The other Besser patents, as near as we can find out, are not in use, and we feel there is no way of evaluating them, because no one is using them and it doesn't appear likely now they will want to.

Our final decision on what we believe is an equitable and fair royalty happens to be the same dollars on each of the three patents we undertook to appraise. That is $25 per 8-inch compartment capacity of machine per patent.

That is to say, if a party used all three of the patents in question on a machine capable of making one 8-inch block at a time, the fee would be $75 on such a machine.

The Court: Is that all you have to say on that?

Mr. Olsen: That is right. I believe so.

The Court: And what do you think it should be, Mr. Rosentnaler?

Mr. Rosenthaler: Well, our request was that the Wellnitz [fol. 2581] patent was a patent that had no reference to the mold phases of it, and it should be $450 per installation.

The Court: You mean $150 apiece?

Mr. Rosenthaler: No. $450.

The Court: $1,200.

Mr. Rosenthaler: $450, whether 1, 2 or 3 openings.

The Court: I see.

Mr. Rosenthaler: That is per machine.

The Court: Yes.

Mr. Rosenthaler: Then, on the other patent, we suggested $75 per mold opening. And, on the Besser patent, the price was the same as theirs, $25 per mold opening.

The Court: There is no question, then, on the Besser patent?

Mr. Rosenthaler: None at all.

The Court: There is a difference on the one patent of how much?

Mr. Rosenthaler: Their opinion was $25 a mold opening and our price was $75 per mold opening, on the Scott patent. Is that right, Mr. Olsen?

Mr. Olsen: I will tell you very quickly. That is correct, on the Scott patent.

The Court: Yes. The other is a difference of—there is a difference of $450 there.

[fol. 2582] Mr. Olsen: Yes. Again, it is as low as $25, if there is one unit.

The Court: That is the Wellnitz?

Mr. Olsen: What is that?

Mr. Rosenthaler: Wellnitz.

The Court: Isn't that the measuring patent?

Mr. Darden: It relates to—that can be put on a machine at a total cost of about $20. Just to limit the size and height control.

The Court: What do you say about the cost of it, Mr. Rosenthaler?

Mr. Rosenthaler: Well, your Honor, I was requested by the counsel, in the telegram, to ask the privilege of submitting the data in a formal manner, and I am not a patent attorney.

The Court: I see.

Mr. Rosenthaler: I know nothing about the details.

The Court: You mean——

Mr. Rosenthaler (Continuing): —of the Wellnitz patent.

The Court: Since yesterday, you have been requested to do this?

Mr. Rosenthaler: I received a telegram from New York.

The Court: Who was in New York?

[fol. 2583] Mr. Rosenthaler: Carl Henry and Mr. Babcock.

The Court: They are——

Mr. Rosenthaler (Interposing): A copy of the telegram they sent to you.

The Court: What is that? If they did, they kept it a secret. I haven't got it.

How long will it take you to prepare that? I am ready to decide this question today some time.

Mr. Rosenthaler: I will give you this telegram, which speaks for itself, as far as I am concerned.

The Court (After reading telegram): I anticipated them. He says that there is nothing for me to act on until it appears on the record "That the Committee are unable to agree on a fair royalty price and form and contents of the royalty contract and unable to agree on a fifth member."

Well, it appears on the record now that that is true. I had that on before I read his telegram. I have that out of the way.

"Private counsel." If you fellows have talked here, I don't think it is right, and I have absolutely—that is, on the royalties. And if you have stated your approach—well, wait a minute, now.

I don't believe, gentlemen, that you should have permitted these committee members to have private counsel in here. It is all right, gentlemen. I mean, to take care of the royalty contracts. I don't want to get in wrong with [fol. 2584] my own judgment—without consulting this court.

Because they say that "private counsel have stated that they approach the discussion on the basis that Besser has been guilty of anti-trust violations and cannot expect any other than a 'nominal' royalty."

That is not true, and no counsel has any authority to make any such statement.

I should think you would have taken care of that.

Mr. Neville: Judge, the Order provides for the committeemen to act, or their attorneys.

The Court: Who made the Order?

Mr. Neville: That was the Order that was signed.

The Court: Attorneys for you, the Government, to act?

Mr. Neville: No, sir.

The Court: What is that? That is what I meant.

Well, may it appear on the record that this court does not approve of counsel having interfered in this matter at all, or their expressing any views, and the Court criticizes the Government for permitting attorneys for the arbitrators to appear in the committee without first having brought the matter to the attention of the Court. There is nothing

in the Order or the judgment that permits counsel of any kind.

However, counsel might be or might have been introduced [fol. 2585] later on to help with the contract.

And the Government and the Court does not subscribe to the statement made by counsel, allegedly made by counsel for the arbitrator, that Besser & Company are to get a nominal royalty.

Is that what you gentlemen have been proceeding under?

Mr. Olsen: No.

The Court: What is that?

Mr. Olsen: No. The statement was made yesterday something along that line by Mr. Darden, but I was quick to say that was not the agreement of the committee.

The Court: That was not the intention of the Court.

Mr. Olsen: I appreciate that.

The Court: I want you gentlemen to give them a fair royalty.

Mr. Olsen: I appreciate that. And I made that very clear yesterday, that was not the opinion of this committee.

The Court: Well——

Mr. Olsen (Interposing): We were to get the royalty.

The Court: Is this a fair royalty?

Mr. Darden: Our figures are a fair royalty, in my opinion, Judge Picard.

[fol. 2586] Mr. Olsen: That is, the patents in question now are only a part of a machine. Well, we looked for a yardstick, some history, something to tie to, of equitable amounts.

One thing made by the Gelbman group, patents which cover—these patents cover the general machine, and not a part of the machine, whereas the patents now discussed are only a part of a machine.

One thing we did go on, not more than two years ago, the Wellnitz patent was up for exclusive license at a fee of $100 per machine. If that is correct, then we are not far from that figure in our offer.

The Court: Yes.

Mr. Olsen: And we reconcile that with the royalty agreed on with the Gelbman group.

The Court: Well, may I ask, is there any question about the contract itself?

Mr. Olsen: I was led to believe yesterday that we could agree upon general terms.

The Court: All right, now. What other royalties are there? What other royalties? I mean, what other patents subject to royalty?

Mr. Olsen: None that I know.

The Court: That is all, those are the three patents?

Mr. Olsen: That is right.

The Court: And one difference is the $75. On the other [fol. 2587] it is $75. On the other it is $450. And the other one it is $25 and $25.

If that is true, then you can go ahead and work on the contract, can't you?

Mr. Olsen: It is my belief we can.

The Court: All right. Draw up the contract, I don't care what you do about that. I want to give you a chance.

I want to learn more about the Wellnitz patent.

You draw up the contract, you gentlemen, together with the counsel. There counsel could properly have been a party. When I referred to the committee "and/or their attorneys", I meant you people, either you, Mr. Neville, or Mr. Speer.

Mr. Neville: Let me say this: When we designated committee members on behalf of the Government, the designation did make it "committee members or their attorneys" in the alternative.

Now, when I submitted that paper on behalf of the Government, you were not here, I don't think, that day, but I left word with somebody here to the effect I wanted you to know particularly that we had made the nomination in the [fol. 2588] alternative, so that the lawyers could be more readily available, especially Mr. Doane, who is in Washington, who may be in the picture for negotiation purposes.

The Court: If that was in there, I certainly didn't notice it.

Mr. Doane: I have a copy, Judge.

The Court: You can rest assured that the attorneys were no. to be in here, except on the contract. Is my order in here?

Mr. Neville: That is the designation (handing document to the Court).

The Court: I don't blame you gentlemen at all. I don't blame you for being in here. It is all right to be in here on the contract. But if any suggestion was made by them or anybody else that we were going on a nominal basis, they are wrong. They are wrong.

If you gentlemen have hit upon that, you are wrong.

Mr. Olsen: Our committee did not go on that basis.

The Court (After reading Order): Now, you see, I didn't sign anything like that at all. I want them to have—you gentlemen were to sit together, the four of you, and that is all, and the Government did not belong there.

Mr. Rosenthaler: We had no counsel present.

The Court: All right. You are going to have a chance today to sit down.

[fol. 2589] The contract you can draw up. There is no question about the contract. And I will hear you at 2 o'clock. I am going on with this other case.

What I want to hear is a little bit more evidence as to why you think it should be $450 and why you think it should be $25, $25 is enough.

Mr. Rosenthaler: I haven't Mr. Stark or anybody here.

The Court: I don't care about that. You know what your arguments were.

Mr. Rosenthaler: I can give them to you as a general basis.

The Court: All right. Then I want the general basis, and I don't want counsel here. I don't want to hear it.

And I want this on the record, that the Court did not expect that this would be carried on, except probably where you got to the contract itself, in the presence of the Government, in the presence of the Court, in the presence of counsel or anybody else.

The four of you were to meet together. If you couldn't agree, then you were to come to me.

Now, of course, that hasn't interfered with the basic principle at all, and you can get together at 2 o'clock. I am going to settle it.

As a matter of fact, you say it can be installed for [fol. 2590] $20?

Mr. Olsen: The cost of the parts is roughly $20.

The Court: Well, then $25 for the installation, is that enough, do you think?

Mr. Olsen: You mean as royalty?

The Court: Yes. Who pays for the cost of the parts?

Mr. Olsen: The customer. The man who buys them.

The Court: You mean it costs a party $25?

Mr. Olsen: Plus the profit of the manufacturer.

The Court: Yes. Then you say he had an exclusive license to somebody at $100 for that?

Mr. Olsen: For just—that was simply the license fee, the $100.

The Court: That is the royalty.

Mr. Rosenthaler: At the time you used it, you paid $200.

Mr. Olsen: I never paid any royalty to Wellnitz.

Mr. Rosenthaler: The Miller——

Mr. Olsen (Interposing): The Meeker.

The Court: I will hear that at 2 o'clock.

Mr. Balluff: We didn't try to run this thing.

The Court: I don't say you did. But you can see how Mr. Babcock is seeking to translate your action into one of not having really a four-man committee, two and two, don't [fol. 2591] you see? You can see that, can't you?

Mr. Balluff: I can now.

The Court: Can you see it?

Mr. Doane: I think so, except for the fact that one of the committee members is an attorney.

The Court: That doesn't make any difference. You would have four. You don't want to go in a room with four against you on an argument. You will just keep it two and two. And that is the way it should have been. And I am not blaming these people.

Mr. Olsen: I understand.

The Court: Of course, when they say in here that they have endeavored to—I think they say in here somewhere that they have endeavored to play fair, this court doesn't have to believe that. Every turn, so far, has been made because the court has insisted upon it. Almost every turn.

Now, these people, I want them to have a fair amount. I don't want them to be punished at all.

Can you and Mr. Rosenthaler sit in here, and discuss it,

the three of you, this afternoon, and arrive at a fair basis? And, in the meantime, I think if you draw up that contract, if you are going to have a contract, draw it up, have it all ready, and we will put in the amount. I am going to decide it today.

I am not going to wait for Mr. Stark. I haven't received [fol. 2592] this telegram either, by the way.

Mr. Rosenthaler: Do you want me to keep that?

The Court: I think you had better keep it. It is the only one you have.

All right.

[fol. 2593] In the United States District Court for the Eastern District of Michigan, Southern Division

Civil Action No. 8144

United States of America, Plaintiff,

vs.

Besser Manufacturing Company, Stearns Manufacturing Company, Inc., Jesse H. Besser, Louis Gelbman, and Hamlin F. Andrus, Defendants

Transcript of proceedings of committee to determine fair royalty prices and form and contents of royalty contracts, held in the chambers of Hon. Frank A. Picard, District Judge, at Detroit, Michigan, on Wednesday, May 23, 1951, at 2:30 o'clock P. M.

Present: Hon. Frank A. Picard, District Judge. M. J. Rosenthaler. Gene F. Olsen. Roy W. Darden.

[fol. 2594]

Detroit, Michigan,
May 23, 1951.
2:30 o'clock P. M.

Proceedings

Judge Picard: We have met again, and we have discussed these various patents and what would be a fair royalty, and many reasons have been advanced.

We are first going to take the Wellnitz patent, and we will put on the record again at least some of the points

that are advanced by Mr. Rosenthaler as to why they feel that a royalty of $450, regardless of whether it is a one, two or three-unit machine, would be fair, and then I am going to ask the other gentlemen, Mr. Olsen and—what is your last name?

Mr. Darden: Darden.

Judge Picard: —Darden. That is right—to advance the reasons. And while these may not be a repetition of all the reasons advanced, they will at least be on the record, most of them.

It appears—and I may as well state this at this time—that when these negotiations between the Besser representatives and representatives of the Government started, it was put on the record by the Besser representatives that they were participating in this discussion without any jeopardizing of their rights on appeal. I think that is [fol. 2595] what you said.

Mr. Rosenthaler: That is about what he says here.

Judge Picard: And——

Mr. Rosenthaler (Interposing): Pursuant to your assurance.

Judge Picard: The Court, acting as the fifth member, remembers he made a promise in court, to the best of his recollection, that that would be true.

Mr. Rosenthaler: That is right.

Judge Picard: That this was not prejudicial to their rights.

Now, will you re-state about how much you paid for the development?

Mr. Rosenthaler: Mr. Babcock wanted four copies of this record. Is this the time for me to ask for it?

Judge Picard: Ask the court reporter, and he will give you as many as you wish.

Mr. Rosenthaler: We would like an opportunity of bringing in the final evidence and proof of the factual statement that I will make, to the best of my knowledge at this time.

First, that the Wellnitz-Meeker patents cost $75,000 as an outright purchase——

Judge Picard: Well, is the Meeker patent involved here too?

[fol. 2596] Mr. Rosenthaler: No.

Mr. Darden: There is no patent on that.

Mr. Olsen: It is just a patent applied for.

Mr. Darden: The Wellnitz patent and the Meeker application together.

Judge Picard: Does the judgment cover that application?

Mr. Olsen: It covers the patents that may be allowed in the future.

Judge Picard: Yes. But shouldn't the Meeker patent be something to be discussed in the future?

Mr. Olsen: Certainly, because we don't know what claims may be allowed.

The Court: I can see that. It may develop into something even more so.

Mr. Rosenthaler: I can't divide the amount of money paid between the two, any more than you could divide the $200 between the two.

Mr. Olsen: I have a basis for my division.

Judge Picard: Now, wait until we get to your turn.

Mr. Rosenthaler: And I have been advised, subject to proof, that the development costs and engineering on the Wellnitz-Meeker group, which has been working on them together, would approximate $200,000. And the patent royalty set up on the Wellnitz patent of $425 is predicated upon an attempt to recover our costs based on the expected [fol. 2597] production of machines with this attachment, which, in our opinion, is not great, and probably may not exceed 150 to 200 a year.

Judge Picard: You mean cost to install it?

Mr. Rosenthaler: No. 150 to 200 a year will be the only machines that, in our opinion, will use this.

Judge Picard: I see. Now, are you talking about Wellnitz or the combination?

Mr. Rosenthaler: I am talking about the Wellnitz patent at this time, and whether it can be separated, as an engineering matter, is something of which I am not at all familiar.

Judge Picard: Hasn't the Wellnitz patent been used without the—what is the name of the other one?

Mr. Rosenthaler: Meeker.

Judge Picard (Continuing): —without the Meeker patent?

Mr. Rosenthaler: The Meeker application. It has never been licensed, as I understand it.

Judge Picard: But it has been used.

Mr. Rosenthaler: The question, your Honor, that I have to go by is the fact that when Meeker had the Wellnitz patent he was changing some machines in the field over to the height and density control that they cover.

Judge Picard: All right.

[fol. 2598] Mr. Rosenthaler: At a charge of about $6,500 per machine.

Judge Picard: I see. All right, now, go ahead. Did you get in the $75,000 figure that you say you paid?

Mr. Rosenthaler: That is right. We have the $75,000 previously mentioned, that we paid——

Judge Picard (Interposing): I don't think you mentioned it before, not after the stenographer came in here.

Mr. Rosenthaler: I will put it in now, that the cost of the Wellnitz-Meeker combination to Besser was $75,000.

Judge Picard: And they purchased that about——

Mr. Rosenthaler (Interposing): They purchased it in the early part of 1950, I believe.

Judge Picard: And it has about eight years. The Wellnitz patent has about eight years to run.

Mr. Rosenthaler: The Wellnitz patent has about eight years to run.

Judge Picard: What does Meeker do to the Wellnitz?

Mr. Olsen: Do you want my answer?

Mr. Rosenthaler: Don't ask me, because I don't know.

Judge Picard: All right. Have you advanced your reasons there?

Mr. Rosenthaler: I have given my reasons and the basis of arriving at the $425, plus the only other reason that I wanted to bring in, in our computation, was the relative [fol. 2599] ability of the product to carry, without restricting trade, the royalty trade, which, in our opinion, any $36,000 machine, which is the cost of a three at a time machine, could easily carry as a royalty rate without any noticeable variation.

Judge Picard: You are under the assumption that it would only be the big machines that will carry the Wellnitz-Meeker combination?

Mr. Rosenthaler: That is my experience to date.

Judge Picard: Now, you go ahead, one of you.

Mr. Olsen: If I may.

Judge Picard: Take up the cost first, what they paid for it.

Mr. Olsen: I don't know what they paid for the Wellnitz patent.

Judge Picard: Any information that you have.

Mr. Olsen: I have the story that for the Wellnitz and the Meeker, that $6,000 was paid to Meeker with an equipment promise of some kind, and that Meeker, who is in the block business, got a due-bill for either a substantial number of parts or a machine, and it has been my impression that might be worth as much as $25,000. I do not know what Wellnitz got.

I think it is not good to try to mix Meeker into this, because Wellnitz is so definitely separable from Meeker. Meeker is an involved device designed to control density [fol. 2600] of a block, whereas Wellnitz controls physical height.

Judge Picard: I see. And the Meeker patent has not been issued?

Mr. Olsen: Not been issued.

Judge Picard: It has not been issued.

Mr. Olsen: But Meeker felt that he must control Wellnitz to be in the clear patent-wise on his Meeker application and patent.

Judge Picard: Do you know what he paid to Wellnitz for the Wellnitz rights?

Mr. Olsen: He paid $100 per machine royalty for an exclusive license.

Judge Picard: Exclusive license.

Mr. Olsen: Regardless of the size of the machine.

Judge Picard: How many machines was Meeker making, do you know?

Mr. Olsen: Meeker made no machines. He sold the attachments, the device.

Judge Picard: To Besser?

Mr. Olsen: To Besser, and owners in the field of various makes of machines.

Judge Picard: Oh, I see. That included the Wellnitz?

Mr. Olsen: Yes.

Judge Picard: And how many machines, do you know, [fol. 2601] were made in any one year, so that you know how much——

Mr. Olsen (Interposing): The machines equipped——

Judge Picard (Interposing): Yes.

Mr. Olsen (Continuing): —with the Meeker-Wellnitz combination?

Judge Picard: Yes.

Mr. Olsen: I think about 18.

Judge Picard: 18 a year?

Mr. Olsen: Well, that was only in 1949 and '50.

Judge Picard: So that he was making about $1800 a year on his exclusive rights?

Mr. Olsen: That would be my best estimate, yes, sir.

Judge Picard: I see. All right.

Mr. Olsen: But you can separate them.

Mr. Rosenthaler: Your Honor——

Judge Picard (Interposing): Wait. I will give you a chance.

Mr. Olsen: You can separate the Wellnitz part, in my opinion, without confusing it with Meeker, in that Wellnitz did accept this $100 for the exclusive license for the machine of that size, and as to confirming the simplicity of the device involved, the Stearns Company last year, to my knowledge, was selling all the parts necessary to equip a three-at-a-time block machine with the Wellnitz control for $50.

[fol. 2602] Judge Picard: Were selling it?

Mr. Olsen: Yes.

Judge Picard: Did you have the right? You had the right to use the Wellnitz patent at that time, didn't you?

Mr. Olsen: No, no. I was not Stearns in this period.

Judge Picard: In other words, did this——

Mr. Olsen (Interposing): The Stearns Manufacturing Company.

Judge Picard: I mean, Stearns had the right to do it at that time because of their arrangement with Besser; is that right?

Mr. Olsen: I doubt it, but I do not know.

Judge Picard: I see.

Mr. Olsen: I know of no arrangement.

Judge Picard: They were not jumped on.

Mr. Olsen: To my knowledge, they were not. But I do know they sold a device known as this height control device for $50, and I do know you could buy the total parts for not to exceed $25.

Judge Picard: Yes. Now, as to the number that will be used, the Wellnitz?

Mr. Olsen: In my opinion, if available at the nominal figures which I think are equitable, that in any year, when material for making machines is reasonably available, there is a potential of perhaps 1,000 machines a year that [fol. 2603] would use the Wellnitz device.

Judge Picard: That isn't liable to happen, is it?

Mr. Olsen: Sir?

Judge Picard: That isn't liable to happen.

Mr. Olsen: I am afraid it won't happen in '51 or '52, due to the economy we seem to face.

Judge Picard: Well, what do you think about now? Or can't you get material for them now? Isn't that useful? I mean, essential.

Mr. Olsen. No. We are not regarded as a defense industry.

Judge Picard: Even though you build buildings and houses?

Mr. Olsen: No. The Department says there are enough block machines, if they will put their mind to it, and run a second shift, to produce all the blocks anybody needs.

Judge Picard: How many machines are there out?

Mr. Olsen: All kinds combined, at least 5,000. That is probably too low.

Judge Picard: Most of those 5,000, if they used the Wellnitz machine, wouldn't they have to pay royalty here?

Mr. Olsen: The ones already out?

Judge Picard: What is that?

Mr. Olsen: The ones that are already out and could put this device on?

[fol. 2604] Judge Picard: Yes.

Mr. Olsen: Yes. I would say an attachment put on a machine in the field, licensed under either, would have to pay a royalty and, for instance, if it is a $50 attachment,

they would have to pay $75 royalty, in the case of a three-at-a-time machine.

Judge Picard: Yes.

Mr. Olsen: Making the price $125 to the customer that used it.

Judge Picard: All right. You mean, instead of costing them $50 to put them on——

Mr. Olsen: Stearns has found $50 an acceptable price for the parts. And pays the royalty. If they have to pay $25 royalty, they must add the net amount of royalty to that $50.

Judge Picard: Well, of course, it probably cost them more than that now. Probably cost them $75 now instead of $50.

Mr. Olsen: Possibly.

Judge Picard: All right. What else is there?

Mr. Olsen: Well, this is the right time, I would like to review the things that controlled our arrival at what is a fair royalty.

Judge Picard: Well, all right. That is what I want you to do. Does that apply to all the patents?

[fol. 2605] Mr. Olsen: Yes.

Judge Picard: All right.

Mr. Olsen: It is just two, really.

Judge Picard: Yes. The Scott patent and the Wellnitz patent.

Mr. Olsen: Yes.

In deciding the fair royalty, I consider we must weigh:

1. That the royalties that a manufacturer of machines might be required to pay must not be so great as to preclude him competing with patent owners.

2. Cost of said patents to Besser and remaining life of patents.

3. Relationship of Besser royalties to those already agreed upon with Gelbman Group. Gelbman principal patents cover entire machine and method and Gelbman royalty covers nine patents.

4. Wellnitz patent was, as late as 1949, under exclusive license to Meeker for $100 per machine.

5. ——

Judge Picard: And how many machines were they manufacturing? About 18 machines?

Mr. Olsen: My estimate is that there were royalties on about 18 machines per year.

Judge Picard: Yes.

[fol. 2606] Mr. Olsen: In 1949 and 1950.

Judge Picard: Well, when you get a machine—when you get a patent—go ahead and finish.

Mr. Olsen: 5. I believe the Scott patent was never licensed, but believe it has been in rather general use by many for as long as 12 years. I know of no action ever taken against anyone by patent owners prior to 1950.

6. Cost of parts necessary to convert a non-infringing machine to one that infringes both the Scott and Wellnitz need not exceed $25.

7. A non-exclusive license now being discussed gives the licensee nothing except assurance that he will not be attacked by Besser.

Now, it was on those abbreviated comments that we undertook to say what was fair in the light of those things.

Judge Picard: You thought that $25 per unit for the Wellnitz patent would be sufficient, and you do not take into consideration the Meeker patent because the Wellnitz patent can be used without the Meeker patent, and the Meeker patent has not been granted at this point?

Mr. Olsen: That is correct.

Mr. Rosenthaler: May I ask a question there?

Judge Picard: Certainly.

Mr. Rosenthaler: When we talked a while ago about these 18 machines with this so-called Wellnitz-Meeker combi-

[fol. 2607] nation——

Judge Picard (Interposing): Yes.

Mr. Rosenthaler (Continuing): How much was he charging per machine for the installation?

Mr. Olsen: He jumped his price all over. To my knowledge, he charged all the way from $3,000 to $6,000.

Judge Picard: To install it?

Mr. Olsen: That was the installing price, including the price of the parts involved, and the labor of putting it on.

Judge Picard: Just for that feature?

Mr. Olsen: Just for the——

Judge Picard (Interposing): Of installing the machines?

Mr. Olsen: That is right. But I suspect that 95 per cent was the Meeker devices, rather than Wellnitz.

Mr. Rosenthaler: That is why I say it is very difficult to break this down.

Mr. Olsen: I know what the Wellnitz device consisted of, and I know what the Meeker device consisted of. There is just no comparison.

Judge Picard: Well, the Meeker device is something for the future, isn't it, something to determine in the future?

Mr. Rosenthaler: It is partially proved by the fact he [fol. 2608] has some 35 or 40 such devices.

Judge Picard: I mean, when they get a patent.

Mr. Rosenthaler: Yes. They have nothing to sell there. They have no patent. What Besser bought, apparently was an application by Meeker, whatever rights that application covered.

Judge Picard: But he can stop everybody from using it, can't he, at the present time?

Mr. Olsen: Not until that license or patent issues.

Mr. Rosenthaler: Not until the patent issues?

Judge Picard: But anybody could use it up to now, and then they have to quit after the patent is granted?

Mr. Olsen: That is my understanding of the patent law.

Judge Picard: Wouldn't they be held liable for that use?

Mr. Olsen: Not until the patent issues, I think.

Mr. Rosenthaler: I thought an application pending, notice of application pending, protected the patentee.

Mr. Olsen: I think that may be.

Judge Picard: I am not passing on that question. I am under the same impression as Mr. Rosenthaler, that it does.

Mr. Olsen: But the hitch is, if you put that device on, do you infringe? And it has infringed, in my opinion, [fol. 2609] Wellnitz, because it is inherent in the Meeker device.

Judge Picard: Well, I think perhaps you would have to have a meeting later on to pass upon the——

Mr. Olsen (Interposing): Meeker.

Judge Picard (Continuing): The Meeker patent.

Mr. Olsen: I think so, too. I don't think we are in a position to pass on the value of that. It may be tremendously valuable.

Judge Picard: Yes.

Mr. Rosenthaler: I think we are tending to depreciate the Wellnitz patent too much, though. I don't think the fact that the parts cost $25 today is as determ-ative a factor as the costs that have to do with arriving at that particular point and the value of the attachment in industry.

Judge Picard: Well, if Meeker—or if Besser was charging $3,000 to install the Wellnitz-Meeker combination in machines that were on the market, or in any other machines, if he had it in the new machines, then there must have been about $2700 or $2800 of that either devoted to Meeker or devoted to the installation itself.

Mr. Rosenthaler: It was Meeker that charged.

Judge Picard: Besser.

Mr. Olsen: Besser didn't make the charge. It was Meeker.

Judge Picard: Isn't that correct?

[fol. 2610] Mr. Olsen: Yes. Very profitable. No question about that.

Judge Picard: The Meeker patent measures the density of the block.

Mr. Olsen: Tends to control the density.

Judge Picard: Controls the density. Makes a better block. The other measures the height, doesn't it?

Mr. Olsen: That is right.

Mr. Rosenthaler: Just the time element of vibration based on the amount of moisture in the mix.

Judge Picard: Oh, I see.

Mr. Olsen: And based on the character of the aggregate being packed.

Mr. Rosenthaler: The character of the aggregate and the length of the vibration.

Mr. Olsen: In technical terms, it is based on the rate of descent of the pressure head.

Judge Picard: Have you got through with everything now? Do you want to add any other reason different than these, Mr. Darden?

Mr. Darden: No. Mr. Olsen speaks for me. I am in agreement with what he says.

Mr. Olsen: I want to make this clear. I want to express doubt that $200,000 was spent on the Wellnitz-Meeker patents combined.

[fol. 2611] Judge Picard: Let alone on the Wellnitz patent?

Mr. Olsen: Right.

Judge Picard: Well, do you want to add anything, Mr. Rosenthaler?

Mr. Rosenthaler: Nothing.

Judge Picard: I feel this way, that the Besser representatives knew or should have known that these questions would present themselves when you started discussing the royalty. You couldn't discuss the royalty without having that information. And that they had the opportunity to present it on Monday and on Tuesday.

This court was informed on Tuesday morning that this committee had reached an impasse and immediately set a meeting for 9 o'clock Wednesday morning at Detroit where he said that he would appoint himself as the fifth arbitrator and that they would proceed immediately.

I am informed that Mr. Stark had left town, that Mr. Rosenthaler tried to get in touch with him and couldn't, and I have a telegram, which I received later this morning, from Mr. Babcock and Mr. Henry, suggesting, I think in there, that the information—that an opportunity be given to present that further information.

Mr. Babcock and Mr. Henry are now in New York. Mr. Rosenthaler was able to get in touch with them in New York. He says he has been unable to get in touch with Mr. [fol. 2612] Stark, although Mr. Stark is up in Alpena.

Where is Mr. Besser, do you know?

Mr. Rosenthaler: Mr. Besser is in Alpena. I got in touch with Mr. Stark today, but not yesterday.

Judge Picard: What did he say? Did he say he would fly down?

Mr. Rosenthaler: There is no air flight service from Alpena to Detroit.

Judge Picard: What about his coming?

Mr. Rosenthaler: He couldn't have got here by nine o'clock this morning.

Judge Picard: I know that. I haven't heard a thing from him.

Mr. Rosenthaler: I can have him down here tomorrow.

Judge Picard: Well, these gentlemen——

Mr. Rosenthaler (Interposing): If Mr. Henry will be in town. Do you know?

Mr. Olsen: I can't be here.

Judge Picard: I will tell you what I am going to do. I am going to accept the recommendation of you two gentlemen, and the main reason for that is that I think they could have had the information, if they wanted to, if they wanted to present it in proper form, that right from the beginning of this—not from the beginning, but especially from the rendition of judgment, there has been a surpris- [fol. 2613] ing lack of cooperation between the defendants, their counsel and this Court, so that to me, to the Court, it appears as though it is but another attempt to delay matters and not get the judgment complete.

The Court hopes he is mistaken. But the Order is not based upon the money to be paid for any patent that will include the—what do you call the other patent?

Mr. Olsen: Meeker.

Judge Picard: —the Meeker patent. Later on that may become desirable, after the patent is granted, or it may even become desirable before the patent is granted. But it is not being granted at the present time. And there has been no compulsion upon Besser to move to control the Meeker patent right now. However, there may come some legal entanglements, if it is necessary to use—to infringe the Wellnitz patent in order to use the Meeker patent. I don't know.

The details of the Meeker patent are not before this Court. I know nothing about them except that it measures—does it measure or control?

Mr. Olsen: It controls.

Judge Picard: It controls the——

Mr. Olsen (Interposing): Density.

Judge Picard (Continuing): —density of the mix, while

the Wellnitz patent merely controls the height of the [fol. 2614] mix.

Mr. Olsen: Height of the block, if you please.

Judge Picard: What is that?

Mr. Olsen: The height of the block. Not the height of the mix.

Judge Picard: The height of what?

Mr. Olsen: Of the block.

Judge Picard: Well, that is the mix inside the form, isn't it?

Mr. Olsen: Oh, I see what you mean.

Judge Picard: Yes. Do you see any inconsistency in considering the Meeker patent at the present time?

Mr. Olsen: No.

Judge Picard: Mr. Darden?

Mr. Darden: I don't think we should consider it.

Judge Picard: That will be the decision.

Mr. Olsen: There are many other applications we couldn't treat.

Judge Picard: Well, I want this case in shape so that it can go to the Court of Appeals, as defendants have expressed a desire to do, and I think it is a case that should go there.

But I am not informed now about the Meeker patent at all. I know something about the Wellnitz patent, and that is what the Committee was named to do.

[fol. 2615] Now, gentlemen, if you can't agree upon a form, you present the form to me and I will go over it.

Have you shown the form to Mr. Rosenthaler?

Mr. Olsen: We have shoen the Gelbman, which this parallels.

Mr. Rosenthaler: I have no basis to pass on that, your Honor.

Judge Picard: All right. Was that shown to Mr. Stark?

Mr. Rosenthaler: No.

Mr. Darden: No, sir.

Mr. Olsen: But he has had the Gelbman contract.

Judge Picard: Well, all right. I think you will have until Monday of next week to either agree upon the form or dispute the form.

You are in favor of it, is that right?

Mr. Darden: Yes, sir.

Judge Picard: I will look at it, and if they raise any valid objection.

Mr. Olsen: We have no quarrel with changing the language of, perhaps, certain of the things——

Judge Picard (Interposing): If you have to make any change in it, I will let you know. We can get you by telephone, if necessary.

Mr. Olsen: Yes.

[fol. 2616] Judge Picard: Do that by telephone. That ends that, gentlemen.

I have been informed by Mr. Rosenthaler—no objection to the form, but he is not going to pass upon it.

Mr. Rosenthaler: That is right. The only question we discussed is the question of the minimum royalty. You have the amounts.

Judge Picard: Put that down, that it is $25 for the Besser patent. What does that control?

Mr. Olsen: The so-called Besser core ventilation patent.

Judge Picard: Yes.

Mr. Olsen: Wellnitz is the height control patent.

Judge Picard: That is $25 per unit, for 8-inch—what do you call it?

Mr. Olsen: Per 8-inch compartment of capacity.

Judge Picard: That is according to the single pallet, isn't it? What do they call it? The single pallet? What do they call that?

Mr. Rosenthaler: Plain pallet or cored pallet.

Mr. Darden: It would be per cycle on the machine.

Judge Picard: Yes. Per cycle.

Mr. Darden: One 8 inch, two eight inch, or three 8-inch per cycle.

[fols. 2617-2618] Judge Picard: The large machine gives three?

Mr. Darden: Yes, sir.

Judge Picard: $75. That is also the amount placed upon the Scott patent?

Mr. Olsen: Scott.

Judge Picard: How much is the Scott?

Mr. Olsen: Same figure, $25 per compartment of machine capacity.

Judge Picard: All right.

[fol. 2619] IN UNITED STATES DISTRICT COURT

[Title omitted]

PROPOSED FORM OF LICENSE AGREEMENT APPLICABLE TO BESSER MANUFACTURING COMPANY PATENTS, FILED BY THE GOVERNMENT IN CONFORMITY WITH PARAGRAPH VII (B) 2, (C) OF THE FINAL JUDGMENT OF APRIL 12TH, 1951— May 29, 1951

Said proposed form of license agreement is that determined by the committee as designated under paragraph VII (B) 1 and 2 of said judgment.

[fol. 2620] Agreement made and entered into this ..... day of ....., 1951, by and between Besser Manufacturing Company, a corporation of Alpena, Michigan (hereinafter referred to as "licensor"), and ..... having its office at ....., in the City of ....., State of ....., (hereinafter referred to as "licensee"),

Witnesseth:

Whereas, the licensor is the owner of all the right, title and interest in and to Letters Patent of the United States Number ....., issued to ..... on ....., 19..; and

Whereas, the licensee is desirous of obtaining a license, non-exclusive and non-assignable, to manufacture in the United States of America and to sell or use in the United States of America and the territories thereof and elsewhere, embodying and employing all or part of the inventions described in the aforesaid Letters Patent, and any re-issues thereof,

Now therefore, in consideration of the sum of One ($1.00) Dollar and other good and valuable consideration, by each of the parties to the other paid, receipt whereof is hereby acknowledged, the parties hereto have agreed and do hereby covenant and agree as follows:

First: Subject to the due performance of all the terms, covenants and conditions of this agreement on the part of the licensee agreed to be performed hereunder, the licensor has given and granted, and by these presents does give and grant unto the licensee, upon the terms and conditions

and with the limitations herein set forth, a non-exclusive and non-assignable right to manufacture in the United States of America at the licensee's factory or factories [fol. 2621] operated under the licensee's exclusive control located in the City of _____, State of _____, and at such other places located within the United States as the licensee may hereafter designate to the licensor in writing, and to sell, use, or otherwise dispose of throughout the United States of America and its territorial possessions, or elsewhere machines and apparatus embodying and employing all or part of the inventions or improvements set forth, described and claimed in the aforesaid Letters Patent.

The term of this license shall extend until the expiration date of the Letters Patent or any renewals or re-issues thereof unless this license is sooner terminated as hereinafter provided.

Second: The licensee agrees and covenants to pay to the licensor during the continuance of this agreement a license fee or royalty computed as follows on each machine which is manufactured, or sold or leased or otherwise disposed of by the licensee which comes within the scope of the claims of said Letters Patent and which is made or sold or otherwise disposed of in the United States of America:—

$25.00 on each machine with mold box to make one at a time of 12" width by 18" length units and any other size or combination of units in this size mold box.

$50.00 on each machine with mold box to make two at a time of 8" width by 18" length units and any other size or combination of units in this size mold box.

$75.00 on each machine with mold box to make three at a time of 8" width by 18" length units and any other size or combination of units in this size mold box.

$25.00 additional for each 8" x 18" section exceeding three at a time on each machine.

[fol. 2622] The licensee shall pay to the licensor simultaneously with the execution and delivery of this license, the sum of Three Hundred ($300.00) Dollars, which said sum shall be applied and credited to the royalties due or to become due by the manufacture or sale or use or other disposition of machines as herein provided.

The licensee agrees to pay to the licensor a minimum annual royalty of Three Hundred ($300.00) Dollars during each and every license year, commencing with the date hereof. This minimum royalty, after the first license year, shall be payable in equal quarterly payments of Seventy-Five ($75.00) Dollars, in advance, commencing with the second license year.

Any royalty payment in excess of the minimum during any license year may be applied toward meeting the minimum royalty for the succeeding year or years until exhausted.

Third: The licensee agrees to make written reports to the licensor, under oath, quarterly, within fifteen (15) days after the first day of each month following such quarter, during the term of this agreement, addressed to the licensor at the City of ....., State of ....., stating the number and descriptions of all machines manufactured, sold or otherwise disposed of, coming within the scope of the claims of said Letters Patent, such reports to itemize the number and type of all such machines manufactured, sold or otherwise disposed of during the preceding quarter, the first of which reports to be made as of ..... and to include all such machines manufactured or sold or otherwise disposed of since the date hereof up to that date, each subsequent report to include all such machines manufactured, sold or otherwise disposed of during the preceding [fol. 2623] quarter, and simultaneously with the making of each such report, to pay to the licensor any excess royalties over the already paid minimum advance royalties for such quantities at the rate specified in Paragraph Second for machines.

Fourth: The licensee agrees to mark all of the machines manufactured, put out and licensed hereunder with the following words, "Licensed under U. S. Letters Patent No. ....."

Fifth: The licensee agrees to keep full, accurate and complete books of account, records, data and memoranda respecting the said business and showing the number and kind of licensed machines manufactured or sold or otherwise disposed of under the license herein granted in sufficient detail to enable the royalties payable hereunder by

the licensee to be determined, and further agrees to permit an independent auditor or accountant acceptable to licensee to inspect the books and records of the licensee's operations under this license, which books of account shall be kept at the licensee's place of business; and said books and the premises where such licensee's business is carried on, insofar as may be necessary shall, at all reasonable times within the period of this license and within ninety days from any surrender, cancellation or termination of this license, be open to such inspection. Said auditor or accountant may communicate to the licensor the result of his investigation, but except as hereinafter provided said auditor or accountant shall not copy names of customers of licensee. However, in any instance or instances where the licensor is desirous of checking the sales to a particular customer or customers of the licensee for the purpose of verifying the licensee's report or reports, the auditor or accountant may copy the name or names of the particular customer [fol. 2624] or customers and communicate the details thereof to the licensor.

Sixth: If the licensee shall become insolvent or shall make an assignment for the benefit of creditors or proceedings in voluntary or involuntary bankruptcy, or for extension arrangement, composition or reorganization, shall be instituted on behalf of, or against the licensee, or a receiver or trustee of the licensee's property shall be appointed, the license herein granted shall terminate forthwith, but the licensor shall recover royalties on machines, and in case of any such termination of right, title and interest in and to the license covered by this agreement shall then and thereby forthwith revert to and become vested in the licensor.

Seventh: If the licensee shall default in rendering reports or payment of royalties as herein provided, or in performance of any other terms and conditions of this agreement, it shall be lawful for the licensor to cancel this agreement after expiration of thirty (30) days from written notice, of such default given to the licensee by the licensor and failure of the licensee to overcome such default during such thirty (30) day period.

Eighth: The licensee may surrender or terminate this

license at any time after one (1) year from date hereof on thirty (30) days written notice to the licensor by giving written notice to the licensor, together with a sworn statement of final account.

Termination of this license shall not prevent the owners of any machines on which royalties have been paid to the licensor from continuing its use of such machines without further payment of royalties.

[fol. 2625] Ninth: Upon any surrender, cancellation or termination of this license all unpaid royalties on operations under this license shall accrue and become immediately due and payable for all of the licensed products on hand or in the course of manufacture, whether or not sold or otherwise disposed of.

Tenth: The surrender, cancellation or termination of this license shall in no way affect the liability of the licensee for any sums of money accruing or becoming due or payable prior to the date such surrender, cancellation or termination becomes effective and shall be without prejudice to any rights of the licensor for the recovery of any monies due them hereunder.

Eleventh: The failure to exercise any right or to terminate this agreement for any breach, shall not be deemed a waiver of the right to do so for persistence by the licensee in a breach of continuing nature or for any subsequent or other breach.

Twelfth: Any notice by either party under this agreement may be served by enclosing the same in a post prepaid wrapper, registered mail, addressed to the other party or its receiver or trustee in bankruptcy, or successor or assignee at its or their last known address, and depositing the same in any post office.

Thirteenth: This agreement is entered into pursuant to the provisions of a certain judgment dated April 12, 1951 made and entered in the United States District Court for the Eastern District of Michigan, Southern Division, in an action entitled "United States of America, plaintiff, vs. Besser Manufacturing Company, Stearns Manufacturing Company, Inc., Jesse H. Besser, Louis Gelbman and Hamlin F. Andrus, defendants," and is in all respects subject there-[fol. 2626] to and any amendment or modification thereof upon appeal, if any, or otherwise.

Fourteenth: This agreement shall be binding upon and inure to the benefit of the successors or assigns of the licensor, also it shall be binding upon and inure to the benefit of the successors of the entire business of the licensee, but the licensee may not assign or sub-license without the written consent first received of the licensor.

In witness whereof, the parties hereto have hereunto set their hand and seals the day and year first above written.

—— ——, By —— ——, Licensor, —— ——, By —— ——, Licensee.

Witnesses: —— ——, —— ——.

[fol. 2627] In United States District Court

[Title omitted]

Motion for Leave to File Minority Report and Affdavits Annexed Thereto—June 12, 1951

Now comes Besser Manufacturing Company and Jesse H. Besser, Defendants in the above entitled cause, and M. P. Rosenthaler and John Stark, members of the Committee designated to Fix Royalty Prices and Contract Terms, by John W. Babcock and Carl R. Henry, their attorneys, and respectfully move that this Court grant leave to file with the Clerk of this Court the Report of said M. P. Rosenthaler and John Stark as members of said Committee, and that said leave be granted as of June 6, 1951, and respectfully show unto the Court:

1. That after completion, on May 23, 1951, of the effort of Mr. Rosenthaler and Mr. Stark to accomplish the purpose and object of the Committee To Fix Royalty Prices and Contract Terms, said Messrs. Rosenthaler and Stark proceeded expeditiously with the preparation of their Report as such Committee members, and such Report was completed on June 4, 1951;

2. On June 5, 1951, Mr. John W. Babcock, as one of the attorneys for Defendants in the above entitled cause, attempted to deliver such report to Mr. John W. Neville of

the Department of Justice of the United States of America, but that said Mr. Nevilie declined to accept such report;

[fol. 2628] 3. On June 6, 1951, a representative of said John W. Babcock attempted to file said Report with the Clerk of this Court, but was advised that under instructions of this Honorable Court the Clerk was compelled to refuse acceptance of such Report for filing;

4. That such effort to file said Report was made prior to the signing, filing and entry of the Order of this Court allowing an appeal of the above entitled cause to the Supreme Court of the United States.

This motion is based upon the contents of the Report of said Messrs. Rosenthaler and Stark, the Affidavit of John W. Babcock attached thereto, and the Affidavit of John W. Babcock and Thais E. Waldeck attached hereto.

Wherefore, Defendants and said Committee Members move for the Order of this Court allowing leave to file said Minority Report of said Committee Members as of June 6, 1951.

s/ John W. Babcock, Attorney for Defendant, Besser Manufacturing Company, 2280 Penobscot Building, Detroit 26, Michigan, Wo 5-5430. s/ Carl R. Henry, Attorney for Defendant, Jesse H. Besser, Alpena, Michigan.

Dated at Detroit, Michigan this 12th day of June, A. D., 1951.

[fol. 2629] AFFIDAVIT

STATE OF MICHIGAN,
County of Wayne, ss.

M. P. ROSENTHALER being duly sworn on oath, states:

1. The affiant and John Stark were the representatives designated by Besser Manufacturing Company and Jesse H. Besser (hereafter called Besser Company and Besser, respectively), to the committee provided by Section VII, subparagraph B, of the Judgment of April 12, 1951, to decide fair royalty rates and the terms of royalty con-

tracts with respect to patents owned by Besser Company and Besser relating to concrete block making machinery (which committee is hereafter referred to as the "royalty committee"); said designation having been made by Besser Co. and Besser under protest and without prejudice to their rights to assign error to the provisions of the judgment purporting to establish such "royalty committee", and without prejudice to their rights to assign errors on appeal as to any proceedings or actions taken or purported to be taken by such royalty committee.

2. On May 21, 1951, the affiant and John Stark met in Detroit, Michigan, with Mr. Eugene F. Olsen and Mr. Roy W. Darden, who had been designated by the Government as its representatives on such royalty committee. Also present at the meeting were Vernon H. Doane, an attorney of Washington, D. C., purporting to represent Mr. Darden, [fol. 2630] and E. J. Balluff, an attorney of Detroit, Michigan, purporting to represent Mr. Olsen. At this meeting Mr. Rosenthaler stated formally to all present that "Mr. Stark and I were designated by defendants Besser Manufacturing Company and Jesse H. Besser to act as members of a committee provided for in paragraph VII of the final Judgment of the Court entered in the United States v. Besser Manufacturing Company and others, on April 12, 1951. This designation was made under protest, without prejudice to the rights of said defendants on appeal and pursuant to the assurance given in open court on May 8, 1951 by Judge Frank A. Picard that the designation of such committee members and such actions as are performed by said committee members would be without prejudice to the rights of the defendants on appeal.

Accordingly, it must be specifically understood that any and all actions taken by us as committee members are taken under protest, under compulsion, and without prejudice to the rights of such defendants on appeal to present and pursue any and all assignments of error as such defendants shall deem appropriate to secure the review of the appellate court of each and every provision of such paragraph VII."

The parties then undertook to discuss the amount of royalty rates which the committee would report for com-

pulsory license to be granted under the Scott and Wellnitz patents owned by Besser Co. Counsel for Messrs. Olsen and Darden took the position that this royalty should be fixed at $25 per opening per machine for both patents; i. e., on a three-at-a-time machine, $75.00; on a two-at-a-time machine, $50.00; and on a one-at-a-time machine, $25.00. The affiants took the position that because of the very heavy investment of Besser Company in these patents and because of the limited prospective production of concrete block making machines within the remaining life of such patents, a fair and reasonable royalty for use of the device covered by the so-called Wellnitz patent would be $600.00 per machine, a fair and reasonable royalty for use of the device covered by the so-called Scott Patent would be [fol. 2631] $100.00 per opening, and a fair and reasonable royalty for use of the device covered by the so-called Besser Patent would be $25.00 per opening.

3. On the morning of May 22, 1951 at 9:15 a. m. the royalty committee met again in Detroit, Michigan. The same persons were present. The government representatives stated that they had decided to recommend $25.00 an opening for each patent instead of their prior position of $25.00 on opening for the two patents. Mr. Rosenthaler pointed out to the committee that the prices as set in the 1938 patent agreements covering the Gelbman patent were $225.00 for three-at-a-time machines which then sold for $12,000; that the same type of machine, with intervening improvements, now sold for $36,000; that since the price of the machine had risen to three times the old price the royalty rate per machine should advance in the same proportion; and that, therefore, a royalty rate of about $675.00 would be appropriate. During this same conference, in an effort to effect a compromise adjustment, affiant thereupon offered to agree upon a fair and reasonable royalty, and in such effort stated that Besser representatives were willing to agree upon a royalty of $450.00 per machine for use of the Wellnitz Patent, $75.00 per opening for use of the Scott Patent and $25.00 per opening for use of the Besser Patent.

Counsel purporting to speak for the government representatives on the committee then stated that since Besser Co. had been found guilty of anti-trust violations it could

expect nothing other than a nominal royalty and that the cost of Besser's investment in the patents and in experimental work and the relative differences in dollar value between the 1938 and 1951 situations had nothing to do with fixing a royalty rate. Mr. Rosenthaler informed the other committee members that it was not his understanding that the provisions of the judgment in the anti-trust case contemplated any such penalty. It was his understanding that under the judgment the so-called royalty committee was to arrive at fair patent royalty rates. [fol. 2632] At this point the government representatives and their counsel stated that there was no need of discussing the matter further; that they were going to see Judge Picard. Mr. Rosenthaler informed them that the attorneys for Besser Co. and Besser were then in New York; that the Besser representatives had no counsel present. Mr. Darden then stated that Mr. Stark was a lawyer. Mr. Rosenthaler pointed out that Mr. Stark was not appearing as a lawyer but as a member of the "royalty committee." He requested that the government representatives not appear before the Judge until the Besser Co. and Besser attorneys would sit down with other counsel and draw up a formal report. The government representatives and their counsel stated that they were not interested in waiting for any such report. The committee then adjourned.

4. Thereafter Mr. Stark left Detroit to return by automobile to Alpena, Michigan, which is approximately 250 miles north of that city.

5. At approximately 11 a. m. on May 22, 1951, Mr. Olsen telephoned Mr. Rosenthaler and stated to Mr. Rosenthaler that Judge Picard was out of the city; that Mr. Olsen had talked with him on the long distance telephone. Mr. Olsen stated that Judge Picard had sent word that there would be a meeting of the committee at 9 o'clock, May 23, 1951, that he (Judge Picard) would make himself the fifth member of the committee and that the committee would then fix the royalty rates whether or not the Besser representatives on the committee were present. Mr. Olsen further said that Judge Picard had stated that whether or not the attorneys

for Besser Co. and Besser were available did not make any difference to him.

6. On the morning of May 23, 1951 at 9 a. m., Mr. Rosenthaler went to the chambers of Judge Picard. Mr. Stark was in Alpena, Michigan. A straight message telegram which had been sent to Judge Picard by Messrs. John W. Babcock and Carl R. Henry, attorneys respectively for Besser Co. and Besser, had not been delivered by Western [fol. 2633] Union because of the fact that the Federal Building was closed at the time the message reached Detroit on the preceding afternoon. Mr. Rosenthaler had a copy of this telegram which he then delivered to Judge Picard and Judge Picard read. This telegram was as follows:

> Mr. Olsen informs Mr. Rosenthaler that he has had a long distance telephone conversation with you respecting the committee established in the judgment in the Besser case. Mr. Olsen states that in this conversation you called a conference in chambers for May 23rd at 9 am. Mr. Olsen stated that you informed him you intend at such conference to designate yourself as the fifth member of the committee which will then and there fix royalty rates and terms. Before contacting you, Mr. Olsen had been informed that we were both out of the city. Since we are presently in New York in an effort to expedite the perfection of the appeals in this case, we can not attend a court session in Detroit tomorrow. We respectfully submit the following statement for your consideration:
>
> Without prejudice to our rights on appeal we suggest that under the terms of your judgment there is nothing before your Honor on which you can appropriately act until such time as it appears as a part of the formal record in this case that the committee is unable to agree on fair royalty prices and the form and content of royalty contracts, and unable to agree on a fifth member. We suggest that the procedure contemplated by your judgment is that on the basis of such record your Honor may then formally elect to act as the fifth member of the committee or select a fifth

member, after which the committee would proceed to perform its duties.

Under your assurance that all proceedings would be without prejudice to the defendants' appeals, the Besser representatives have made a good faith effort to negotiate fair royalty rates for the patents involved. However, at the committee meetings private counsel, who are not members of the committee, have undertaken to speak and negotiate for the committee members appointed by the government. The Besser representatives have at no time attempted to introduce outside counsel into what should have been informal negotiations by committee members. We are informed that such private counsel have stated that they approach the discussion on the basis that Besser has been guilty of antitrust violations and cannot expect any other than a "nominal" royalty. This is directly contrary to the terms of your judgment, and the basic disagreement in the committee has arisen from the refusal of such counsel, who are not committee members, and who were not contemplated by your judgment to recognize your Honor's instruction that the committee shall negotiate "fair" and not "nominal" rates. [fol. 2634] In view of these facts we respectfully except to any informal proceedings at the conference on May 23rd, and except to any formal action during that conference. We also respectfully except to any procedure then or thereafter, either by the court or the committee, which purports to set royalty rates or terms without affording to our clients a full opportunity to present evidence to the full committee of five, to be heard by such committee, and to have a formal record of all future proceedings with respect to this matter.

We request that this communication be filed with the clerk of the Court as a part of the record in civil action No. 8144 United States versus Besser Manufacturing Company, et al.

After reading the telegram Judge Picard stated to the members of the royalty committee that nothing in his judgment contemplated that either party would be repre-

sented at the sessions of the committee by counsel. Moreover, he stated that the judgment which he had entered contemplated the setting of fair royalty rates and not mere nominal rates. He then instructed the committee members to discuss the matter further and to return to his chambers at 2 P. M.

7. Thereafter Mr. Rosenthaler informed Messrs. Olsen and Darden that he would be prepared to sit with them and discuss the matter but Mr. Olsen stated that the government representative did not want to talk with him further concerning the committee's duties. Mr. Rosenthaler informed them that he would be in his hotel room, available for a conference.

Later the same morning a conference was had between Messrs. Rosenthaler, Olsen and Darden in which Mr. Rosenthaler asked that the Committee adjourn until some later date to give him time and opportunity to present proofs and accounting records to support the reasonable character of the royalties which he and Mr. Stark had recommended. Thereupon, Mr. Olsen stated in substance that such further time and opportunity was not necessary because while he, Mr. Olsen, was confident that if he and Mr. Besser could confer privately they could come to an agreement which would be completely satisfactory to both of them and in Mr. Olsen's opinion fair, but that after all he and Mr. Darden were obliged to consider both the industry and [fols. 2635-2657] their private instructions from the Department of Justice who wanted fixed a very low royalty. Thereupon, Mr. Darden confirmed Mr. Olsen's statement, and expressed the thought that by conference with Mr. Besser he too could arrange satisfactory terms but that he too was hampered in accomplishing such mutually satisfactory result by the desires of others in the industry and the instructions received from the Department of Justice. Thereupon, Mr. Rosenthaler offered to arrange such conference with Mr. Besser, but Mr. Olsen and Mr. Darden insisted that upon proceeding because of their assumed obligation to follow the desires of others in the industry and the Department of Justice.

8. At 2 p. m. on May 23, 1951, Mr. Rosenthaler, Mr. Olsen and Mr. Darden returned to the court's chambers and a

transcript of the proceedings has been secured from the court reporter, who was present. This transcript shows that the following occurred:

(Transcript omitted because previously printed at pp. 2594-2617 original.)

[fol. 2658] 9. It was and is the view of the affiants that the royalty rates set by the majority of the "Royalty Committee," to-wit, Frank A. Picard, Eugene F. Olsen and Roy W. Darden were and are so inadequate as to be confiscatory. It was and is the opinion of affiants that fair royalty rates could be determined only after giving due consideration to the items of original cost and development expense of each patent, and the reasonably foreseeable number of machines likely to be manufactured or operated under such license. It was and is the view of the affiants that the royalties set by the majority of the Committee are not fair royalties. The affiants therefore dissent from the decision of the majority and without prejudice to the rights of Besser Company, Besser on appeal, present this as their dissenting report.

s/ M. P. Rosenthaler.

Subscribed and sworn to before me this 1st day of June, A. D. 1951, Thais E. Waldick, Notary Public —Wayne County—Michigan. My Commission expires: Aug. 12, 1952.

[fol. 2659] AFFIDAVIT

STATE OF MICHIGAN,
County of Wayne, ss.

JOHN STARK being duly sworn on oath, states:

1. The affiant and M. P. Rosenthaler were the representatives designated by Besser Manufacturing Company and Jesse H. Besser (hereafter called Besser Company and Besser, respectively), to the committee provided by Section VII, subparagraph B, of the Judgment of April 12, 1951, to decide fair royalty rates and the terms of roy-

alty contracts with respect to patents owned by Besser Company and Besser relating to concrete block making machinery (which committee is hereafter referred to as the "royalty committee"); said designation having been made by Besser Co. and Besser under protest and without prejudice to their rights to assign error to the provisions of the judgment purporting to establish such "royalty committee", and without prejudice to their rights to assign errors on appeal as to any proceedings or actions taken or purported to be taken by such royalty committee.

[fol. 2660] 2. On May 21, 1951, the affiant and Mr. Rosenthaler met in Detroit, Michigan, with Mr. Eugene F. Olsen and Mr. Roy W. Darden, who had been designated by the Government as its representatives on such royalty committee. Also present at the meeting were Vernon H. Doane, an attorney of Washington, D. C., purporting to represent Mr. Darden, and E. J. Balluff, an attorney of Detroit, Michigan, purporting to represent Mr. Olsen. At this meeting Mr. Rosenthaler stated formally to all present that "Mr. Stark and I were designated by defendants Besser Manufacturing Company and Jesse H. Besser to act as members of a committee provided for in paragraph VII of the final Judgment of the Court entered in the United States v. Besser Manufacturing Company and others, on April 12, 1951. This designation was made under protest, without prejudice to the rights of said defendants on appeal and pursuant to the assurance given in open court on May 8, 1951 by Judge Frank A. Picard that the designation of such committee members and such actions as are performed by said committee members would be without prejudice to the rights of the defendants on appeal.

Accordingly, it must be specifically understood that any and all actions taken by us as committee members are taken under protest, under compulsion, and without prejudice to the rights of such defendants on appeal to present and pursue any and all assignments of error as such defendants shall deem appropriate to secure the review by the appellate court of each and every provision of such paragraph VII."

The parties then undertook to discuss the amount of royalty rates which the committee would report for compul-

sory license to be granted under the Scott and Wellnitz [fol. 2661] patents owned by Besser Co. Counsel for Messrs. Olsen and Darden took the position that this royalty should be fixed at $25 per opening per machine for both patents; i. e., on a three-at-a-time machine, $75.00; on a two-at-a-time machine, $50.00; and on a one-at-a-time machine, $25.00. This affiant took the position that because of the very heavy investment of Besser Company in these patents and because of the limited prospective production of concrete block making machines within the remaining life of such patents, a fair and reasonable royalty for use of the device covered by the so-called Wellnitz patent would be $600.00 per machine, a fair and reasonable royalty for use of the device covered by the so-called Scott Patent would be $100.00 per opening, and a fair and reasonable royalty for use of the device covered by the so-called Besser Patent would be $25.00 per opening.

3. On the morning of May 22, 1951 at 9:15 a. m. the royalty committee met again in Detroit, Michigan. The same persons were present. The government representatives stated that they had decided to recommend $25.00 an opening for each patent instead of their prior position of $25.00 an opening for the two patents. Mr. Rosenthaler pointed out to the committee that the prices as set in the 1938 patent agreements covering the Gelbman patent were $225.00 for three-at-a-time machines which then sold for $12,000; that the same type of machine, with intervening improvements, now sold for $36,000; that since the price of the machine had risen to three times the old price the royalty rate per machine should advance in the same proportion; and that, therefore, a royalty rate of about $675.00 would be appropriate. During this same conference, in an effort to effect a compromise adjustment, affiant and Mr. Rosenthaler thereupon offered to agree upon a [fol. 2662] fair and reasonable royalty, and in such effort stated that Besser representatives were willing to agree upon a royalty of $450.00 per machine for use of the Wellnitz Patent, $75.00 per opening for use of the Scott Patent and $25.00 per opening for use of the Besser Patent.

Counsel purporting to speak for the government representatives on the committee then stated that since Besser

Co. had been found guilty of anti-trust violations it could expect nothing other than a nominal royalty and that the cost of Besser's investment in the patents and in experimental work and the relative differences in dollar value between the 1938 and 1951 situations had nothing to do with fixing a royalty rate. Mr. Rosenthaler informed the other committee members that it was not his understanding that the provisions of the judgment in the anti-trust case contemplated any such penalty. It was his understanding that under the judgment the so-called royalty committee was to arrive at fair patent royalty rates.

At this point the government representatives and their counsel stated that there was no need of discussing the matter further; that they were going to see Judge Picard. Mr. Rosenthaler informed them that the attorneys for Besser Co. and Besser were then in New York; that the Besser representatives had no counsel present. Mr. Darden then stated that Mr. Stark was a lawyer. Mr. Rosenthaler pointed out that Mr. Stark was not appearing as a lawyer but as a member of the "royalty committee." He requested that the government representatives not appear before the Judge until the Besser Co. and Besser attorneys would sit down with other counsel and draw up a formal report. The government representatives and their counsel stated that they were not interested in waiting for any [fol. 2663] such report. The committee then adjourned.

4. Thereafter Mr. Stark left Detroit to return by automobile to Alpena, Michigan, which is approximately 250 miles north of that city.

5. It was and is the view of the affiant that the royalty rates set by the majority of the "royalty committee," to-wit, Frank A. Picard, Eugene F. Olsen and Roy W. Darden were and are so inadequate as to be confiscatory. It was and is the opinion of affiant that fair royalty rates could be determined only after giving due consideration to the items of original cost and development expense of each patent, and the reasonably for-seeable number of machines likely to be manufactured or operated under such license. It was and is the view of the affiant that the royalties set by the majority of the committee are not fair royalties. The affiant therefore dissents from the decision of the ma-

jority and without prejudice to the rights of Besser Company, Besser on appeal, presents this as his dissenting report.

s/ John Stark.

Subscribed and sworn to before me this 4th day of June, A. D. 1951, Thais E. Waldeck, Notary Public—Wayne County—Michigan. My Commission expires: Aug. 12, 1952.

[fol. 2664] AFFIDAVIT

STATE OF MICHIGAN,
County of Wayne, ss.

JOHN W. BABCOCK, being duly sworn, deposes and says that he is one of the Attorneys for Besser Manufacturing Company and Jesse H. Besser in the above entitled cause. Deponent further says that in such capacity he had presented to him a Minority Report signed by M. P. Rosenthaler, and another Minority Report signed by John Stark as the report of such minority members of the Committee designated to determine the fair royalty prices as provided in Paragraph VII of the Court's Judgment in the above entitled cause. Deponent further says that upon receiving such minority reports deponent telephoned Mr. John W. Neville of the Department of Justice and offered to deliver such minority reports to the said Mr. Neville in order that the representatives of the United States of America might file the same with the Clerk of the above entitled Court, and that upon making such offer deponent was advised by Mr. Neville that he had already received from Frank A. Picard, a member of such Committee, a report submitted by said Frank A. Picard and by Eugene F. Olsen and Roy W. Darden, and which last named document he had already filed with the Clerk of the above entitled Court. Deponent [fol. 2665] further says that he was then advised by the said John W. Neville that Mr. Neville felt that he had performed his duty under the terms of the Judgment, and that he declined to accept the said minority reports of Rosenthaler and Stark.

Deponent further says that on June 5, 1951, he presented to said John W. Neville a document from the files of the Clerk of this Court entitled, "Proposed Form of License Agreement" and bearing thereon the Clerk's number 162, and that thereupon the said John W. Neville identified said document as the report to which he had referred in the telephone conversation of June 4, 1951, and referred as the report of said majority members of said committee.

Further deponent says not.

s/ John W. Babcock.

Subscribed and sworn to before me this 5th day of June, A. D., 1951. s/ Thais E. Waldeck, Notary Public, Wayne County, Michigan. My Comm. exps: 8/12/52.

[fol. 2666] AFFIDAVIT

STATE OF MICHIGAN,
County of Wayne, ss.

JOHN W. BABCOCK, being duly sworn, deposes and says:

That, as indicated by this deponent's affidavit attached to the Minority Report of the Committee to Fix Fair Royalty Prices and Contract Terms, it was on June 5, 1951 that deponent completed negotiations of his effort with Mr. John W. Neville to file said Minority Report with the Department of Justice.

Deponent further says that it was necessary for this deponent to be in Bay City, Michigan on June 6, 1951 to present to the Honorable Frank A. Picard, who was then sitting in the Northern Division of the Eastern District of Michigan, the Petition of Defendants Besser For Leave To Appeal to the Supreme Court of the United States, and that in such effort this deponent appeared before the Honorable Frank A. Picard in his Court Room at Bay City, Michigan during the afternoon of June 6, 1951.

Deponent further says that prior to leaving the City of Detroit for Bay City, Michigan, deponent had instructed Thais E. Waldeck, deponent's Secretary, to deliver the said [fol. 2667] Minority Report to the office of the Clerk of the

United States District Court for filing, and was later informed that said Clerk had refused to accept said Report for filing on orders of the Honorable Frank A. Picard, United States District Judge.

Deponent further says that during the course of this deponent's appearance before the Honorable Frank A. Picard in his Court Room at Bay City, Michigan, on the afternoon of June 6, 1951, the Honorable Frank A. Picard stated, "The four men met, and they couldn't get together and appoint a fifth. The two men appointed by the Besser people refused to cooperate, and only one of them, I think, appeared when we did have the meeting * * * and they made no minority report, but now I understand they want to file with the Court a minority report, and I instructed the Clerk not to accept a minority report until a petition was made to the Court."

Deponent further says that in accordance with such Order of this Honorable Court, in behalf of deponent's clients, deponent is now petitioning this Court for leave to file said report.

Further deponent says not.

s/ John W. Babcock.

Subscribed and sworn to before me this 12th day of June, A. D., 1951. Thais E. Waldeck, Notary Public, Wayne County, Michigan. My Comm. exps: 8/12/52.

[fol. 2668] AFFIDAVIT

STATE OF MICHIGAN,
County of Wayne, ss.

THAIS E. WALDECK, being duly sworn, deposes and says that she is employed as Secretary to Mr. John W. Babcock, Attorney for the Defendants in the above entitled case. Deponent further says that during the forenoon of June 6, 1951, upon instructions of Mr. Babcock, she took a document entitled, "Minority Report of Committee To Fix Royalty Prices and Contract Terms and Proof of Effort to Comply With Court's Judgment" to the office of the

Clerk of the United States District Court in the Federal Building at Detroit, Michigan. Deponent further says that upon arriving at the filing desk of said office she was informed that Judge Picard had issued orders to the Clerk in substance, that if anybody brought in any papers in the Besser Case, File No. 8144, they were not to be accepted until presented either to Mr. Dingell, the Clerk, or Mr. Allred, the Chief Deputy Clerk.

Deponent further says that she was then taken to Mr. Dingell's office, and was informed by Mr. Dingell that he had received orders from the Honorable Frank A. Picard to refuse to accept any Minority Report.

[fol. 2669] Deponent further says that thereupon Mr. Duffy, who is Judge Picard's Court Clerk, came into Mr. Dingell's office, and advised deponent that he had talked with Judge Picard by telephone and that Judge Picard had given him personal distinct orders not to accept any Report from Mr. Babcock.

Deponent further says that thereupon she returned to Mr. Babcock's office with the said Report, and that the document tendered for filing with this Motion is the same document which she attempted to file with the Clerk of this Honorable Court during the forenoon of June 6, 1951.

Further deponent says not.

Thais E. Weldeck.

Subscribed and sworn to before me this 12th day of June, A. D., 1951. Hertha Niskanen, Notary Public, Wayne County, Michigan. My Comm. exps: Apr. 19, 1955.

[fol. 2670] IN UNITED STATES DISTRICT COURT

[Title omitted]

Transcript of Proceedings

Transcript of proceedings on Motion for Leave to File Minority Report in the above entitled cause before Hon. Frank A. Picard, District Judge, at Detroit, Michigan, on Monday, June 25, 1951.

APPEARANCES:

John W. Neville, Assistant United States Attorney, and William E. Speer, Assistant United States Attorney, 733 Federal Bldg., Detroit 26, Michigan, Appearing on behalf of the Plaintiff.

John W. Babcock, 2280 Penobscot Bldg., Detroit 26, Michigan, Appearing on behalf of the Defendants.

[fol. 2671]

Detroit, Michigan.
Monday, June 25, 1951.
11:00 o'clock A. M.

Proceedings

The Court: United States versus Besser Manufacturing Company.

Mr. Babcock: The matter before your Honor this morning is motion for leave to file a minority report of members of the committee to fix royalty prices and contract terms, and proof of effort to comply with the court's judgment.

The Court: I haven't seen it. Is it here?

Mr. Babcock: Yes, your Honor. It has been filed.

The Court: Do you know what document number it is? Let me see your copy of it.

(Document handed to the court.)

The Court: Is the minority report here? Is this all of it?

Mr. Babcock: Yes, your Honor. That is both the motion and the report, too.

[fol. 2672] The Court: I think that this fairly states what happened with the single exception that when the men came before me that morning, and my attention was directed to the presence of two attorneys—what were their names? Sloan or Doane?

Mr. Neville: Mr. Doane from Washington.

The Court: Mr. Doane from Washington, and the other gentleman?

Mr. Neville: I don't recall his name, your Honor. But I think it was the gentleman who was here in a previous case this morning. Mr. Balluff.

Mr. Babcock: Mr. Balluff.

The Court: What was that?

Mr. Babcock: Balluff.

The Court: Yes. Mr. Balluff. And I told them that they had no right to be in there, and we continued then without their presence.

Mr. Babcock: Mr. Rosenthaler's statement records the fact your Honor did so state.

The Court: Yes; but it doesn't record the fact that I put them out, and the implication may be that they con-[fol. 2673] tinued as part of the arbitration board, and they did not. I made them get out of the room and set the next day for the hearing and wouldn't let them stay in there, didn't I? Isn't that true?

Mr. Neville: That also included counsel for the Government.

The Court: Yes.

Mr. Babcock: There isn't any question but what that was the fact, your Honor.

The Court: All right. We understand that.

Mr. Babcock: I thought it was covered by that and also the later statement that when you convened in your chambers at 2:00 P. M. on May 23rd, Mr. Rosenthaler, Mr. Olsen and Mr. Darden returned to the court's chambers, and a transcript of the proceedings has been secured and is attached.

The Court: Yes.

Mr. Babcock: Showing that they are the only ones named as being present.

The Court: As long as we understand that; I think that

that shows here. And I think the petition fairly states what happened at that time. Don't you agree? Have you read it?

Mr. Neville: Yes, your Honor.

The Court: Now what do you want to do? File a minor-
[fol. 2674] ity report?

Mr. Babcock: We want to file that as a minority report.

The Court: You want to file this as a minority report?

Mr. Babcock: Yes, your Honor.

The Court: Is there any objection to that?

Mr. Neville: There is no objection on the part of the Government, your Honor. I would like to make this observation, however, that there is no provision in the judgment calling for the filing of a minority report.

The Court: I don't look upon this as a minority report. I look upon this as a statement of what happened. Because they never made any minority report. And I don't see why the court should refuse to permit this as a petition to be filed. But it is not a minority report and will not be considered as a minority report.

They certainly have the right to say what they think happened. As a matter of fact, I couldn't get out of Mr. Rosenthaler—well, I guess he did say what he thought they ought to charge, and that all appears there, doesn't it?

Mr. Babcock: Yes.

The Court: And his reasons.

Mr. Babcock: Yes.

[fol. 2675] The Court: I gave him an opportunity.

Mr. Babcock: I might invite your Honor's attention to one thing about this, and I am sure you will have no objection to it.

As established here by the proofs supporting my motion, the first attempt to file this was made on June 5th by tendering it to Mr. Neville. And then, when Mr. Neville felt he could not accept it, an attempt was made early in the morning of June 6th to file it with the Clerk, and the Clerk advised that the filing could only follow a motion for leave to file.

Then it was on the afternoon of June 6th, on our motion, that the court signed an order allowing the appeal. So, in order to avoid any jurisdictional question, I have asked

that the order granting leave to file this be as of the 6th, so that there won't be any question raised that it was filed subsequent to the time when the order allowing the appeal was signed.

The Court: Well, I don't know what was submitted to the Clerk, except that they told me that a minority report was being submitted. Now, this could not have been submitted to him because this, by its very language, anticipates what happened after it was submitted to the Clerk. You see that?

Mr. Babcock: Oh, no, your Honor.

[fol. 2676] The Court: Yes. It recites——

Mr. Babcock (Interposing): This all occurred prior to June 6th.

The Court: Yes. But it was after the so-called minority report. My object was that I wanted to see what they were going to file, and because there was no provision, as stated by Mr. Neville, no provision in the judgment for a minority report, I didn't want something going into the record as a minority report that was not a minority report, and a minority report had never been recognized, submitted or requested to be authorized.

Now, when the Clerk called me—or Mr. Neville called me, I don't remember who it was—somebody called me and said that they wanted to file a minority report, I said, "No, they may not file any kind of a minority report until they petition this court for authority so that I can make an order."

I do not look upon this as a petition for a minority report. But I think it is a statement that you have a right to file.

Mr. Babcock: May I have the order provide it was filed as of June 6th?

The Court: Yes. I don't want to prevent your getting it in your record. I think it ought to be there. I believe [fol. 2677] you ought to have the right to have it in there.

But had either Mr. Rosenthaler or Mr. Stark said that they would like to file a minority report, I would have made an order right then as to whether or not they could file it. But when somebody calls me and says they want to file a minority report of some kind, why, I have got to see what it is. That is all I want to know.

And I think they may have the benefit of a minority report as a result of this document that they are filing today. But do I make my position clear that I do not accept it as a minority report?

Mr. Neville: No.

The Court: It is a statement, and it should be filed as of June 5th, whatever date it was offered, unless there is some objection. Do you have some objection?

Mr. Neville: There is no objection on the part of the Government, your Honor. But at this time, inasmuch as your Honor is allowing the statement to be introduced, I would like Mr. Speer to make a statement on behalf of the Government which would deal with the so-called statement itself.

The Court: All right.

Mr. Speer: If it may please the court, in the affidavit of Mr. Mark Rosenthaler which is included in the report, he states that Messrs. Darden and Olsen claimed that they were under instructions from the Department to obtain a [fol. 2678] low rate of patent royalty. We, of course, have kept out of this problem as far as we could, and we did not give any such instructions to either of those gentlemen, so that we have here before us the affidavits of Darden and Olsen to the effect that they were not under any such instructions, and we would like permission to file these affidavits.

The Court: Any objection to that?

Mr. Babcock: No, your Honor.

The Court: They may be filed as of the same day.

I also noticed the statement there, he said the court didn't care whether Stark was present or not. Isn't there something in there to that effect?

Mr. Babcock: I will check that, your Honor. But may I invite your Honor's attention to one thing. The court just said that these affidavits might be filed as of the same day, and the affidavits were not made until the 23rd of June, so that they can't very well be filed as of the 6th of June.

The Court: When was your notice of hearing given?

Mr. Babcock: I beg pardon?

The Court: When was your notice of hearing made? As long as it gets in as a part of the entire record.

Mr. Neville: That is all.

Mr. Babcock: I have no objection to including it in the record.

[fol. 2679] The Court: I see here that Mr. Olsen has this in his statement—or, I don't know who makes this affidavit. Oh, Mr. Rosenthaler.

Mr. Rosenthaler, in his affidavit on page 4, says,

> "Mr. Olsen further said that Judge Picard had stated that whether or not the attorney for Besser Company and Besser were available did not make any difference to him."

Now, the court never told him that. But I did tell him that whether or not they were present wouldn't make any difference, because I felt that they were not acting in good faith and were not trying to arrive at a conclusion, and if they were out of town they had left town just so that they would be out of town—now, I wanted them present and tried to get them present, offered to adjourn if they would be present, but what I did say is that we would go ahead whether they were there or not. But I don't want to imply that we were going ahead because it didn't "make any difference." It made a difference to me, because I wanted them there.

Mr. Babcock: Your Honor is now speaking about Messrs. Rosenthaler and Stark, are you not? Mr. Rosenthaler's statement, as recorded on page 4, is "Mr. Olsen further said——"

The Court (Interposing): Yes.

Mr. Babcock (Continuing): "— that Judge Picard had [fol. 2680] stated that whether or not the attorney for Besser Company and Besser were available did not make any difference."

Mr. Rosenthaler's statement refers to the attorneys for Besser and not to Mr. Rosenthaler and Mr. Stark.

The Court: Wait a minute. That refers to the attorneys, doesn't it?

Mr. Babcock: Yes, your Honor.

The Court: That would be true. I wasn't worried about

the attorneys at all, on either side. As a matter of fact, I put the other attorneys out. That is true. "Whether or not the attorney for Besser"—you see, the reason I got a little mixed up on that was because Stark is really the attorney, patent attorney, and knows quite a bit about patents, I guess, and I can't help but think about the attorney-ship.

Now, that is all right. It didn't make any difference to me. As a matter of fact, it made enough difference so that I had the other people get out of the room so we wouldn't have any attorneys there at all.

All right.

Mr. Speer: If the court please, then there is this one other point I should like to have the opportunity to state.

In the discussions, the value of the Scott patent was not mentioned at all. It was stated orally, without any [fol. 2681] other proof, by Mr. Rosenthaler that Besser paid $25,000 for the Wellnitz patent, and that, in addition to that, for the engineering of the patent, he spent $200,000.

Now, there wasn't any proof offered——

The Court (Interposing): I know it. And I stated in there, as I remember it, that I felt that they knew or should have known that they would have to have that information.

Mr. Neville: I do think it is quite important, your Honor, inasmuch as this case is going to the Supreme Court, that there should be some elaboration as to how they arrived at that figure. Incidentally, that is $75,000. If I heard Mr. Speer right, he said $25,000.

The Court: No.

Mr. Neville: But that is a mistake.

The Court: I don't know why you want it in there.

Mr. Neville: We would like to know, and I think it is important for all counsel.

The Court: No. The reason I adopted that theory is because—one of the reasons, as I remember, is because they failed to show what that $75,000 was. They just grabbed that figure out of the air for all I know.

Mr. Neville: If the record will show that it just came in from out of the air——

[fol. 2682] The Court: They won't admit that. No.

But I said this: I said, "You knew or should have known

that that might become or was going to become important in this case. I think you should have had it here."

Do you remember words to that effect? And do you remember that in my decision I say that they information should have been available?

Mr. Neville: I, frankly, don't recall that.

The Court: It is in there, isn't it, Mr. Babcock?

Mr. Babcock: It appears in the latter part of the transcript, I think, your Honor.

The Court: Yes. Here it is. Where is it? You have it here somewhere.

Mr. Babcock: The fifth page from the last.

The Court (Reading):

"I will tell you what I am going to do——"

Mr. Babcock: You stated (Reading):

"I will tell you what I am going to do. I am going to accept——"

The Court (Continuing):

"I am going to accept the recommendation of you two gentlemen, and the main reason for that is that I think they could have had the information, if they wanted to, if they wanted to present it in proper form, that right from the beginning of this—not from the begin- [fol. 2683] ning, but especially from the rendition of judgment, there has been a surprising lack of cooperation between the defendant, their counsel and this Court, so that to me, to the Court, it appears as though it is but another attempt to delay matters and not get the judgment complete."

Now, I am referring there to the fact that they did not have all of that information that they should have had before me.

Mr. Babcock: Two pages prior to that, your Honor also said (Reading):

"I feel this way, that the Besser representatives knew or should have known that these questions would

present themselves when you started discussing the royalty. You couldn't discuss the royalty without having that information. And that they had the opportunity to present it on Monday and on Tuesday."

The Court: There you are. Now, do you want anything more on it than that?

Mr. Neville: The only reason I made the statement I made a while ago, your Honor, was to be helpful.

The Court: Yes. But don't you see this, that it specifically states in there—and this is to your benefit—that they should have put the information in.

[fols. 2684-2686] Mr. Neville: But that they were not diligent in so doing.

The Court: They didn't do it and we were there ready to pass upon these royalties and I felt that they should have known that that information was needed, and they did not present it.

[fol. 2687] In United States District Court

[Title omitted]

Order Granting Leave to File Minority Report of "Royalty Committee" and Permitting Affidavits of Eugene F. Olsen and Roy W. Darden to Be Filed—June 27, 1951

In the above entitled matter there having been brought on the Motion of the Defendant Besser Manufacturing Company and others "For Leave To File A Minority Report Of Members Of The Committee To Fix Royalty Prices And Contract Terms And Proof Of Effort To Comply With The Court's Judgment", and the same having been considered by the Court, although the Court does not accept the document tendered as a "Minority Report",

It is ordered that leave to file said document as a part of the record in this case as of the 6th day of June, 1951 be, and the same hereby is, granted, and said document is hereby filed as of said date, and

It is further ordered that the Affidavits of Eugene F. Olsen and Roy W. Darden tendered by attorneys for the Plaintiff in the above entitled cause during the hearing upon said Motion also be filed in this cause.

Frank A. Picard, United States District Judge.

[fol. 2688] In United States District Court

Affidavit

State of Michigan,
County of Lenawee, ss.

Eugene F. Olsen, being duly sworn, deposes and says:

(1) That he is the Eugene F. Olsen designated by the United States Government, pursuant to Paragraph 7 (B) 2 of the Final Judgment in the above action dated April 12, 1951, and that he has been present at all meetings of the Committee created pursuant to such paragraph of such Final Judgment;

(2) That he has read a copy of an affidavit allegedly executed by M. P. Rosenthaler, a member of such Committee, on June 4, 1951, which affidavit contains the following allegation;

[fol. 2689] "Later the same morning a conference was had between Messrs. Rosenthaler, Olsen and Darden in which Mr. Rosenthaler asked that the Committee adjourn until some later date to give him time and opportunity to present proofs and accounting records to support the reasonable character of the royalties which he and Mr. Stark had recommended. Thereupon, Mr. Olsen stated in substance that such further time and opportunity was not necessary because while he, Mr. Olsen, was confident that if he and Mr. Besser could confer privately they could come to an agreement which would be completely satisfactory to both of them and in Mr. Olsen's opinion fair, but that after all he and Mr. Darden were obliged to consider both the industry and their private instructions from the Department of Justice who wanted fixed a very low

royalty. Thereupon, Mr. Darden confirmed Mr. Olsen's statement, and expressed the thought that by conference with Mr. Besser he too could arrange satisfactory terms but that he too was hampered in accomplishing such mutually satisfactory result by the desires of others in the industry and the instructions received from the Department of Justice. Thereupon, Mr. Rosenthaler offered to arrange such conference with Mr. Besser, but Mr. Olsen and Mr. Darden insisted upon proceeding because of their assumed obligation to follow the desires of others in the industry and the Department of Justice."

(3) That said allegation appearing in the said Rosenthaler affidavit has reference to a Committee meeting which was held on the morning of May 23, 1951, at which meeting the affiant, the said M. P. Rosenthaler, and Roy W. Darden, another member of the Committee were present;

(4) At such meeting on May 23, 1951, the said Rosenthaler did ask for an adjournment to some later date. Affiant and the said Darden pointed out that they had come from widely separated locations to attend the meetings of the Committee; that they had come on the date suggested by the said Rosenthaler; that the said Rosenthaler knew the nature and purpose of the meeting; and that the said [fol. 2690] Rosenthaler knew that the members of the Committee designated by Besser Manufacturing Company were already tardy in their availability for Committee meetings. Affiant and the said Darden informed the said Rosenthaler that for these reasons affiant and Darden could not agree to an adjournment of the Committee.

(5) At such meeting Rosenthaler made the statement that he believed affiant and Darden could meet with Jesse H. Besser and could quickly agree on terms for a license agreement. Affiant and Darden indicated their belief that they might be able to come to an agreement with Jesse H. Besser for the respective companies headed by affiant and Darden. Affiant and Darden pointed out, however, that affiant and Darden were obliged, under the terms of the Court's Final Decision to attempt to reach an agreement

on terms and conditions which would be equitable and fair to any applicant requesting a license under the Besser owned patents. Affiant and Darden further pointed out that the Final Judgment of the Court specifies the procedure to be followed in the event no agreement could be reached by the Committee members, and expressed the view that such procedure should be followed.

(6) The allegation in the aforesaid Rosenthaler affidavit to the effect that affiant or Darden stated that they were under private instructions from the Department of Justice is inaccurate;

[fol. 2691] (7) That affiant and Darden at no time gave the members of the Commitee appointed by Besser Manufacturing Company and justification for a belief that affiant or Darden had any private instructions from the Department of Justice, or any obligation to follow the desires of the Department of Justice;

(8) That neither affiant nor Darden had ever received any instructions of any character from the Department of Justice or from any other Governmental source;

(9) That affiant did at all times make a diligent and conscientious effort to arrive at an agreement as to terms and conditions of a royalty contract which would be fair and equitable to all parties concerned;

(10) That counsel for affiant and Darden attended most of the meetings of the Committee appointed pursuant to Paragraphs 7 (B) 1 and 7 (B) 2 of the Final Judgment, and that at no time prior to May 23, 1951 was any objection whatsoever made to the presence of such counsel;

Further affiant sayeth not.

/s/ Eugene F. Olsen.

Subscribed and sworn to before me this 23rd day of June, 1951. /s/ Virginia Lee Foster, Notary Public. (Seal.)

[fol. 2692] IN UNITED STATES DISTRICT COURT

AFFIDAVIT

STATE OF GEORGIA,
County of Fulton, ss.

ROY W. DARDEN, being duly sworn, deposes and says:

(1) That he is the Roy W. Darden appointed by the United States Government pursuant to Paragraph 7 (B) 2 of the Final Judgment dated April 12, 1951, in the above action; that he was present at a meeting of the Committee provided for by such paragraph of the Final Judgment, on May 23, 1951; that M. P. Rosenthaler and E. F. Olsen, members of such Committee were also present at such meeting;

(2) That he has seen a copy of an affidavit, allegedly executed by M. P. Rosenthaler on June 4, 1951, which affidavit contains the following paragraph:

[fol. 2693] "Later the same morning a conference was had between Messrs. Rosenthaler, Olsen and Darden in which Mr. Rosenthaler asked that the Committee adjourn until some later date to give him time and opportunity to present proofs and accounting records to support the reasonable character of the royalties which he and Mr. Stark had recommended. Thereupon, Mr. Olsen state- in substance that such further time and opportunity was not necessary because while he, Mr. Olsen, was confident that if he and Mr. Besser could confer privately they could come to an agreement which would be completely satisfactory to both of them and in Mr. Olsen's opinion fair, but that after all he and Mr. Darden were obliged to consider both the industry and their private instructions from the Department of Justice who wanted fixed a very low royalty. Thereupon, Mr. Darden confirmed Mr. Olsen's statement, and expressed the thought that by conference with Mr. Besser he too could arrange satisfactory terms but that he too was hampered in accomplishing such mutually satisfactory result by the desires of others in the industry and the instructions received from the Department of Justice. Thereupon,

Mr. Rosenthaler offered to arrange such conference with Mr. Besser, but Mr. Olsen and Mr. Darden insisted upon proceeding because of their assumed obligation to follow the desires of others in the industry and the Department of Justice."

(3) That the foregoing allegation of the Rosenthaler affidavit is inaccurate insofar as it relates to alleged indications by himself or Eugene F. Olsen to the effect that he and/or Olsen were under private instructions from the Department of Justice;

(4) That he never received instructions of any character from the Department of Justice or from any other Governmental agency, and that neither he nor Eugene F. Olsen ever gave the said Rosenthaler any indication or [fol. 2694] reason to believe he and Olsen were under instructions from the Department of Justice;

(5) That he at all times made a diligent and conscientious effort to arrive at an agreement as to terms and conditions of a royalty contract which would be fair and equitable to all parties concerned;

(6) That at every meeting of the Committee pursuant to Paragraphs 7 (B) 1 and 7 (B) 2 of the Final Judgment in the above action he was represented by counsel, and that at no time was there any objection whatsoever to the presence of said counsel;

(7) That acting pursuant to Section 7 of the Final Judgment the Government designated "Roy Darden and Eugene F. Olsen or their attorneys" to serve on the Committee; that he would have felt incapable of properly representing the block making machine industry without the advice and assistance of such counsel; and further affiant sayeth not.

/s/ Roy Darden.

Subscribed and sworn to before me this 22 day of June, 1951. /s/ Ora C. Allen, Notary Public Fulton County, Georgia. My commission expires Oct. 13, 1954. (Seal.)

[fol. 2695] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—June 6, 1951

To the Honorable Frank A. Picard, Judge of the District Court of the United States for the Eastern District of Michigan, Southern Division:

Petitioners, Besser Manufacturing Company, a Michigan corporation, and Jesse H. Besser, two of the defendants in the above-entitled action, considering themselves aggrieved by the final judgment herein, entered on April 12, 1951, hereby pray this Court to allow their appeal to the Supreme Court of the United States from said final judgment.

Pursuant to paragraph 1 of Rule 12 of the Rules of the Supreme Court of the United States, petitioners present herewith a statement disclosing the basis of the jurisdiction of the Supreme Court of the United States upon appeal to review said final judgment.

The particulars wherein petitioners consider said final judgment to be erroneous are set forth in the assignment of errors and prayer for reversal filed herewith.

[fol. 2696] Wherefore, petitioners pray that their appeal to the Supreme Court of the United States may be allowed, that a citation be issued as provided by law, that a transcript of the record, proceedings and documents upon which said final judgment was based, duly authenticated, be transmitted to the Supreme Court of the United States under the rules of said Court in such cases made and provided, and that an order be made, pursuant to Rule 62 of the Rules of Civil Procedure, upon such security as this Court shall direct, granting a supersedeas and staying execution of and compliance with said final judgment until the determination of said appeal by the said Supreme Court and the entry of a final order pursuant to such determination.

Dated: Detroit, Michigan, June 6th, 1951.

Respectfully submitted, Carl R. Henry, Attorney for Petitioner Jesse H. Besser, Alpena, Michigan.

John W. Babcock, Attorney for Petitioner, Besser Manufacturing Company, 2276 Penobscot Building, Detroit 26, Michigan.

[fol. 2697] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—June 6, 1951

Besser Manufacturing Company and Jesse H. Besser, two of the defendants in the above entitled action, having made and filed their petition for the allowance of an appeal to the Supreme Court of the United States from the final judgment of this Court, entered herein on April 12, 1951, and having also made and filed their assignments of error and prayer for reversal, and their jurisdictional statement, and having in all respects conformed to the statutes and rules of court in such cases made and provided,

It is ordered that the said appeal be and the same is allowed as prayed for, and

It is further ordered that a certified transcript of the record, proceedings and documents upon which said final judgment was based be transmitted to the Supreme Court of the United States under the rules of the said Court in such cases made and provided, and

It is further ordered that a citation issue returnable within forty (40) days from the date hereof, and

[fol. 2698] It is further ordered that petitioners each give bond with good and sufficient security in the sum of $250, that said petitioners, as appellants, shall prosecute their appeal and pay all costs necessary to make their appeal good.

/s/ Frank A. Picard, United States District Judge.

Dated: Detroit, Michigan, June 6, 1951.

[fol. 2699] Bond on appeal for $250.00 approved and filed June 13, 1951. [Omitted in printing.]

[fol. 2700] Bond on appeal for $250.00 approved and filed June 13, 1951. [Omitted in printing.]

[fol. 2701] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR AND PRAYER FOR REVERSAL—June 6, 1951

Besser Manufacturing Company and Jesse H. Besser, two of the defendants in the above entitled cause, in connection with their petition for appeal to the Supreme Court of the United States hereby severally assign error to the findings of fact and conclusions of law set forth in the option of the Court filed herein on January 30, 1951, to the final judgment entered herein on April 12, 1951, and to the proceedings in this cause prior to, concurrent with, and subsequent to the entry of such judgment, and say that there is manifest error committed by the District Court to the prejudice of each of said defendants severally in the following several particulars, to wit:

1

The court erred in its opinion, adopted in its judgment as its findings of fact and conclusions of law, in each of the following respects, separately and severally assigned as error:

[fol. 2702] (a) In basing its determination of the percentage positions in the industry of the defendants Besser Manufacturing Company and Stearns Manufacturing Company, Inc. upon the dollar values of the concrete block making machines sold by such companies as compared with the dollar value of such machines sold by the industry as a whole.

(b) In failing and refusing to base its determination of the percentage position in the industry of the defendants Besser Manufacturing Company and Stearns Manufacturing Company, Inc. upon the annual production capacity of the machines manufactured and sold by the several manufacturers of concrete block making machines.

(c) In aggregating the dollar value of the sales of Besser Manufacturing Company and Stearns Manufacturing Company, Inc., and using such aggregate figure as a basis of

comparison with the dollar value of sales of other manufacturers of concrete block making machinery.

(d) In holding that "Besser [Manufacturing Company and] Stearns [Manufacturing Company, Inc.] has the power in its field to control the prices."

(e) In holding that Besser Manufacturing Company controls Stearns Manufacturing Company, Inc.

(f) In concluding that there is an "alignment" between Besser Manufacturing Company and Stearns Manufacturing Company, Inc.

(g) In holding "that the Besser [Manufacturing Company]-Stearns [Manufacturing Company, Inc.] alignment created a monopoly" in violation of Section 2 of the Sherman Act (15 U. S. C. § 2).

(h) In finding that the defendants Besser Manufacturing Company and Stearns Manufacturing Company, Inc. constituted a combination which was and is a monopoly in [fol. 2703] violation of Section 2 of the Sherman Act (15 U. S. C. § 2).

(i) In holding that "in 1946," when Besser Manufacturing Company purchased the assets of Stephen Flam, Inc., "the conspiracy and monopoly undeniably began to show substance."

(j) In finding that "the reasonable deduction" as to the motive activating the acquisition by Besser Manufacturing Company in 1946 of the assets of Stephen Flam, Inc. "is that Flam was giving Besser too much competition in nine states reserved to it."

(k) In finding that "Flam was . . . fourth in dollar sales in the United States" at the time that Besser Manufacturing Company acquired the assets of Stephen Flam, Inc.

(l) In finding that the acquisition by Besser Manufacturing Company of the assets of Stephen Flam, Inc., was pursuant to a decision by Besser "to remove this fly in the ointment."

(m) In finding and concluding that the provision of the 1946 contract with Stephen Flam whereby he was employed by Besser Manufacturing Company for five years was "to make sure" that "Flam" carried out "its" agreement "to stay out of the concrete block machine making business for 8 years."

(n) In finding and concluding that there was impropriety in the provision of the contract by which Besser Manufacturing Company was entitled to exclusive rights under any patents secured by Stephen Flam during the period Flam was employed by Besser Manufacturing Company.

(o) In finding and concluding that the transactions between Besser Manufacturing Company and Stephen Flam, Inc. and Stephen Flam individually were violations of the Sherman Act (15 U. S. C. §§ 1 and 2), there being no evidence to sustain such a finding or conclusion.

[fol. 2704] (p) In finding and concluding that the written agreements between Besser Manufacturing Company and Stephen Flam, Inc. and Stephen Flam individually constituted evidence of a violation of the Sherman Act (15 U. S. C. §§ 1 and 2), there being no evidence in the record concerning the circumstances relating to the transactions reflected in such contracts, and no evidence concerning such transactions except the contracts themselves; and the contracts not being illegal *per se*.

(q) In finding and concluding that the Gelbman-Andrus patent license agreement was executed "as a result of the Bell suit."

(r) In finding and concluding that the "purpose" of the Besser-Stearns-Gelbman-Andrus contract of December 7, 1942 "was to make certain that these two giants of the industry didn't battle each other over patents any more."

(s) In finding and concluding that the Besser-Stearns-Gelbman-Andrus contract of December 7, 1942 "goes further than is necessary to protect the patent monopoly of Gelbman and Andrus."

(t) In finding and concluding that the Besser-Stearns-Gelbman-Andrus contract of December 7, 1942 "virtually made it impossible for others to obtain rights under [the Gelbman-Andrus] patents."

(u) In finding and concluding that the Besser-Stearns-Gelbman-Andrus contract of December 7, 1942, in requiring the consent of all parties to further licenses under the Gelbman-Andrus patents which were its subject, unlawfully gave Stearns Manufacturing Company, Inc., and Besser Manufacturing Company "power to restrict competition—present and future."

(v) In finding and concluding that the Besser-Stearns-Gelbman-Andrus contract of December 7, 1942 was rendered invalid by the provision thereof requiring that the licensors and licensees approve the issuance of any fur-
[fol. 2705] ther licenses under the patents which were its subject.

(w) In finding and concluding "that the parties intended this contract [the Besser-Stearns-Gelbman-Andrus contract of December 7, 1942] to be a means whereby control of the industry could be acquired and competition eliminated."

(x) In finding and concluding that the object of the Besser-Stearns-Gelbman-Andrus contract of December 7, 1942 was illegally "to eliminate competition."

(y) In finding and concluding that "the intent [of defendants] to restrain trade and the illegality is further augmented and evidenced by the provision in both the four-way [i.e., the Besser-Stearns-Gelbman-Andrus] contract of 1942 and the Flam purchase contract granting exclusive rights to Besser and Stearns of all improvements to the existing patents and to inventions still unborn."

(z) In finding and concluding with respect to the Besser-Stearns-Gelbman-Andrus contract of December 7, 1942, that "the intent to restrain trade and the illegality is further augmented and evidenced by the provision . . . granting exclusive rights to Besser and Stearns of all improvements to the existing patents and to inventions still unborn."

(aa) In finding and concluding that "the intent to restrain trade and the illegality is further augmented and evidenced by the provision in . . . the Flam purchase contract granting exclusive rights to Besser . . . of all improvements to the existing patents and to inventions still unborn."

(ab) In concluding that a provision in a patent assignment or license granting to the assignee or licensee the right to "improvements to the existing patents and to inventions still unborn . . . cannot be justified as neces-
[fol. 2706] sary to the enjoyment of or ancillary to the patent rights conveyed."

(ac) In holding and concluding that the contract provision with respect to improvement patents contained in the Flam contracts and the Besser-Stearns-Gelbman-Andrus contract of December 7, 1942 "read in conjunction with the rest of the contract provisions and other acts herein enumerated, makes the conclusion inescapable that the Besser-Stearns group had and achieved an . . . objective" in violation of the Sherman Act (15 U. S. C. §§ 1 and 2).

(ad) In concluding that the Flam contracts and the Besser-Stearns-Gelbman-Andrus agreement of December 7, 1942 were unlawful and hence "fatal to the defendants."

(ae) In finding and concluding that such threats of patent infringement actions as are shown in the record by competent evidence were made pursuant to anxiety of Gelbman and Andrus "not to protect their patent rights but to protect their contract with Besser [Manufacturing Company] and Stearns [Manufacturing Company, Inc.]."

(af) In finding and concluding that the Besser-Stearns-Gelbman-Andrus contract of December 7, 1942 "was the real beginning of the fruition of the monopoly."

(ag) In finding and concluding that the Besser-Stearns-Gelbman-Andrus contract of December 7, 1942 resulted "from a conspiracy of the parties to that agreement to accomplish an illegal objective."

(ah) In finding and concluding that through the purchase by Besser Manufacturing Company of common stock of Stearns Manufacturing Company, Inc., "Besser had gobbled up Stearns."

[fol. 2707] (ai) In finding and concluding that beginning in 1946 the defendants engaged in "what appears to have been a deliberate campaign to wipe out all remaining competition."

(aj) In finding that "Besser tried to buy out Go-Corp. founded by Olsen after he left Stearns, and continued this activity right up to the time of the hearings in this case."

(ak) In finding that "Besser offered jobs . . . to Olsen and his son."

(al) In finding that "Besser brought influence on a mate-

rial supply source of Darden that curtailed the Warren output since Darden was building the Warren machine."

(am) In finding and concluding that "practically all these men [listing various manufacturers] got out of their own business, generally impelled by threats of law suits, being given a job, pressure on customers, or all three, and usually Besser picked up their then patents with a mortgage on the fruits of their genius for years to come."

(an) In finding that Besser Manufacturing Company "attempted to limit Appley to 'cored pallet' machines that can make 2 blocks at a time."

(ao) In finding that "a cored pallet (2 at a time) machine . . . costs the producer about five times as much to operate as the plain pallet machine."

(ap) In finding and concluding that Besser Manufacturing Company had an "objective to accomplish the elimination of almost every competitor."

(aq) In finding and concluding that the efforts of Besser Manufacturing Company and Jesse H. Besser to protect their patent rights by informing others of their claim that such others were infringing said patents, erroneously de- [fol. 2708] scribed by the Court in its opinion as "recklessly [making] threats of suits," constituted a violation of the Sherman Act (15 U. S. C. §§ 1 and 2).

(ar) In finding and concluding that the purchase of assets by Besser Manufacturing Company constituted a violation of the Sherman Act (15 U. S. C. §§ 1 and 2).

(as) In finding and concluding that such "covenants not to compete" as were reflected in the evidence of this case violated the Sherman Act (15 U. S. C. §§ 1 and 2).

(at) In finding that "there were two or three instances where suit [for a patent infringement] was threatened involving machines that agents of defendants have never even seen."

(au) In finding and concluding that the efforts of Besser Manufacturing Company and Jesse H. Besser to prevent the infringement of their patent rights constituted an abuse of such rights.

(av) In concluding that before the owner or licensee of a patent may urge that another is infringing his patent he must make "an examination . . . of the charged ma-

chine"; and that thereafter he must start "a law suit if necessary or at least negotiations."

(aw) In finding and concluding, with respect to a Stearns letter to Gelbman (copy to Jesse Besser), which in fact dealt with the infringement by Darden of Gelbman's patents, that such letter referred "to Darden's audacity in daring to compete in the concrete block machine industry."

(ax) In finding and concluding that the policy of Besser Manufacturing Company of leasing, rather than selling, [fol. 2709] concrete block making machines manufactured by such company "adds to the realization of a complete monopoly."

(ay) In concluding that the decision by a manufacturer of a machine to lease the same rather than to sell it outright constitutes any evidence of violation, or constitutes in itself a violation, of the Sherman Act (15 U. S. C. §§ 1 or 2).

(az) In finding and concluding that the leasing system whereby the defendant Besser Manufacturing Company made available its extremely expensive models of its concrete block making machine on a rental basis, constituted any evidence of a violation, or was in itself a violation, of the Sherman Act (15 U. S. C. §§ 1 and 2).

(ba) In finding and concluding that there was a "Besser-Stearns combination," and that such combination got "a grip . . . on the industry during the crucial period—1946-1948."

(bb) In finding that Besser Manufacturing Company "could have been interested in Stearns [Manufacturing Company, Inc.] for no other reason" than that of exercising control over it.

(bc) In finding and concluding that the evidence established "the intent of Besser—with its Stearns control—to dominate [the concrete block making machine] industry by monopoly."

(bd) In finding and concluding that the Gelbman-Andrus-Besser-Stearns contract of December 7, 1942 was a conspiracy in violation of the Sherman Act (15 U. S. C. §§ 1 and 2).

(be) In finding and concluding that "the result of the

Gelbman-Andrus-Besser-Stearns" contract of December 7, 1942, "was to restrict competitors" in violation of the Sherman Act (15 U. S. C. §§ 1 and 2).

(bf) In finding and concluding that the contract between Besser Manufacturing Company and Ben Stone, dated March 31, 1950 whereby Besser Manufacturing Company [fol. 2710] proposed to sell to Stone all its stock in Stearns Manufacturing Company, Inc., constituted evidence of violation of the Sherman Act (15 U. S. C. §§ 1 and 2).

(bg) In finding and concluding that the Stone contract dated March 31, 1950 "is a practical admission that Besser not only has a monopoly, but knows that it has one and is seeking to superficially cleanse itself of all taint of monopoly while retaining all its benefits."

(bh) In finding and concluding that the defendants Besser Manufacturing Company, Stearns Manufacturing Company, Inc., Andrus and Gelbman "have combined and conspired to restrain and to monopolize interstate trade and commerce in concrete block making machines in violation of Sections 1 and 2 of the Sherman Act."

(bi) In finding and concluding that "Besser Manufacturning Company and Jesse H. Besser have attempted to monopolize and have monopolized [interstate trade and commerce in concrete block making machines] in violation of Section 2 of the Sherman Act."

(bj) In concluding that "the Besser interest must dispose of its holdings in the Stearns Manufacturing Company, Inc."

(bk) In concluding that the Gelbman-Andrus patents listed in the December 7, 1942 agreement, plus all improvements and inventions made subsequently and which come within the terms of said agreement [shall] be made available to everyone in the industry on the same terms."

(bl) In concluding that "all lessees of Besser machines may, at their option, withdraw as a party to such leases [fol. 2711] providing said option is exercised by July 1, 1951."

(bm) In concluding "that each of the parties to that December 7, 1942 contract be and is hereby enjoined from entering into a like agreement with each other or any other person, corporation or combination."

2

The Court erred in its final judgment entered April 12, 1951, in Section I thereof, in adjudging and decreeing that the defendants Besser Manufacturing Company and Jesse H. Besser have combined and conspired with the other named defendants "to unreasonably restrain, and to monopolize, trade and commerce in concrete block making machines in violation of Sections 1 and 2 of the Sherman Act" (15 U. S. C. §§ 1 and 2).

3

The Court erred in its final judgment entered April 12, 1951, in Section I thereof in adjudging and decreeing that the defendants Besser Manufacturing Company and Jesse H. Besser have attempted to monopolize and have monopolized trade and commerce in violation of Section 2 of the Sherman Act (15 U. S. C. § 2).

4

The Court erred in its final judgment entered April 12, 1951, in Section III thereof, in adjudging and decreeing as follows:

> The provisions of this final judgment applicable to any defendant shall apply to such defendant, its subsidiaries, successors, assigns, and each of its officers, directors, agents, employees and any other person acting under, through or for such defendant.

5

The Court erred in its final judgment entered April 12, 1951 and in Section III thereof, in failing to provide, as required by Federal Rule of Civil Procedure 65(d), that [fol. 2712] the injunction therein granted should be binding upon, and only "upon the parties to the action, their officers, agents, servants, employees and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise"; and instead in attempting to make the injunctive provisions of the final decree also applicable to the successors and assigns of any defendant.

6

The Court erred in Section IV, Subparagraph (A) of the final judgment entered April 12, 1951, in adjudging and decreeing as follows:

> Within sixty (60) days following the entry of this final judgment, defendants Besser Company and Besser shall present to this court for approval their plan for divesting themselves, by July 1, 1951, of all stock holdings and other interests, direct or indirect, in defendant Stearns.

7

The Court erred in Section IV, Subdivision (A) of the final judgment entered April 12, 1951, in that the periods of time therein specified within which the defendants Besser Manufacturing Company and Jesse H. Besser should present a plan to the Court for divesting themselves of stock holdings in defendant Stearns and the time therein specified for completing such divestiture, was so unreasonably short as to constitute in effect a confiscation of the property of such defendants, and a deprivation of property without due process of law.

8

The Court erred in Section IV, Subparagraph (B) of the final judgment entered April 12, 1951, in adjudging and decreeing as follows:

> [fol. 2713] Defendants Besser Company and Besser are hereby ordered and directed to cancel and terminate any and all contracts, agreements and understandings between said defendants or either of them, and any other person, calling for the disposition of any of the capital stock of defendant Stearns, where such contracts, agreements or understandings were entered into prior to entry of this final judgment. Defendants Besser Company and Besser are hereby enjoined and restrained from adhering to, enforcing or claiming any rights under any of the aforesaid contracts, agreements or understandings.

9

The Court erred in Section V, Subparagraph (A) of the final judgment entered April 12, 1951, in adjudging and decreeing as follows:

> Acquiring, directly or indirectly by purchase, merger, consolidation or otherwise after entry of this final judgment, and from holding or exercising after such acquisition ownership or control of, the business, physical assets or good will, or any part thereof, or any capital stock or securities of any person engaged in the manufacture, sale or distribution of concrete block making machines until after said defendant has, upon reasonable notice to the Attorney General and an opportunity on the part of the latter to be heard, shown to this court that such acquisition would not substantially lessen competition in the manufacture, sale or distribution of concrete block making machines.

10

The Court erred in Section V, Subparagraph (B) of the final judgment entered April 12, 1951, in adjudging and decreeing as follows:

> Causing, authorizing or knowingly permitting any officer, director, agent or employee to serve as an officer, director, agent or employee of any other person engaged in the manufacture of concrete block making machines.

11

The Court erred in Section VI, Subparagraph (A) of the final judgment entered April 12, 1951, in adjudging and decreeing as follows:

> [fol. 2714] The license agreement to which defendants Gelbman, Andrus, Stearns and Besser Company are parties, dated December 7, 1942, is adjudged to be unlawful under Sections 1 and 2 of the Sherman Act and is hereby declared null and void.

12

The Court erred in Section VI, Subparagraph (B) of the final judgment entered April 12, 1951, in adjudging and decreeing as follows:

> Defendants are jointly and severally enjoined and restrained from conveying or receiving any patent rights under any license, contract, agreement or understanding which gives the licensee or licensees control over the number of licenses issued or to be issued, or which has the same unlawful purpose and effect as the afore-described license agreement of December 7, 1942.

13

The Court erred in Section VI, Subparagraph (B) of its final judgment entered April 12, 1951 (which subparagraph is quoted in Assignment of Error No. 12) in extending the injunction provisions of its decree beyond the issues litigated, and in making such injunctive provision applicable perpetually to any and all future patent transactions in which the defendants may be engaged, regardless of the subject matter of such patents.

14

The Court erred in Section VI, Subparagraph (B) of its final judgment entered April 12, 1951 (which subparagraph is quoted in Assignment of Error No. 12) in that such provision perpetually bars the defendants from ever granting or receiving an exclusive license under any patent now existing or issued in the future, regardless of the subject matter of such patent, and wholly without reference to [fol. 2715] whether such future transaction is or is not violative of the Sherman Act (15 U. S. C. §§ 1 or 2).

15

The Court erred in Section VI, Subparagraph (C) of the final judgment entered April 12, 1951, in adjudging and decreeing as follows:

> Except for now pending actions, appeals and proceedings pursuant thereto in *Andrus and Gelbman* v.

Whitman; Andrus and Gelbman v. *Wenzel, et al.; Besser Manufacturing Company* v. *Whitman;* defendants Besser Company, Besser, Gelbman and Andrus are enjoined and restrained from instituting or threatening to institute, or maintaining or continuing any action, suit or proceeding for acts of infringement of any patent referred to in Section VII (A) of this judgment occurring prior to the date of this judgment.

16

The Court erred in Section VII, Subparagraph (A) of the final judgment entered April 12, 1951, in adjudging and decreeing as follows:

> Defendants Gelbman, Andrus, Besser Company and Besser are each ordered and directed to grant to any applicant therefor a non-exclusive license to make, use and vend concrete block making machinery under any, some or all patents and patent applications pertaining to concrete block making machinery now owned or controlled by the defendant, or which are issued or applied for within ten years from the entry of this final judgment, and each of said defendants is hereby enjoined and restrained from making any sale or other disposition of any of said patents or patent applications which deprives it of the power of authority to grant such licenses, unless it sells, transfers or assigns such patents and patent applications and requires as a condition of such sale, transfer or assignment that the purchaser, transferee or assignee shall observe the requirements of this Section VII, and the purchaser, transferee or assignee shall file with this court prior to consummation of said transaction, an undertaking to be bound by the provisions of this Section VII. The reference to an "undertaking" shall not be construed as requiring the posting of a bond.

[fol. 2716] 17

The Court erred in Section VII, Subparagraph (A) of its final judgment dated April 12, 1951 (which subparagraph is quoted in Assignment of Error No. 16) in directing the

defendants Besser Manufacturing Company and Jesse H. Besser to grant to any applicant a license under any or all patents and patent applications then owned or controlled by such defendants pertaining to concrete block making machinery.

18

The Court erred in Section VII, Subparagraph (A) of its final judgment dated April 12, 1951 (which subparagraph is quoted in Assignment of Error No. 16) in directing the defendants Besser Manufacturing Company and Jesse H. Besser to grant to any applicant a license under any or all patents and patent applications "which are issued or applied for within ten years from the entry of the final judgment."

19

The Court erred in Section VII, Subparagraph (A) of its final judgment dated April 12, 1951 (which subparagraph is quoted in Assignment of Error No. 16) in that the provisions thereof relating to the defendants Besser Manufacturing Company and Jesse H. Besser are without support in the evidence, the findings of fact, or the conclusions of law; are punitive in nature, operation, and result; are not necessary or appropriate to remedy or eliminate violations of the Sherman Act, if any, by such defendants; and in effect confiscate the present property of these defendants and the future product of their research and developments during a period long after any illegalities, if any exist, shall have been terminated by a suitable and correct decree.

20

The Court erred in Section VII, Subparagraph (B) of the [fol. 2717] final judgment entered April 12, 1951, in adjudging and decreeing as follows:

> Defendants Gelbman, Andrus, Besser Company and Besser are hereby enjoined and restrained from including any restrictions or condition whatsoever in any license or sublicense granted by or pursuant to the provisions of this Section VII and in order to arrive at a fair royalty price for the use of the various patents,

present and future, as above enumerated, and the form and contents of the royalty contracts—

1. Said plaintiff government and said defendants Gelbman and Andrus, shall on or before April 21, 1951, each select two persons, which said four persons so selected shall act as a committee to determine such fair royalty prices and the form and contents of the royalty contracts; provided, however, that if they are unable to so agree on or before May 5, 1951, then said four persons so selected may then select and appoint a fifth person to act with them as the fifth member of said committee; and provided further that if said four are unable to agree upon the fifth member by at least a three to one vote, on or before May 12, 1951, then such questions and points not agreed upon shall forthwith be referred to this court which shall then have the right to act as the fifth member himself or select another person in his stead to aid in making the final decision; and

2. It is further ordered that the same method and manner shall be used in arriving at a fair royalty price and the form and contents of the royalty contracts covering the patents, present and future, as above enumerated, owned and/or controlled by defendants Besser Manufacturing Company and Jesse H. Besser and when arrived at shall be filed as provided in subparagraph (C) following.

21

The Court erred in Section VII, Subparagraph (B) 2 of its final judgment entered April 12, 1951 (which subparagraph is quoted in Assignment of Error No. 20), in providing that the royalty rates to be charged by the defendants Besser Manufacturing Company and Jesse H. Besser upon licenses to be granted pursuant to the compulsory licensing provisions of Section VII, Subparagraph (A) should be determined by an extra-judicial board of arbitrators.

[fol. 2718]

22

The Court erred in Section VII, Subparagraph (B) 2 of its final judgment entered April 12, 1951 (which subpara-

graph is quoted in Assignment of Error No. 20), in that the provisions thereof constitute an erroneous and unlawful attempt by the district court to delegate its judicial function to an extra-judicial committee of laymen, and by Subparagraph VII(C) to make a decision reached by a majority vote of such board a part of the judgment herein, which attempted delegation of judicial power constitutes a deprivation of these defendants of the due process of law.

23

The Court erred in Section VII, Subparagraph (B) 2 of its final judgment entered April 12, 1951 (which subparagraph is quoted in Assignment of Error No. 20) in that the procedure therein attempted to be established purports to vest in the majority of the members of an extra-judicial committee of laymen the power arbitrarily to fix the rates of royalty to be received by these defendants on compulsory licenses of present and future patents, without specifying or limiting the "powers" of such committee, without according to these defendants the right to present evidence to such committee or to test (by cross-examination or otherwise) evidence offered by others, without a record of the proceedings of the "committee," without provision for judicial review of the "committee" decision, and without provision for any of the other minimum safeguards essential to due process of law.

24

The Court erred in Section VII, Subparagraph (C) of the final judgment entered April 12, 1951, in adjudging and decreeing as follows:

> [fol. 2719] It is further ordered that said final royalty prices together with the form and contents of the royalty agreement, when determined, shall be forthwith filed by the government with the United States District Court Clerk and upon so filing will then become a part of this judgment just as though it were now included herein.

25

The Court erred in Section VII, Subparagraph (D) of the final judgment entered April 12, 1951, in adjudging and decreeing as follows:

> Nothing herein shall prevent any applicant from attacking in the aforesaid proceedings, the validity or scope of any of the patents, nor shall this final judgment be construed as importing any validity or value to any of the said patents.

26

The Court erred in Section VIII, Subparagraph (A) of the final judgment entered April 12, 1951, in adjudging and decreeing as follows:

> Defendant Besser Company is hereby ordered and directed, within thirty (30) days from the entry of this final judgment to notify each person presently leasing a concrete block making machine from said defendant that the lessee may, at its option,
>
> (1) terminate the said lease agreement at any time prior to January 1, 1953, or
>
> (2) continue under the terms of the lease, or
>
> (3) enter into an agreement to purchase the machine or machines leased, and the accessory equipment used, as mutually satisfactory to the parties concerned;
>
> provided, however, that the provisions of subsections 1 and 2 of this sub-paragraph (A) shall be contingent upon said lessee making his election in writing on or before October 1, 1952.

27

The Court erred in providing, in Section VIII, Subparagraph (A), that every lessee of a Besser concrete block making machine should have the right, at its option, to [fol. 2720] "enter into an agreement to purchase the machine or machines leased, and the accessory equipment used, as mutually satisfactory to the parties concerned."

28

The Court erred in Section VIII, Subparagraph (B) of its final judgment entered April 12, 1951, in adjudging and decreeing as follows:

> Defendant Besser Company is hereby ordered and directed to sell to any existing lessee or purchaser under this Section VIII, of concrete block making machinery and accessory equipment of said defendant repair parts upon reasonable, uniform and nondiscriminatory prices, terms and conditions of sale.

29

The Court erred in Section IX of its final judgment entered April 12, 1951, in adjudging and decreeing as follows:

> Defendants are jointly and severally enjoined and restrained from entering into, adhering to or claiming any rights under any contract, agreement or understanding with any person presently or hereinafter engaged in the development or manufacture of concrete block making machinery which has the purpose or effect of preventing such person, or any other person from competing with defendants or any of them in the development, manufacture or sale of concrete block making machinery.

30

The Court erred in Section X of its final judgment entered April 12, 1951, in adjudging and decreeing as follows:

> Each of the defendants is enjoined and restrained from compelling, coercing or influencing any person to refrain from manufacturing concrete block making machinery or supplying steel or other materials, used in the manufacture of said machines, to any manufacturer of such machines.

[fol. 2721] 31

The Court erred in its final judgment entered April 12, 1951, in failing to limit the scope thereof to the United States of America the undisputed evidence in the case showing that the defendant Besser Manufacturing Company is engaged extensively in foreign commerce and there being no evidence and no finding that any acts of the defendant Besser with respect to foreign commerce infringe the Sherman Act in any respect.

32

The Court erred, subsequent to April 12, 1951, with respect to the "committee to determine fair royalty prices and the form and contents of the royalty contracts" (herein called "royalty committee"), provided by Section VII, Subparagraph (B) of the final judgment entered April 12, 1951, in each of the following respects, each of which is severally assigned as error by each of these defendants:

(a) In accepting and giving approval to the appointment by the government, as its "representatives" on the "royalty committee," of two of the principal competitors of these defendants, to wit, Eugene F. Olsen and Roy W. Darden, both of whom testified at the trial as government witnesses, and both of whom were disqualified by interest and prejudice from serving on such a "committee" in view of the provision of the judgment purporting to make the "report" of such "committee" *ipso facto* a part of the court's final judgment.

(b) In receiving, on May 22, 1951, an *ex parte* report by long distance telephone from committeeman Olsen, wherein Olsen stated orally that the "royalty committee" had reached an impasse.

(c) In using committeeman Olsen, on May 22, 1951, as a conduit through whom the judge summoned the "royalty committee" to meet with him forthwith in chambers on May 23, 1951.

[fol. 2722] (d) In overruling the exception of the defendants Besser Manufacturing Company and Jesse H. Besser, made without prejudice to their rights on appeal, by telegram dated May 22, 1951, and received by the Hon.

Frank A. Picard on May 23, 1951 before he purported to act as the fifth member of the "royalty committee," which exception read as follows:

> "Mr. Olsen informs Mr. Rosenthaler that he has had a long distance telephone conversation with you respecting the committee established in the judgment in the Besser case. Mr. Olsen states that in this conversation you called a conference in chambers for May 23rd at 9 AM. Mr. Olsen stated that you informed him you intend at such conference to designate yourself as the fifth member of the committee which will then and there fix royalty rates and terms. Before contacting you, Mr. Olsen had been informed that we were both out of the city. Since we are presently in New York in an effort to expedite the perfection of the appeals in this case, we can not attend a court session in Detroit tomorrow. We respectfully submit the following statement for your consideration:
>
> "Without prejudice to our rights on appeal we suggest that under the terms of your judgment there is nothing before your honor on which you can appropriately act until such time as it appears as a part of the formal record in this case that the committee is unable to agree on fair royalty prices and the form and content of royalty contracts, and unable to agree on a fifth member. We suggest that the procedure contemplated by your judgment is that on the basis of such record your honor may then formally elect to act as the fifth member of the committee or select a fifth member, after which the committee would proceed to perform its duties.
>
> "Under your assurance that all proceedings would be without prejudice to the defendants' appeals, the Besser representatives have made a good faith effort to negotiate fair royalty rates for the patents involved However, at the committee meetings private counsel, who are not members of the committee, have undertaken to speak and negotiate for the committee members appointed by the government. The Besser representatives have at no time attempted to introduce out-

side counsel into what should have been informal negotiations by committee members. We are informed that such private counsel have stated that they approach the discussion on the basis that Besser has been guilty of [fol. 2723] antitrust violations and cannot expect any other than a 'nominal' royalty. This is directly contrary to the terms of your judgment, and the basic disagreement in the committee has arisen from the refusal of such counsel, who are not committee members, and who were not contemplated by your judgment to recognize your honor's instruction that the committee shall negotiate 'fair' and not 'nominal' rates.

"In view of these facts we respectfully except to any informal proceedings at the conference on May 23rd, and except to any formal action during that conference. We also respectfully except to any procedure then or thereafter, either by the court or the committee, which purports to set royalty rates or terms without affording to our clients a full opportunity to present evidence to the full committee of five, to be heard by such committee, and to have a formal record of all future proceedings with respect to this matter.

"We request that this communication be filed with the clerk of the court as a part of the record in Civil Action No. 8144 United States versus Besser Manufacturing Company, et al.

Carl R. Henry, John W. Babcock".

Full Rate Telegram.

(e) In calling a meeting of such "royalty committee" for 2:30 PM in the judge's chambers on the afternoon of May 23, 1951, which action, if judicial in nature, was an abuse of discretion in that the judge knew that counsel for these defendants was temporarily absent from the city and knew also that one of the Besser representatives, appointed to the "committee" under protest and without prejudice to this appeal, was not in Detroit and could not reach Detroit in time for such meeting.

(f) In purporting, at such "royalty committee" meeting in the judge's chambers on May 23, 1951, to appoint the

district judge himself as the fifth member of such "royalty committee."

[fol. 2724] (g) In departing from the court's appropriate and lawful function of adjudicating contested fact issues through a trial in open court upon evidence offered and received in accordance with the statutes and rules of procedure and evidence, and instead thereof, in purporting to serve as an individual on an extra judicial "royalty committee" and purporting by a majority vote thereof to determine disputed fact issues without pleadings, evidence, or other formal procedures, which factual determinations, when made by a majority vote of such "royalty committee," the court then purported to make a part of the judgment herein.

(h) In arbitrarily refusing the request of M. P. Rosenthaler, one of the Besser representatives on the "royalty committee," which request, without prejudice to the defendants' rights on appeal, was duly presented to the judge at the "committee meeting" on May 23, 1951, for an opportunity to present to the "royalty committee" formal evidence and proof as to the investment of these defendants in the patents on which the "royalty committee" was then purporting to act, and other evidence relevant to the question of fair royalty rates.

(i) In acting in the judge's individual capacity as a fifth member of the "royalty committee" and, as such committeeman, purporting to set a royalty rate for the Scott, Besser and the Wellnitz patents when there was no evidence in the record as to any of the facts relevant to the determination of a fair royalty rate for either patent.

(j) In acting in the judge's individual capacity as a fifth member of the "royalty committee," and, as such committeeman, undertaking to vote on and fix the "fair royalty rate" for the Wellnitz patent on the basis of the judge's statement in such committee meeting that "I know something about the Wellnitz patent," when there was no evidence at the trial as to the facts relevant to a fair royalty [fol. 2725] rate thereon, and when the judge had refused to allow a reasonable time for the presentation of evidence thereon after his appointment of himself to such "com-

mittee," and when the facts relevant thereto were not such that the court could take judicial notice thereof.

(k) In acting in the judge's individual capacity as a fifth member of the "royalty committee" and, as such committeeman, accepting the recommendations of committeemen Olsen and Darden as to the royalty rates on the Wellnitz patent, despite the fact tha Olsen in such "committee" meeting expressly stated: "I don't know what they paid for the Wellaitz patent," and despite the complete absence from the trial record and the committee proceedings of any evidence on which any adjudication of fair royalties could be grounded.

(l) In acting in the judge's individual capacity as a fifth member of the "royalty committee," and as such committeeman undertaking to vote on and fix the "fair royalty rate" for the Scott patent when there was no evidence at the trial as to the facts relevant to a fair royalty rate thereon, and when the judge had refused to allow a reasonable time for the presentation of evidence thereon after his appointment of himself to such "committee," and when the facts relevant thereto were not such that the court could take judicial notice thereof.

(m) In arbitrarily accepting the recommendations of committee members Olsen and Darden as to the amount of royalties to be paid on compulsory licenses, without allowing the defendants an opportunity formally to offer evidence and to be heard thereon.

[fol. 2726] (n) In acting in the Judge's individual capacity as a fifth member of the "royalty committee", and delivering to Government Counsel what purports to be a "committee" report setting the final royalty prices and the form and content of the royalty agreement which report was thereafter filed by the Government on May 29, 1951 with the Clerk of the Judge's own District Court purportedly as a part of the Judge's Final Judgment herein.

(o) In attempting to make a report of an extra-judicial "royalty committee", upon which the Judge acted only in his individual capacity as a fifth member of such "royalty committee" and with the two Government "Committee" representatives, a part of the Final Judgment in this case

"just as though it were now (as of April 12, 1951) included herein."

(p) In acting in the Judge's individual capacity as a fifth member of the "royalty committee" and, as such committee man, delivering to Government Counsel a report which he purported to have made a part of the Final Judgment herein on which report and Final Judgment he might subsequently be called to act in his judicial capacity.

(q) In purporting to make a part of the Judgment a "committee report" setting royalties for the Scott patent which are inadequate in amount, are not fair and reasonable, and are wholly without support in the record.

(r) In purporting to make a part of the Judgment a "committee report" setting royalties for the Wellnitz patent which are inadequate in amount, are not fair and reasonable, and are wholly without support in the record.

[fol. 2727] 33

The Court erred subsequent to April 12, 1951, with respect to the "committee to determine fair royalty prices and the form and contents of the royalty contracts" (herein called "royalty committee") provided by Section VII, subparagraph (B) of the final judgment entered April 12, 1951, in each of the following respects, each of which is separately assigned as error by each of these defendants.

(a) The provision of the judgment for such a "royalty committee" and all purported proceedings by such "committee" were erroneous as an attempt by the district court to establish a compulsory extrajudicial arbitration board and to delegate to it the performance of judicial functions conferred by statute only on the district court.

(b) The provision of the judgment for such a "royalty committee" and all purported proceedings by such "committee" were erroneous as a denial of the rights of these defendants to a formal hearing in court or before a duly appointed and qualified master, upon evidence produced by all interested parties and tested by cross examination, of the factual issues relevant to the judicial establishment of royalty rates; to a record thereof; and to orderly judicial review of the findings thereon.

(c) The provision of the judgment for such a "royalty committee" and all purported proceedings by such "committee" were erroneous as an arbitrary extra-judicial confiscation and condemnation of valuable property rights of these defendants in violation of the minimum standards of due process of law.

34

The Court erred in its rulings during the trial of this cause in each of the following respects, each of which is severally assigned as error by each of these de-
[fol. 2728] fendants:

(a) In overruling the objection of defendants and permitting the witness Eugene F. Olsen to testify to statements made to him by persons (not defendants) who attended a meeting in April, 1948, of twelve to fourteen owners or operators of large concrete block plants, with respect to their plans to manufacture concrete block making machinery and their motivations therein.

(b) In overruling the objection of defendants and permitting the witness Eugene F. Olsen to testify to hearsay statements purportedly made to Olsen by one Goldcamp in the course of conversations between Goldcamp and Olsen.

(c) In overruling the objection of defendants, and overruling defendants' motion to strike, and permitting the witness Eugene F. Olsen to testify to hearsay statements purportedly made to Olsen by one John Chase in the course of conversations between Chase and Olsen.

(d) In overruling the objection of defendants and receiving in evidence Plaintiff's Exhibit 115, a letter from Taylor Concrete Products Co. containing hearsay recitations of a purported conversation between one Leland F. Taylor and one C. F. Rowell.

(e) In overruling the objection of defendants and permitting the witness Robert L. Graveley to testify to hearsay statements purportedly made to Graveley by one Harry Hirshison and one A. Vinci in the course of conversations between Graveley and Hirshison and Vinci.

(f) In overruling the objection of defendants and permitting the witness Robert L. Graveley to testify to hearsay statements purportedly made to Graveley by one A. J.

Thomas in the course of conversations between Graveley and Thomas.

(g) In overruling the objection of defendants and over- [fol. 2729] ruling defendants' motion to strike, and permitting the witness Thomas E. Winn to testify to hearsay statements purportedly made to Winn by one E. F. Steneman in the course of conversations between Winn and Steneman.

(h) In overruling the objection of defendants and permitting the witness Thomas E. Winn to testify to hearsay statements purportedly made to Winn by one Gomojack and one Haymaker in the course of conversations between Winn and Gomojack and Haymaker.

(i) In overruling the objection of defendants and permitting the witness Thomas E. Winn to testify to hearsay statements purportedly made to Winn by one Kuntz in the course of conversations between Winn and Kuntz.

(j) In overruling the objection of defendants and permitting the witness Joseph J. Hanneman to testify to hearsay statements purportedly made to Hanneman by one Charles Hemkes in the course of conversations between Hanneman and Hemkes.

(k) In overruling the objection of defendants and permitting the witness Frank E. Milewski to testify to hearsay statements purportedly made to Milewski by one Lawrence Miller in the course of conversations between Milewski and Miller.

(l) In overruling the objection of defendants and receiving in evidence Plaintiff's Exhibit 138, a letter from F. E. Milewski to Miller Block Company with reply by Lawrence E. Miller containing hearsay recitations of a purported conversation by Miller with one Glenn Leemon.

(m) In overruling the objection of defendants and permitting the witness Frank E. Milewski to testify to hearsay statements purportedly made to Milewski by one Lacey in the course of conversations between Milewski and Lacey.

[fols. 2730-2777] (n) In overruling the objection of defendants and receiving in evidence Plaintiff's Exhibit 139, a letter from Wytheville Block Co. containing hearsay recitations of a purported conversation between two unidentified persons.

(o) In overruling the objection of defendants and permitting the witness Roy W. Darden to testify to hearsay statements purportedly made to Darden by one George Clark, Jr. in the course of converstaion between Darden and Clark.

(p) In overruling the objection of defendants and receiving in evidence Plaintiff's Exhibit 144, a letter from H. E. Shaw containing hearsay recitations of a purported conversation between Shaw with one Thompson, since deceased.

Wherefore, petitioners pray that the judgment of the District Court be reversed and for such other and further relief as to the Court may seem just and proper.

Dated: New York N. Y., June 6th, 1951.

Respectfully submitted, John W. Babcock, Attorney for Petitioner Besser Manufacturing Company, 2276 Penobscot Building, Detroit 26, Michigan.
Carl R. Henry, Attorney for Petitioner, Jesse H. Besser, Alpena, Michigan.

[fols. 2778-2779] STATEMENT CALLING ATTENTION TO THE PROVISIONS OF SUPREME COURT RULE 12 (3) (omitted in printing)

[fol. 2780] Citation in usual form omitted in printing.

[fol. 2781] SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1950

Civil Action No. 8144, U. S. D. C., Eastern Michigan

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

BESSER MANUFACTURING COMPANY, STEARNS MANUFACTURING COMPANY, INC., JESSE W. BESSER, LOUIS GELBMAN and HAMLIN F. ANDRUS, Defendants

ORDER OF STAY—Filed June 11, 1951

Before Stanley Reed, Associate Justice.

The petition of defendants, Besser Manufacturing Company and Jesse W. Besser, for a supersedeas and a stay pending determination of an appeal from a judgment entered in the United States District Court for the Eastern District of Michigan on April 12, 1951, having been presented,

It is now ordered:

That a supersedeas be granted and that Paragraphs IV (A), VI, VII, VIII and IX of the said judgment shall be stayed pending the hearing and final determination of the said appeal by the Supreme Court of the United States, except

(1) that the provisions of Paragraph VI (B) are not stayed insofar as they enjoin and restrain defendants from conveying or receiving any patent rights under any license, contract, agreement or understanding which has the same purpose and effect as the Stearns-Besser-Gelbman-Andrus license agreement of December 7, 1942;

[fol. 2782] (2) that the provisions of Paragraph VI (C) are not stayed insofar as they restrain defendants from instituting any action, suit or proceeding for acts of infringement of any patent referred to in Section VII (A) of the judgment occurring prior to the date of the judgment;

(3) that the provisions of Paragraph IX are not stayed insofar as they restrain defendants from entering into any contract, agreement or understanding with any person presently or hereinafter engaged in the development or manufacture of concrete block making machinery which has the purpose or effect of preventing such person, or any other person from competing with defendants or any of them in the development, manufacture or sale of concrete block making machinery.

Stanley Reed, Associate Justice of the Supreme Court of the United States.

Dated this 8th day of June, 1951.

[fols. 2783-2785] PROOFS OF SERVICE OF APPEAL PAPERS (omitted in printing)

[fols. 2786-2789] PRAECIPE (omitted in printing)

[fols. 2790-2791] DESIGNATION OF ADDITIONAL MATTERS FOR INCLUSION IN APPEAL RECORD (omitted in printing)

[fol. 2791A] STIPULATION WAIVING COMPARISON OF RECORD (omitted in printing)

[fol. 2791B] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 2791C] SUPREME COURT OF THE UNITED STATES

No. 230, October Term, 1951

BESSER MANUFACTURING COMPANY and JESSE H. BESSER, Appellants,

vs.

THE UNITED STATES OF AMERICA

ORDER NOTING PROBABLE JURISDICTION—October 8, 1951

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

MR. Justice Clark took no part in the consideration or decision of this question.

[fols. 2791D-2791N] STIPULATION (omitted in printing)

[fols. 2791O-2791Q] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

No. 230

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON—Filed November 10, 1951

Appellants adopt for their statement of points upon which they intend to rely in their appeal to this Court the points contained in their Assignments of Error heretofore filed.

Roy W. McDonald, Attorney for Appellants.

Service of the foregoing statement is acknewledged on behalf of the Appellee this 6 day of November, 1951.

Philip B. Perlman, Solicitor General of the United States, Attorney for Appellee.

[File endorsement omitted.]

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EXHIBITS

TRANSCRIPT OF RECORD

(Pages 1179 to 1412)

Supreme Court of the United States

OCTOBER TERM, 1951

No. 230

BESSER MANUFACTURING COMPANY AND JESSE H. BESSER, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

FILED AUGUST 9, 1951

PROBABLE JURISDICTION NOTED OCTOBER 8, 1951

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 230

BESSER MANUFACTURING COMPANY AND JESSE H. BESSER, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JAN. 18, 1952.

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24—Release signed by J. J. Hanneman, Hamlin F. Andrus, Louis Gelbman and J. H. Besser	2853	1220
25—Memorandum of Agreement between Gelbman and Andrus as patentees granting permission to Roy Darden to continue manufacture of concrete block machines under Gelbman patents	2856	1224
26—Patent agreement dated November 21, 1946, between Stephen Flam and Besser Mfg. Co.	2863	1229

Exhibits—Continued	Original	Print
27—Conditional sales agreement dated November 21, 1946, between Stephen Flam, Inc. and Besser Mfg. Co.	2871	1235
28—Agreement for sale of inventories dated November 21, 1946 between Stephen Flam, Inc. and Besser Mfg. Co.	2875	1238
29—Agreement for the sale of real estate dated November 21, 1946, between Stephen Flam, Inc. and Besser Mfg. Co.	2884	1246
30—Balance sheet as at December 31, 1946 of Besser Mfg. Co.	2888	1250
32—Letter dated February 11, 1948, J. H. Besser authorizing addressees to purchase Stearns Co. common stock	2889	1252
36-37—Correspondence and cancelled check in reference to purchase of Stearns Mfg. Co. stock	2906	1252
38—Letter dated March 16, 1949, Besser Mfg. Co. to Department of Justice	2908	1255
40—Balance sheet as at December 31, 1948 of Besser Mfg. Co.	2923	1256
51—Letter dated June 12, 1946, Louis Gelbman to Besser Mfg. Co.	2924	1258
52—Letter dated June 27, 1946, Stearns Mfg. Co. to Louis Gelbman concerning Darden	2925	1259
53—Letter dated July 1, 1946, Louis Gelbman to Stearns Mfg. Co.	2926	1260
54—Letter dated July 8, 1946, Stearns Mfg. Co., Inc. to J. H. Besser	2927	1261
55—Letter dated July 23, 1946, Louis Gelbman to Jesse Besser referring to the Darden machine	2929	1262
56—Letter dated July 31, 1946, Besser Mfg. Co. to Mr. Louis Gelbman	2930	1263
57—Letter dated August 7, 1946, Louis Gelbman to Mr. Hamlin F. Andrus	2931	1264
58-59—Letters dated August 8, 1946, Louis Gelbman to Stearns Mfg. Co. and to Besser Mfg. Co. re: Darden infringement suit	2932	1264
63—Letter dated October 21, 1946, Besser Mfg. Co. to Mr. Louis Gelbman re Darden	2934	1266
67—Letter dated November 4, 1946, Louis Gelbman to Besser Mfg. Co.	2935	1267
68—Letter dated November 29, 1946, Stearns Mfg. Co., Inc. to Mr. Louis Gelbman	2936	1268
69—Statement dated December 16, 1946, Louis Gelbman to Besser Company of expenses incurred in retaining attorneys	2938	1269

Exhibits—Continued	Original	Print
70—Letter dated December 17, 1946, Stearns Mfg. Co. to Mr. Louis Gelbman	2939	1270
71—Letter dated December 21, 1946, Besser Mfg. Co. to Mr. Louis Gelbman	2940	1271
72—Letter dated December 26, 1946, Louis Gelbman to Roberts B. Larson	2941	1273
75—Statement showing cost of advertising in trade papers on Darden patent suit	2942	1274
76-77—Preliminary agreement dated February 20, 1947, between Roy Darden and Louis Gelbman with transmittal letter	2943	1274
78—Letter dated February 24, 1947, Louis Gelbman to Mr. John Stark c/o Besser Mfg. Co.	2945	1276
79—Telegram dated March 12, 1947, J. H. Besser to Louis Gelbman	2946	1277
80—Letter dated April 14, 1947, Louis Gelbman to Besser Mfg. Co.	2947	1277
81—Letter dated April 17, 1947, Stearns Mfg. Co. to Mr. Louis Gelbman	2948	1279
84—Letter dated November 20, 1946 Stearns Mfg. Co. to Louis Gelbman	2949	1280
85—Letter dated November 23, 1946, Louis Gelbman to Stearns Mfg. Co.	2951	1281
86—Letter dated March 12, 1948, Stearns Mfg. Co., Inc. to Mr. Louis Gelbman	2952	1282
87—Letter dated March 15, 1948, Louis Gelbman to Besser Mfg. Co.	2953	1282
88—Letter dated October 14, 1947, Stearns Mfg. Co., Inc. to Mr. Louis Gelbman	2954	1283
89—Letter dated November 10, 1947, Louis Gelbman to Besser Mfg. Co.	2955	1284
90—Letter dated November 11, 1947, Louis Gelbman to F. C. George Machine Co.	2956	1285
91—Letter dated November 24, 1947, Louis Gelbman to Harold Greenwald	2957	1285
92—Agreement dated April 1, 1947 between John B. Lagarde and Besser Mfg. Co.	2958	1286
93—Telegram dated March 21, 1947, Stearns Mfg. Co. to Louis Gelbman	2964	1290
95—Letter dated February 3, 1948, John F. Stark of Besser Mfg. Co. to Columbia Machine Works	2965	1291
96—Letter dated September 21, 1948, W. Elmer Ramsey to J. F. Stark, Esq.	2967	1292
97—Letter dated October 23, 1948, Besser Mfg. Co. to Mr. W. Elmer Ramsey, Esq.	2969	1294
98—Letter dated February 3, 1948, Besser Mfg. Co. to Scripps Pearson Machine Co.	2971	1295

Exhibits—Continued	Original	Print
99—Memorandum of agreement dated December 7, 1948, between Bernard Flam and Besser Mfg. Co.	2973	1296
100—Description of Besser Vibrapac with use agreement, dated January 20, 1948	2978	1300
101—Blank lease form of Besser Mfg. Co.	2980	1303
108—Excerpts from U. S. Department of Commerce publication, "15th Census of the United States for the Year 1929."	3016	1307
109—Excerpts from U. S. Department of Commerce, Bureau of the Census publication, "Census of Manufacturers 1931."	3018	1308
110—Agreement dated June 26, 1934 between Besser Mfg. Co. and Eugene F. Olsen	3020	1309
111—License agreement dated April 1, 1938 between Jolterete, Inc. and Stearns Mfg. Co., Inc. and Eugene F. Olsen	3020a	1310
112—License agreement dated March 1, 1940 between Hamlin F. Andrus and Louis Gelbman, Licensors; Stearns Mfg. Co. Inc., Licensee and Eugene F. Olsen	3020q	1323
113—Excerpts from U. S. Department of Commerce publication, "16th Census of the United States, taken in 1940 for the year 1939."	3021	1337
114—Memorandum of agreement dated July 16, 1932 between Besser Mfg. Co. and Eugene F. Olsen	3022	1338
115—Letter dated May 9, 1950, Taylor Concrete Products, Inc. to Central Gocorp.	3025	1340
121—Letter not dated, E. F. Steneman to Vibra Tamp Machinery Co.	3067	1343
134—Vibrapac lease agreement dated July 11, 1949 of Besser Mfg. Co. and Goldcamp Sand and Gravel Co.	3069	1345
135—Letter dated March 25, 1949, Besser Mfg. Co. to Goldcamp Sand and Gravel Co.	3073	1349
136—Vibrapac lease agreement dated January 26, 1949 of Besser Mfg. Co. and Goldcamp Sand and Gravel Co.	3075	1351
138—Letter dated November 1, 1948, Lith-i-Bar Co. to Miller Block Co. and on which Lawrence E. Miller endorsed his reply	3079	1355
139—Signed statement dated September 2, 1949 of Wytheville Block Co.	3081	1356
142—Letter dated December 17, 1947, Altavista Concrete Products to Ray Darden Industries, Inc.	3082	1357

Exhibits—Continued	Original	Print
144—Letter dated March 25, 1948, H. E. Shaw to Roy Darden Industries	3083	1358
148, 149, 150, 151—The Besser Mfg. Co. purchase orders from Building Units Inc. and cancelled checks given for down payments	3085	1360
152—Lease dated October 21, 1947 between Besser Mfg. Co. and Building Units, Inc.	3090	1365
153—Letter dated October 21, 1947, Staley & Co. to Building Units Inc.	3094	1369
154—Letter dated October 29, 1947, Besser Mfg. Co. to Building Units Inc.	3095	1370
155—Letter dated June 4, 1949, Besser Mfg. Co. to Building Units, Inc.	3096	1371
156—Letter dated April 5, 1950, Louis Gelbman to Stearns Mfg. Co.	3097	1372
157—Draft of letter of Stearns Mfg. Co., Inc. prepared for Myron Hultmark's signature to Louis Gelbman	3098	1373
159—Memorandum of agreement dated March 30, 1950 between Ben Stone and Besser Mfg. Co.	3099	1374
160—Proxy appointing Ben Stone for Besser Mfg. Co.	3104	1377
162—License agreement dated April 1, 1950 between Besser Mfg. Co. and J. W. Appley & Son, Inc.	3105	1378
176—Letter dated March 24, 1950, Waxstein & Gelbman to Stearns Mfg. Co., Inc.	3111	1383
177—Modification of license agreement between Hamlin F. Andrus, Louis Gelbman, Licensors and Stearns Mfg. Co., Inc., Licensee and Besser Mfg. Co., Licensee	3112	1384
178—Letter dated April 5, 1950, Louis Gelbman to Besser Mfg. Co.	3115	1386
179—Letter dated April 21, 1950, Stearns Mfg. Co. to Mr. Louis Gelbman	3116	1387
180—Reprint of article and illustrations from August 1949 issue of "Pit and Quarry."	3117	1389
182—Excerpts from U. S. Department of Commerce, Bureau of the Census publication, "Census of Manufactures 1947."	3122	1393
183—Composite statement compiled from depositions and oral testimony re: concrete block making machines—Tamper Type	3127	1395
184—Composite statement compiled from depositions and oral testimony re: concrete block making machines—Vibrator Type	3128	1396
185—Chart of Stearns Mfg. Co. showing production data for years 1946, 1947 and 1948	3131	1399

Exhibits—Continued	Original	Print
186—Chart of Besser Mfg. Co. showing production data for years 1946, 1947 and 1948	3132	1400
187—Chart of industry statistics showing annual production capacity of all machines manufactured and sold in years 1946, 1947 and 1948	3133	1401
188, 189, 190—Summary schedule reflecting machines manufactured, production and dollar value of vibrating and tamping machines for years 1946, 1947 and 1948 and the working papers	3134	1402

[fol. 2792]

EXHIBIT 1

LIST OF MACHINE SALES

	Automatic Machines		Total Machines				
	No. of Machines	Value	Number	Value	Lease No.	Rental Receipts	Value Replacement Parts
1939	23	179,170.00	52	243,856.00			113,054.63
1946	184	2,838,200.00	184	2,838,200.00			792,302.50
1947	208	4,211,814.00	208	4,211,814.00	7	None	1,670,508.46
1948	16	385,000.00	16	385,000.00	63	245,541.31	1,032,439.27
Totals	431	7,614,184.00	460	7,678,870.00	70	245,541.31	3,708,304.86

Prepared by
F. C. BENNETT
Assistant Secretary
Besser Manufacturing Company

[fol. 2793]

EXHIBIT 2

STEARNS MANUFACTURING COMPANY, INC.

Adrian, Michigan

Schedule of Sales

	Fiscal year ended August 31, 1939		Fiscal year ended August 31, 1946		Fiscal year ended August 31, 1947		Ten Month Period January 1, 1948 to October 31, 1948	
	Number	Amount	Number	Amount	Number	Amount	Number	Amount
Model 15 block machine	...	.....	...	.....	32	$478,930.30	17	$298,127.50
Jolterete block machine	46	$170,170.60	80	$492,692.91	99	755,097.21	33	265,800.77
Clipper stripper block machine	9	8,439.35	247	455,084.50	265	564,952.37	40	94,072.95
Other block machines	50	27,107.38	24	9,867.67	4	1,700.00	8	[illegible]020.00
Total block machines	105	$205,717.33	351	$957,645.08	400	$1,800,679.88	98	$662,021.22
Block machine parts		100,875.23		501,977.33		613,295.56		715,937.99
Mixers, skip loaders and yardhoists		34,861.37		745,688.67		876,892.38		177,738.79
Mixer, skip loader and yardhoist parts		5,955.29		115,308.77		138,478.31		141,638.06
Other equipment		27,679.98		150,733.39		280,510.42		193,058.92

[fol. 2794] EXHIBIT 3

Besser Manufacturing Company
Main Office and Factory
Alpena, Michigan

Inter-Office Correspondence

Office

Date September 16, 1947.
Subject:

New Proposals

We take this opportunity to hand you herewith our latest corrected proposals on Besser Super Vibrapacs, Standard and '47 Model and the Victory Vibrapac.

Increased Commission

You will be pleased to note that these proposals include a ten per cent (10%) commission for you on all items. This is in line with our policy of giving every possible advantage to our Representative and we trust will be a stimulus for you to go out and secure more orders for Besser Vibrapac Plain Pallet Strippers.

Delivery

For your information delivery on all items of our manufacture is prompt. All standard equipment can be shipped within thirty days from receipt of order; most special equipment in forty-five to sixty days. Complete plants can be shipped in sixty days. If screening and crushing equipment is required one hundred and twenty days should be figured.

1947 Vibrapac

This machine is now made available to all your good customers and prospects. It has a production capacity of 6,000—8 x 8 x 16" or equivalent units per eight hour day. This is 25% more production than the Standard Vibrapac. This feature alone is worth more than the difference in price, however, that is only one point—easier offbearing by removing two pallets at a time instead of one is another

profitable feature. Of course, the most important feature is the reduced labor cost.

Why Your Customer Should Have a 1947 Vibrapac

First, because 25% greater production means 25% greater profit. For example, if your customer makes a net profit of 6c per 8 x 8 x 16" unit using the standard machine he [fol. 2795] will make 4800 block in eight hours or a profit of $288.00. Using the 1947 Machine he will make 6,000—8 x 8 x 16" blocks and a profit of $360.00. It seems unnecessary to remind ourselves that the additional profit is net profit and in no way concerns the price of the equipment which is already taken care of in the price of the block under the item of amortization. In our enthusiasm we sometimes forget this very important point and we trust you will pardon us for bringing it up here.

Second, because only by having the highest production machine available can your customer assure himself of the ability to keep control of his markets. Plant labor costs with the 1947 Machine is so low that no other concrete block making machine comes anywhere near the minimum achieved by this machine. The quality and appearance of the block made on this machine is also far ahead of any competitive equipment. Where quality and low costs are concerned the 1947 Model Besser Super Vibrapac has no equal and the purchaser assures himself immunity from competition.

Third, the higher the production the greater and more important the savings made by the Plain Pallet. It is not difficult to imagine the savings made by the use of Plain Pallets in a plant producing 6,000—8" x 8 x 16" block per day and an equivalent number of 4 x 8 x 16", 6 x 8 x 16" and 12 x 8 x 16" units, when you figure that in the 8" size alone the block maker would have an investment of about $8,000.00 in cored pallets. By the time a plant was fully equipped with the above four sizes and the necessary variations there would be an investment of about $30,000.00 in cored pallets against Plain Pallets selling at $2.50 each, with a total investment of $6,000.00 for an equal production. It is also significant that no single cored pallet machine would be able to produce at that rate.

Production Figures

We estimate conservatively that Besser Machines produce 80% of the concrete block made in the U. S. A. These figures were arrived at very simply. In 1946 concrete block makers produced one billion (1,000,000,000) 8 x 8 x 16" equivalent concrete block in the U. S. A. Available production figures for 1947 point to about the same production. There are in operation in the U. S. A. some 600 Super Vibrapac Machines—many of them operating two and three shifts. Thus if each machine averaged 5,000 block per day they would produce an average of three million (3,000,000) block per day and in 250 working days, seven hundred and fifty million block (750,000,000) or 75% of our total production; old Besser Tamping Machines still in use, will more than account for the balance of the 80%.

Why Such Popularity

Only by producing the world's finest and most outstanding concrete block making equipment can any company merit such universal acceptance in a country where competition is the life of industry.

[fol. 2796] The Besser Manufacturing Company which you and we represent was founded in 1904 and since that time has dedicated itself exclusively to the concrete block industry except for two short periods when it was necessary to devote all of our facilities to the production of materials to help win freedom for Democracy. Even then new ideas and methods were worked out and concrete block made on Besser Machines contributed no small amount to our efforts.

The advance of the concrete block industry has been parallel to the major advancements in machinery for its manufacture and a review of the industry will bear out the statement that the Besser Manufacturing Company has always been first with new ideas and new methods.

We need your cooperation in maintaining this high standard, you can give us such cooperation by sending us your orders and your suggestions for bettering our service to our mutual friends and customers.

May we look forward to your continued efforts and loyal

support in furnishing the finest machinery in the world to the best people in the world—Our Customers.

Yours very truly, Besser Manufacturing Company,
By —— —— Export Sales Manager.

Ervin Hahn/klm
Enc: Super & Vic. P. L.

Pro-Forma Invoice

P. S. Please advise if you read any of the following periodicals, "Rock Products," "Concrete," "Ingineria Internacional," or "American Exporter". If not we can help you to receive them.

[fol. 2797] EXHIBIT 4

List of Share Holders of Besser Manufacturing Co.

Name	Address	Number of Shares
J. H. Besser	232 First Avenue	29,700
Anna M. Besser	232 First Avenue	300

Officers & Directors

1931-1932-1933

Officers: J. H. Besser, President, Anna M. Besser, Secretary.

Directors: J. H. Besser, Anna M. Besser, Frank R. Oakes.

1934-1935-1936-1937-1938

Officers: J. H. Besser, President, Anna M. Besser, Secretary.

Directors: J. H. Besser, Anna M. Besser.

1939-1940

Officers: J. H. Besser, President, P. M. Park, Vice President, Anna M. Besser, Secretary, J. H. Besser, Treasurer, Gertrude Behnke, Ass't. Secretary.

Directors: J. H. Besser, Anna M. Besser.

1941

Officers: J. H. Besser, President, P. M. Park, Vice President, Elroy C. Bobolts, Vice President, J. H. Besser, Treasurer, Anna M. Besser, Secretary, Gertrude Behnke, Ass't. Secretary.

Directors: J. H. Besser, Anna M. Besser.

1942-1943-1944

Officers: J. H. Besser, President, P. M. Park, Vice President, Elroy C. Bobolts, Vice President, J. H. Besser, Treasurer, Anna M. Besser, Secretary, Paul B. Purdy, Ass't. Secretary, Gertrude Behnke, Krueger, Ass't. Secretary.

[fol. 2798] 1942-1943-1944

Directors: J. H. Besser, Anna M. Besser, P. B. Purdy.

1945

Officers: J. H. Besser, President, P. M. Park, Vice President, Elroy C. Bobolts, Vice President, J. H. Besser, Treasurer, Anna M. Besser, Secretary, Paul B. Purdy, Ass't. Secretary.

Directors: J. H. Besser, Anna M. Besser, Paul B. Purdy.

1946-1947-1948

Officers: J. H. Besser, President, P. M. Park, Vice President, Elroy C. Bobolts, Vice President, J. H. Besser, Treasurer, Anna M. Besser, Secretary, F. C. Burnett, Ass't. Secretary.

Directors: J. H. Besser, Anna M. Besser, F. C. Burnett.

1186A

EXHIBIT 5

September 20, 1945

BESSER HOME OFFICE SALES & SERVICE ORGANIZATION

The address for the following parties is:-

BESSER MANUFACTURING COMPANY
Alpena, Michigan
Phone: 291

MANAGEMENT

J. H. Besser, General Manager
Res. Phone: 733

Elroy Bobolts
Asst. General Manager
Res. Phone: 967

Haakon Paulson
Distribution Manager
Res. Phone: 374

D. R. Fox
General Sales Manager
Res. Phone: 975

J. J. Buzzell
Advertising Manager
Res. Phone: 326

Ervin Hahn
Export Sales Manager
Res. Phone: 183-J

W. A. Devins
Sales Office Manager
Res. Phone: 464-W

NAME	RES. PHONE NO.	NAME	RES. PHONE NO.
Ralph G. Bailey	858-M	Paul P. Klemens	101-J
Richard Boboltz	--	Archie W. McIntyre	426-W
J. Wes Craighead	438-M	Carl Olson	--
Howard M. Davis	198-M	Ross S. Patterson	785-R
Erwin Flewelling	298-J	John R. Thompson	54

BESSER REPRESENTATIVES WHO LIVE IN THEIR TERRITORIES

Jack Franklin
60 East 42nd Street, Room 4919
New York 17, New York
Phone: Vanderbilt 6-2498

RESIDENCE:-
158 S. Harrison St., East Orange, N.J.
RESIDENCE PHONE:-
Orange 4-3647

Lewis G. Galloway
New York Office

RESIDENCE:-
Navesink, New Jersey
RESIDENCE PHONE:-
Atlantic Highlands 774

W. L. Fuller
1511 K Street, N.W., No. 2 Lobby
Washington 5, D.C.
Phone: District 6749

RESIDENCE:-
3700 Massachusetts Ave., N.W.
Washington 16, D.C.
RESIDENCE PHONE:-
Wodly 0303

James A. Rhodes
5197 Doraine Avenue
Detroit 8, Michigan
Phone: Tyler 6-7067

RESIDENCE:
8901 Sorrento Street, Detroit, Michigan
RESIDENCE PHONE:

J. J. Staley
STALEY & COMPANY
236 N. Rolling Road
Springfield, Delaware Co., Pa.
Phone: Swarthmore 1840

Fred W. Wehrum
208 Pine Road
Edgeworth, Sewickley, Pa.
Phone: Sewickley 1104

David Wright
[illegible] Ellis Building
Phoenix, Arizona
Phone: 3-3913

RESIDENCE:
2214 N. Central, Apt. 14, Phoenix, Ariz.
RESIDENCE PHONE:
32474

TEXAS OFFICE:- 405 Alamo National Bldg.
San Antonio 5, Texas
Phone: Garfield 7151

Ray Niehaus
1710 N. Bend Road
Cincinnati 24, Ohio
Phone: Kirby 4913

Derrick Hubert, Jr.
Architectural Bldg., Room 216
816 W. Fifth Street
Los Angeles, California
Phone: Michigan 7363

RESIDENCE: (Mail Address)
4076 Benedict Canyon Drive
Van Nuys, California

Fred Leach
1337 - 10th Avenue
Port Huron, Michigan
Phone: [illegible]033

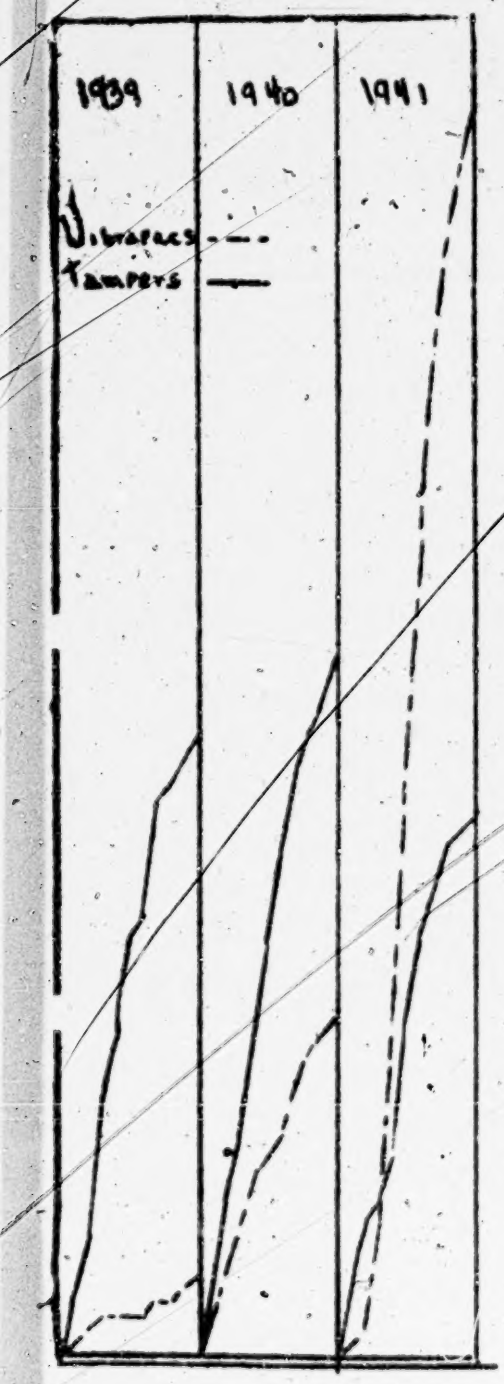
Robert J. Flood (Mike)
2000 F Street, N.W.
Washington 6, D.C.
Phone: Republic 2081, Ext. 501

RESIDENCE:
Monmouth Junction, N.J.
RESIDENCE PHONE:
4772

N. Y. OFFICE:- 347 Madison Ave., Room 1712
New York, New York
Phone: Murray Hill [illegible]

2800

EXHIBIT 6



Sales Comparisons

Vibrapac Sales Skyrocket

Person scores again

Vibration the method of the future comes into its own

Vibrapac sales in 1941 already 125% ahead of Tamper sales

The graph gives you proof

Lets capitalize on the Vibrapac and its great features

50% greater production

Fully Automatic

One man off bearing

Low maintenance cost

All units made on one set of interchangeable Plain Pallets

Units of perfect texture & dimensions

[fol. 2802] EXHIBIT 7

Bessergram

Besser Manufacturing Co., Alpena, Mich.

Date March 12, 1943.

Fellow Representatives:

New Price List

We are attaching hereto a new price list, Page 7 E—2 of 3. There are no changes on the machine or mixer in this price list. You will note that the changes are on the lift truck racks. These are now priced at $41.00 each. The pallets, of course, are listed at $2.00 each, but this price has been in effect for many months although we have not made changes in the printed price list until now. We advised you by letter of the advance in pallets some months ago.

The pallet situation, of course, remains the same as regards fluctuation in steel market prices. We hope that the price will not advance further.

Please destroy your price list No. 7 D and insert this new enclosed price list into your book.

Another change we would like to have you make is to correct the error in price list on 7 D—page 3 of 5. On the bottom of the page you will note that the brick attachment is listed, stating that 16 are made on one pallet. This is an error; it should be 12 brick. Please make this correction.

Champion Tamper

Tamper sales, as you know, have dwindled down to almost nothing and Vibrapacs in the various models and capacities have taken their place.

Due to the almost complete changeover and demand by the trade, we have found that it is no longer profitable for us to continue the manufacture of the Champion Tamper. Therefore, from now on, the manufacture of this machine will be discontinued. For the same reason that it becomes more profitable for our customers to manufacture Vibrapac

blocks, we have to devote our production schedule almost entirely to Vibrapacs; Master, Victory and Super. The machine that replaces the Champion nicely is the Master Vibrapac. The Master Vibrapac is now a completely automatic cycle machine, stopping only once during the cycle of producing a block. The Master can also be obtained without the automatic strike-off feed and side placing of pallets feature.

Another reason, the Champion is now the only machine that does not make the block having the fully pressed top feature. With the Champion discontinued, it can be stated that all Besser machines now produce the Fully Pressed Top.

[fol. 2803] Vibrapac Installations

Enclosed herewith also is an up-to-date list showing installations of all three types of Plain Pallet Vibrapacs. This is for your latest information and replaces list we sent you before.

Regarding Deliveries

The delivery of guns to the United States Navy is first and foremost in the minds of everyone here at Alpena. We are also striving to maintain the best possible kind of service on new block making equipment and replacement parts on Besser equipment. It is our aim to try to have on hand for immediate shipment any one of the Besser Vibrapacs, particularly the Super. We have, as you know, sent out quite a number of Supers this year. They have gone on jobs for war housing and some of the machines are running two and three shifts. Millions of blocks are the orders mentioned today and we stand ready to deliver quickly equipment for this tremendous block production so necessary to house our war workers now massed in large production areas where adequate housing will be built as speedily as possible in 1943. This is your assurance that we can make immediate delivery of equipment to established plants, as well as important new plants being erected on or near housing sites.

The factory stands ready to help you on consummating any deal where help from the factory is necessary.

Assuring you of our best service and trusting you may have good sales this coming Spring, we are

Cordially, Besser Manufacturing Company, Haakon Paulson, General Sales Manager.

HP:thd

Enc: Price List (Super Vibrapac)

Vibrapac Installations.

[fol. 2804] EXHIBIT 8

Bill of Sale and Agreement

Industrial Brownhoist Corporation, an Ohio corporation duly qualified to do business in Michigan, party of the first part (hereinafter called the "Seller") does hereby sell, assign, transfer and set over to Besser Manufacturing Company, a Michigan corporation, of Alpena, Michigan, party of the second part (hereinafter called the "Buyer") the following described chattels, to be delivered and paid for in the manner, and subject to the terms and conditions hereinafter set forth:

1. *Description*

The chattels so sold are described in general as

All machines and parts, and the accompanying patterns, drawings, jigs, templates, and office data such as records, selling literature, lists of customers and prospects, patents and patent information connected with the manufacture of concrete building units and concrete products plant mixers, as formerly carried on by the Seller or by its assignor, Portland Concrete Machines Company.

A more detailed schedule of the property so sold is annexed hereto, marked "Exhibit A" and made a part of this instrument.

2. *Purchase price*

The purchase price is the sum of twenty thousand dollars ($20,000.00), of which sum it is understood that $10,000.00

represents the consideration for the patterns, drawings, jigs, templates, office data as above described, patents and patent information, and $10,000.00 represents the consideration for the balance of the property sold.

3. *Terms of payment*

The purchase price shall be paid as follows:

The sum of five thousand dollars ($5,000.00) shall be paid in cash on the execution and delivery of this instrument.

[fol. 2805] A series of fifteen notes in the principal sum of one thousand dollars ($1,000.00) each shall be given for the remainder of the purchase price, which shall mature as follows, viz:

$1,000.00 on or before February 10, 1936, and $1,000.00 on or before the tenth day of each month thereafter.

These notes will draw no interest until maturity or until July 10, 1936, whichever is sooner. From these dates respectively the notes shall bear interest at six per cent.

The first maturing five notes shall be unsecured. The last maturing ten notes shall be secured by a chattel mortgage, in form approved by Seller, on the patterns, drawings, jigs, templates, office data as above described, patents and patent information.

4. *Terms of delivery, passage of title*

The patterns, drawings, jigs, templates, records, selling literature, lists of customers and prospects, patents and patent information shall be delivered to the Buyer immediately upon payment of the initial installment of five thousand dollars ($5,000.00), and title to all of the chattels sold shall then pass. The property now stored on the premises of the Seller at Bay City, Michigan and Cleveland, Ohio, may remain in storage there until needed by the Buyer in the course of manufacture or sale, but subject to the following conditions:

The inventory stored in the building at Cleveland may be left there by the Buyer for twelve months from the date of this agreement, except that in case a lease or sale is made of said building, the Buyer shall remove the in-

ventory there stored within thirty days after written notice, and shall thereafter store the inventory so removed, in a place and under conditions satisfactory to the Seller. After April 1, 1936, the Seller shall also have the right to require the inventory now stored at Bay City to be removed and stored elsewhere, at a place and under conditions satisfactory to the Seller.

[fols. 2806-2809] 5. *Other conditions*

This sale is made subject to an agency contract with F. R. Oakes, which was subject to cancellation by the Seller on ninety days notice, which notice was given September 26, 1935.

The Seller shall retain the privilege of making mixer parts for the Glen Smith Coal Block Machine, and may retain drawings of the twenty-six foot mixed arms, paddles and gates used in connection with its manufacture.

Title to the type M machine now rented to the Saginaw Brick Company shall pass to the buyer who shall succeed to the Seller's interest in said rental arrangement, but all sums heretofore received by the Seller in consideration for the use of said machine shall be retained by it.

All the Seller's rights and duties arising from a contract between it and the Turtle Creek Cement Block Company, of Turtle Creek, Pennsylvania, for the furnishing of a type K machine, shall be assumed by the Buyer. The Seller, however, shall retain the down payment heretofore made under this contract.

All material machines and parts covered by this contract shall be received by the Buyer in its or their now existing condition.

Executed in duplicate, at Bay City, Michigan, by the respective parties, through their duly authorized officers, as of the 8th day of November, 1935.

In the presence of: H. E. Kay, E. W. Taylor.

Industrial Brownhoist Corporation, By Melvin Pattison, President, J. Cope Lundy, Assistant Secretary.

In the presence of: J. P. Cullen, E. W. Taylor.

Besser Manufacturing Company, By J. H. Besser, President, P. M. Park, Asst. Secretary.

[fol. 2810] EXHIBIT 9

Memorandum of Agreement

This agreement made and entered into this 29th day of October, 1938, by and between Stephen Flam, of Sherman Oaks, California, hereinafter referred to as Licensor, and Besser Manufacturing Company, a corporation duly organized and existing under and by virtue of the laws of the State of Michigan, having its place of business in Alpena, Michigan, hereinafter referred to as Licensee,

Witnesseth:

Whereas, the Licensor is the owner of the following United States Letters Patent and application for United States Letters Patent:

Molding Apparatus and Process, Serial No. 194,627, filed March 8, 1938;
Mold for Casting Blocks, Patent No. 1,526,667, issued February 17, 1925;
Multiple Mold, Patent No. 1,585,845, issued May 25, 1926;
Mold Core, Patent No. 1,618,647, issued February 22, 1927;
Mold for Building Material, Patent No. 1,618,648, issued February 22, 1927;
Multiple Mold, Patent No. 1,687,010, issued October 9, 1928;
Multiple Mold, Patent No. 1,696,756, issued December 25, 1928;
Process and Apparatus for Molding, Patent No. 1,749,213, issued March 4, 1930;
Vibrator Mechanism, Patent No. 1,806,620, issued May 26, 1931;
Mold, Patent No. 1,754,087, issued April 8, 1950.

[fol. 2811] which application and patents are based upon inventions made by the Licensor, and

Whereas, the Licensor covenants that there are no outstanding rights or licenses under said patents or application, excepting a limited exclusive license to use so-called

Supertile machinery, and to sell products made by said machinery in the County of Los Angeles, California, now enjoyed by M. L. White, of Los Angeles, California, as well as a license to manufacture machinery under said patents and application in Canada and expiring February 1, 1941; and

Whereas, the Licensee is desirous of acquiring certain exclusive rights and licenses to make, use and sell devices, apparatus and/or processes described in said patents and application.

Now, therefore, in consideration of One ($1.00) Dollar and other valuable consideration, received by the Licensor from the Licensee, receipt of which is hereby acknowledged, and in consideration of the mutual covenants of said parties as hereinafter set forth, it is covenanted and agreed by and between the said parties as follows:

1. The Licensor hereby grants to the Licensee for the lives of the aforesaid patents and any reissues and extensions thereof, and any patents that may be hereinafter granted as a result of said application, including any renewals and divisions thereof, unless this agreement shall be sooner terminated as hereinafter provided, the following rights:

[fol. 2812] The exclusive license and privilege of making, using, selling or leasing, embodiments of the inventions disclosed in said Letters Patent and said application for Letters Patent, irrespective of mold sizes to be used with said embodiments, throughout all foreign countries, and throughout the United States, its territories and possessions; except that in Washington, Oregon, California, Idaho, Nevada, Utah, Arizona, New Mexico and Texas, Licensee acquires no rights or licenses hereunder to make, use and sell machinery, apparatus, and devices that have hand operated stripping mechanism. It is understood that Licensor hereby retains in the foregoing specifically mentioned states, the right to make, use, sell and lease, embodiments of the inventions disclosed in said Letters Patent and application for Letters Patent, for machinery and devices adapted to be power vibrated but with hand feed and hand stripper, said retained license being indivisible

and not transferable except to the heirs of said Licensor. It is specifically understood and agreed that any apparatus, machinery and devices which may be equipped with any type of vibrator or jolting devices other than as disclosed and claimed in said patents, are to be construed as falling within the scope of this license, when used in connection with hollow or solid building units, and excluding vibrators other than the Licensor's system for such things for example as fence posts, joists, pipes, burial vaults, septic tanks, laundry tubs, silo staves, lamp posts and garden furniture, trimstone, etc.

[fol. 2813] 2. The exclusive licenses hereinbefore defined as granted to the Licensee are indivisible and not assignable or transferable, either by operation of law or otherwise, except by the written consent of the Licensor or except to the successors of the entire good will and business of said Licensee, or to a subsidiary of Licensee, but such transfer to a successor or successors or a subsidiary shall also carry with it any and all undischarged obligations of the Licensee to the Licensor, and such transferee shall be liable thereunder and shall specifically assume and agree to perform the same. Furthermore, the Licensee acquires no right to sell exclusive territorial rights for manufacture of said machinery or devices or product of said machinery or devices without the written consent of the Licensor, provided that upon the granting of such consent, the royalty rates contained herein shall not be increased.

3. The Licensee hereby agrees to pay royalties to the Licensor in accordance with the following schedule:

For licensed machinery adapted to utilize molds having spaces not greater than 12 inches by 24 inches, $50.00 for each such machine;

For licensed machinery adapted to utilize molds having spaces not greater than 16 inches by 24 inches, and exceeding 12 inches by 24 inches, $90.00 for each machine; and not to exceed two mold spaces of 8 inches by 8 inches by 18 inches, or two mold spaces of 8 inches by 12 inches by 18 inches;

For licensed machinery adapted to utilize molds having spaces not greater than 24 inches by 24 inches, and

exceeding 16 inches by 24 inches, $120.00 for each machine;

[fol. 2814] For licensed machinery adapted to utilize molds having spaces not greater than 32 inches by 24 inches, and exceeding 24 inches by 24 inches, $140.00 for each machine;

For licensed machinery adapted to utilize molds having spaces exceeding 32 inches by 24 inches, $150.00 for each machine;

For each assembly of a pair of vibrating arms embodying the features of patent No. 1,806,620, $10.00, when used for miscellaneous work and not for production manufacture of regular building units.

4. Beginning November 1, 1938, the Licensee shall pay to Licensor as a minimum royalty, the sum of $250.00 per month, payable in advance.

5. The royalties as to any equipment, machinery or devices as specified in Paragraph 3 thereof, shall accrue upon shipment from Licensee's factory of the equipment, machinery or device.

6. The Licensee shall pay in sums bankable at par in Los Angeles, California, or any other address in the United States of America, designated by Licensor, where funds are bankable at par, the excess of the accumulated royalties over the minimum royalties, if any there be, for the preceding three calendar months, on or before the 15th day of February, May, August and November of each year. It is understood that the minimum royalty is to be $3000.00 per year and each year is to stand by itself. Therefore in arriving at the quarterly settlement mentioned above, in case the accumulated royalties for any quarter in the year are less than the minimum, then said deficit shall be deducted from later quarters, in the same year, in which there is an excess.

[fol. 2815] 7. At the time of making each of said royalty payments as provided in Paragraph 6 hereof, the Licensee shall deliver to the Licensor a written statement showing the total business upon which said royalty payments accrued in connection with equipment, apparatus and devices falling under this agreement, and said statement shall in-

clude the character and number of apparatus sold, leased, rented or the like, together with the names and addresses of the parties from whom proceeds are derived; and at his option the Licensor may at any time require such statements to be verified and the accuracy thereof sworn to before a Notary Public, by someone in the employment of the Licensee and familiar with the facts upon which the statements are based, and upon receiving written notice to do so, the Licensee shall thereafter have such statements so verified and sworn to.

8. Licensee shall keep full, true and accurate books of account disclosing fully and in detail the business done by the Licensee under the terms of this agreement, and the said books shall be so kept that the amount of royalties due and payable under the terms hereof, can be readily and clearly ascertainable therefrom. At any time during business hours, but not exceeding four inspections in any one twelve month period, the Licensor shall have the right to have his agents or representatives for his benefit and at his expense, inspect said books and make copies of the entries therein, and determine the accuracy of said books by referring to and inspecting all papers and documents of the Licensee pertaining to its business under this agreement.

[fol. 2816] 9. The Licensee and Licensor shall both use their best efforts and endeavors to promote and constantly increase the business done under this agreement, and in the manufacture of equipment, machinery and devices under this agreement, the Licensee shall employ good material and workmanship and generally conduct its business hereunder in such manner as to develop and maintain a good reputation for such equipment.

10. The Licensor also grants to Licensee the exclusive right and privilege of using and publishing for advertising purposes, photographs, pictures, and data of any kind useful for information regarding the work and reputation of Licensor; said photographs and pictures including those of Licensor's person; and excluding only a personal right and privilege of Licensor to use any of said photographs, pictures and data.

11. The Licensee covenants and agrees that the Letters

Patent already issued, are good and valid in law in respect to each of the claims, and agrees not to attack or question, directly or indirectly, the validity of the said claim, during the period in which the said claims are in force.

12. It is known to Licensee that Blystone Manufacturing Company, of Cambridge Springs, Pennsylvania, alleges that it has an oral license under the said Licensor's patents, and Licensor agrees to use his best efforts to enjoin such activities. In the event he is unable to do so, it may be desirable for Licensee to employ appropriate legal remedies to enjoin the activities of said Blystone Manufacturing Company in this regard. Licensor and Licensee may for that purpose join in the employment of counsel. The funds necessary for financing such legal remedies including law- [fol. 2817] yer's fees, court fees, witness fees and the like, are to be obtained by licensee withholding one-half of the excess royalties over the said minimum royalties hereinbefore provided for; but the total amount so withheld shall not exceed twenty-five hundred ($2500.00) Dollars. Any further cost of pursuing such legal remedies to conclusion shall be borne by Licensee. In the event that all or part of such withheld royalties be not required for pursuing such legal remedies, or within two years from the date of execution of this agreement, licensee shall pay to licensor the said withheld royalties or any unused portion thereof. In the event such remedy results in recoveries obtained from Blystone Manufacturing Company, said Licensee shall divide said recoveries in the same ratio as their respective contributions to the cost of the said legal proceeding.

13. It is agreed between the Licensee and the Licensor that all other infringements which involve any of the rights granted to the Licensee under this agreement, and which are known by either the Licensee or the Licensor, shall be called to the attention of the other in writing, and that either the Licensor or the Licensee shall have the right to bring suit for such infringement, and for such purpose either party may, where necessary, name the other as a formal party to the suit. Upon written notice by either the Licensee or the Licensor to bring such suit, the other party shall within thirty (30) days elect whether it will

participate in the expense and recoveries of such suit. Upon such election to participate, the Licensee and Licensor shall select joint counsel for the suit and assume [fol. 2818] full control thereof, and the expense and the recoveries shall be divided equally between the parties. But if either the Licensee or the Licensor elects not to participate, or fails to specify its election within the said thirty (30) days period, then the party bringing the suit shall bear all the expense thereof, shall assume the control thereof, and shall be entitled to all recoveries therefrom.

14. The Licensee shall mark all devices and articles furnished by it under this agreement with the appropriate patent notices as specified by the laws of the country where such devices and articles are to be sold, and in all events with the appropriate United States Patent dates or numbers.

15. Any improvements developed by either party hereto relating to the machinery, devices and apparatus licensed hereunder, are to fall within the scope of this agreement, and to be licensed to the other party.

16. This agreement shall be in force for three years from the date hereof, unless sooner terminated as hereinafter provided. Unless Licensee shall, not later than ninety (90) days prior to the termination of this agreement, elect and inform Licensor in writing not to extend this agreement, this agreement shall be automatically extended for a further three year period. Similarly, unless Licensee shall, not later than ninety (90) days prior to the expiration of any three year extension elect and inform Licensor, in writing not to extend this agreement, this agreement shall be automatically extended for an additional three year period, or up to the time when the last Letters [fol 2819] Patent referred to herein expires. The termination of the agreement, however, shall not release the Licensee from its obligations to pay the Licensor all money due under the agreement at the time of the termination of the agreement, and the Licensee shall give access to the Licensor as to all books, covering transactions made under this agreement.

17. In the event the Licensee fails to keep and perform

any of the conditions of this agreement, or in the event the Licensee becomes insolvent or bankrupt, the Licensor may, at his option, terminate this agreement by serving the Licensee with sixty (60) days written notice to such effect by Registered mail, and thereupon solely by virtue of the service of such notice and without the necessity of any judicial decree or notice, this license and agreement shall terminate, and the Licensee shall not thereafter make, use or sell, or deal with equipment, machinery, and devices, falling under the scope of said Letters Patent; but in that event the Licensee shall not be absolved, discharged, excused or free from previously arisen or attached or accrued liability, debt or obligation, pursuant to the covenants or terms of this agreement, and upon such termination, all equipment under the agreement then on lease or on hand may be disposed of by the Licensee to the best advantage, and proceeds from such disposal shall be accounted for as if the agreement were in effect.

18. The Licensor agrees that he will spend no more than ninety (90) days in any calendar year away from his residence, to provide consulting service in connection with the manufacture and sale of equipment, machinery and apparatus falling under the scope of this agreement. Addi- [fol. 2820] tional time over the said ninety (90) days may be mutually agreed upon between the parties hereto. However, any one period of such service shall not exceed thirty (30) days and shall not occur oftener than once in two calendar months. The Licensor shall be excused from performing these services in the event of any physical disability. In the event of the death of the Licensor, the failure to perform the provisions of this paragraph shall not invalidate or terminate the remaining provisions of this contract. The Licensee agrees to advance to Licensor in the event that his services are thus required, his transportation expenses, including railroad and Pullman fares, and $8.00 per diem for living expenses, and agrees that it will give Licensor not less than two weeks notice whenever his services shall be thus required. No further payment shall be made to the Licensor under the provisions of this paragraph.

19. No waiver by the Licensor of any breach of any of

the foregoing conditions or covenants shall be deemed a waiver as to any subsequent or similar breach.

In witness whereof, the respective parties hereto have this 29th day of October, 1938, respectively caused its corporate name to be attached hereto by its officers, and the Licensor has signed his name and seal; and Jesse H. Besser covenants that he is authorized by Licensee to execute this agreement for its behalf.

Executed in duplicate.

Besser Manufacturing Company, By J. H. Besser, President, Anna M. Besser, Secretary, Stephen Flam, Licensor.

[fol. 2821] Certified Copy of Resolution

Duly Passed by the Board of Directors of Besser Manufacturing Company.

"Resolved, that the contract dated the 29th day of October, 1938, by and between Besser Manufacturing Company and Stephen Flam, heretofore executed on behalf of Besser Manufacturing Company by its President, Jesse H. Besser, is hereby ratified, and the execution thereof on behalf of this corporation by Jesse H. Besser as President, is likewise hereby ratified, affirmed and approved as the act of this corporation."

The foregoing is a full, true and correct copy of the original resolution of the Board of Directors of the Besser Manufacturing Company, duly passed at a special meeting of said board on the 14th day of November 1938.

Anna M. Besser, Secretary.

[fol. 2822] State of California,
County of Los Angeles, ss.

On this 29th day of October, in the year One Thousand Nine Hundred and Thirty-eight, before me, a Notary Public in and for the County of Los Angeles, State of California, duly commissioned and sworn, personally appeared J. H. Besser and Stephen Flam, known to me to be the persons

whose names are subscribed to the within Memorandum of Agreement, and acknowledged that they executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal at my office in said County of Los Angeles, the day and year in this certificate first above written.

Delilah Oter Fawcet, Notary Public in and for the County of Los Angeles, State of California.

[fol. 2823] EXHIBIT 10.

License Agreement

between

Hamlin F. Andrus and Louis Gelbman, Licensors

and

Stearns Manufacturing Co., Inc., Licensee, and Besser Manufacturing Company, Licensee

Emery, Varney, Whittemore & Dix, 60 East 42d Street, New York.

[fol. 2824] License Agreement

This Agreement made this 7th day of December, 1942, by and between Harlin F. Andrus, of 650 North Broadway, Yonkers, N. Y. and Louis Gelbman, of 64 Grosshall Avenue, Yonkers, N. Y., hereinafter jointly referred to as Licensors, and Stearns Manufacturing Co., Inc., a Michigan corporation having its office and principal place of business at Adrian, Michigan, hereinafter referred to as Stearns, and Besser Manufacturing Company, a Michigan corporation having its office and principal place of business at Alpena, Michigan, hereinafter referred to as Besser, witnesseth:

Whereas, Licensors are the owners of certain improvements and inventions in concrete block making machines of the vibrating type in which the mold box is vibrated during the operating cycle of the machine in order to compact the concrete mixture therein, which said improvements and inventions are the subject of the following Let-

ters Patent and application for Letters Patent of the United States and Canada owned by Licensors:

United States Patents

1,867,144	Louis Gelbman	July 12, 1932
2,003,632	Louis Gelbman	June 4, 1935
2,029,365	Louis Gelbman	Feb. 4, 1936

[fol. 2825]

2,069,880	Louis and Nathan L. Gelbman	Feb. 9, 1937
2,251,447	Louis Gelbman, Eugene F. Olsen and Arthur B. Mays	Aug. 5, 1941
2,269,955	Eugene F. Olsen	Jan. 13, 1942
2,275,676	Louis Gelbman, Eugene F. Olsen and Arthur B. Mays	Mar. 10, 1942

U. S. Patent Application

Serial No.	Name	Filed
407,710	Louis Gelbman, Eugene F. Olsen and Arthur B. Mays	Aug. 21, 1941

Canadian Patent

302,579	Louis Gelbman	July 29, 1930

and

Whereas, Stearns has heretofore entered into a certain agreement with Licensors under which Stearns acquired certain exclusive rights with respect to said improvements and inventions and under said Letters Patent and application for Letters Patent, all as set forth in a certain license agreement, dated March 1, 1940, and

Whereas, pursuant to the provisions of said agreement, [fol. 2826] Licensors and Stearns brought suit for infringement of the aforesaid patent No. 1,667,144 in the United States District Court for the Southern District of New York against H. E. Bell Company because of its use of a concrete block making machine of the vibrating type manufactured by Besser, and

Whereas, the defense of said suit was admittedly undertaken and openly conducted by Besser, and

Whereas, judgment was rendered in said suit on September 8, 1948 by said District Court holding claims 12 and 13 of said patent No. 1,667,144 invalid and not infringed by the said machine manufactured by Besser, and

Whereas, Licensors, Stearns and Besser are mutually desirous of settling, by this agreement, their future relationships with respect to the remaining claims of said patent

No. 1,667,144 and with respect to the other patents above listed,

Now, therefore, the parties agree as follows:

1. The aforementioned agreement dated March 1, 1940 between Licensors and Stearns and Eugene Olsen and all other existing agreements between Licensors and Stearns and Olsen, and the license rights granted thereby are hereby cancelled and terminated.

2. Licensors and Stearns agree that any appeal taken in said suit will be dismissed, and Licensors and Stearns hereby waive any and all claims for profits or damages which might be assessed against the defendant, H. E. Bell Co., Inc., by reason of its use of the accused machine or against Besser by reason of its manufacture, use or sale of [fol. 2827] the accused machine or similar machines prior to the date of this agreement.

3. Subject to the terms and conditions of this agreement, Licensors give and grant to Stearns, and to Besser, the right and license to manufacture or have manufactured, use and sell machines embodying the improvements and inventions disclosed in the above listed patents, or any of them, in and throughout the United States and Canada. The license granted herein shall extend to and include any and all improvements or inventions hereafter made by Licensors, or either of them, during the term of this agreement, in concrete block making machines of the vibrating type in which the mold box is vibrated during the operating cycle of the machine in order to compact the concrete mixture therein, and throughout the United States and Canada.

4. Licensors covenant and agree that they will not grant any other right or license to manufacture, use or sell machines embodying said improvements or inventions, or any of them, or under said patents, or any of them, during the term of this agreement without permission of Stearns and Besser, in writing. Neither Stearns nor Besser shall have any right to grant sublicenses to others or to grant, assign or transfer to others the whole or any part of the license rights granted by this agreement.

[fol. 2828] 5. Stearns agrees and Besser agrees to pay to Licensors a royalty on each and every concrete block making machine of the vibrating type in which the mold box

vibrated during the operating cycle of the machine in order to compact the concrete mixture therein which is sold, leased or otherwise disposed of to a customer of Stearns or Besser for use in the manufacture of molded units. Such royalty shall be as follows:

Two Hundred Twenty-Five Dollars ($225.00) on machine with molds to make three (3) at a time of eight inch width by eighteen inch long units and any other size or combination of units in this size mold;

One Hundred Fifty Dollars ($150.00) on machines with molds to make two (2) at a time of eight inch width by eighteen inch length units and any other size or combination of units in this size mold;

Seventy-Five Dollars ($75.00) on machines with molds to make one (1) at a time of twelve inch width by eighteen inch length units and any other size or combination of units in this size mold.

In the case of any machine selling at a price of twelve hundred dollars ($1200.00) or less the royalty shall be 3% of the retail sales price. In the case of any machine selling at a price of seventy-five hundred dollars ($7500.00) or more, regardless of the capacity of such machine, the royalty shall be two hundred and twenty-five dollars ($225.00). Royalties shall accrue on all such machines when such machines are shipped to the customer. Licensors hereby waive, until July 12, 1952, payment of royalty on machines sold for export from the United States for use [fol. 2829] outside of the United States as to any machine manufactured and sold by Stearns or Besser under the patents and patent application listed above, provided, however, that this waiver shall not apply to machines covered by patents on improvements or inventions hereafter made by Licensors, or either of them, during the term of this agreement. As to such machines, Stearns and Besser agree that they will not sell such machines for export from the United States without prior agreement with Licensors as to the royalty payable thereon.

6. Stearns and Besser shall each keep accurate records of all such machines manufactured, sold, leased or otherwise disposed of by them, which said records shall be open

to the inspection of Licensors, or their duly authorized representative, at any time during reasonable business hours. On or before the tenth day of each month of this agreement, Stearns and Besser shall each render to Licensors a written report, commencing the tenth day of January, 1948, setting forth the number of such machines sold, leased or otherwise disposed of and shipped to the customer by them during the preceding calendar month, including the name of the customer and the serial number and type of such machines. Stearns and Besser shall each pay to Licensors, with said report the total amount of royalties shown to be due thereby.

7. Stearns agrees that the royalties paid to Licensors [fol. 2830] by it will amount to a minimum of $1.50, during every calendar quarter ending April 1, July 1, October 1 or January 1 of every year of this agreement, and Besser agrees that the royalties paid to Licensors by it will amount to a minimum of $1.50 during every calendar quarter ending April 1, July 1, October 1 or January 1 of every year of this agreement. Any royalties paid in excess of $1.50 by either Stearns or Besser during any such calendar quarter may be applied toward meeting said minimum royalties for the next succeeding calendar quarter.

8. The expense of prosecuting any alleged infringers of patents covered by this agreement shall be shared equally by each of the three parties hereto; and the determination of what suits shall be brought must be by unanimous agreement of the parties hereto; but any two parties hereto may prosecute alleged infringers at their own expense and the party not participating in the expense of such suit shall not share in any damages awarded. The party not participating in the expense of any suit agrees to give cooperation and execute the necessary papers.

[fol. 2831] 9. If Stearns or Besser fail to keep or perform any covenant or agreement herein contained, Licensors may give written notice of the default, and if the same has not been made good within thirty days, Licensors may, at their option, forthwith cancel and terminate the license of the party in default by written notice. Such termination of the license of the party in default shall not affect the license of the party not in default, however. If Stearns or

Besser shall become insolvent, or shall make an assignment for the benefit of creditors, or if proceedings in voluntary or involuntary bankruptcy shall be instituted in behalf of or against Stearns or Besser, or if a receiver or trustee of the property of Stearns or Besser shall be appointed, Licensors may, at their option, terminate the license of such party forthwith, by written notice. Such termination shall not affect the license of the other party, however. Unless sooner terminated as above provided, this license and agreement shall continue for the entire term of the patents and patent application above listed, but after July 13, 1949, this license and agreement shall be terminable at any time by Stearns or Besser on ninety days written notice to Licensors, such termination to be effective, however, only as to the party giving such notice. As to improvements or inven-
[fol. 2832] tions hereafter made by Licensors, or either of them, during the term of this agreement, however, all rights and license shall terminate on July 1, 1952, unless renewed or extended by mutual agreement between Licensors and Stearns or Besser.

10. This agreement shall inure to the benefit of and be binding upon Licensors, their heirs, executors, administrators and assigns. This agreement shall inure to the benefit of and be binding upon Stearns and Besser and any successor to the entire business and good will of either Stearns or Besser in concrete block making machines, but shall not otherwise be assignable by Stearns or Besser without permission of Licensors in writing.

11. This agreement is to become effective if and when approved by the Marine Midland Trust Company of New York, assignee of Louis Gelbman and Hamlin F. Andrus, and the Estate of A. A. Silberberg, assignee of Hamlin F. Andrus.

[fo. 2833] In witness whereof, the parties hereto have executed this agreement, in triplicate, the day and year first above written.

Hamlin F. Andrus, Louis Gelbman, Stearns Manufacturing Co., Inc., By Eugene Olsen, Pres., Besser Manufacturing Company, By J. H. Besser, Pres.

Approved: Marine Midland Trust Co. of N. Y., by ——, V. P., Estate of A. A. Silberberg, Theo. R. Silberberg, Executrix, The Chase National Bank of the City of New York, by —— ——, Executor, Personal Trust Officer.

[fol. 2834] STATE OF NEW YORK,
County of New York, ss:

On this 7th day of December, 1942, personally appeared before me Hamlin F. Andrus, to be known and known by me to be the person mentioned in and who executed the attached agreement, and he acknowledged to me that he executed the same as his free act and deed for the uses and purposes therein mentioned.

Miriam E. Chatfield.

STATE OF NEW YORK,
County of New York, ss:

On this 7th day of December, 1942, personally appeared before me Louis Gelbman, to me known and known by me to be the person mentioned in and who executed the attached agreement, and he acknowledged to me that he executed the same as his free act and deed for the uses and purposes therein mentioned.

Miriam E. Chatfield.

STATE OF NEW YORK,
County of New York, ss:

On this 14th day of December, 1942, personally appeared before me Eugene F. Olsen, who being by me duly sworn did depose and say that he resides at Adrian, Michigan, and is President of Stearns Manufacturing Co., the corporation described in the attached agreement; that he knows the corporate seal of said Stearns Manufacturing Co.; that the seal affixed to said agreement is said corporate seal; that the same was affixed to said agreement by authority of the Board of Directors; and that he signed his name thereto by like authority.

Helen D. Williamson, Notary Public, Adrian County, Michigan. My Commission Expires —— 10, 1945.

STATE OF NEW YORK,
County of New York, ss:

On the 7th day of December, 1942, personally appeared before me Jesse H. Besser, who being by me duly sworn did depose and say that he resides at Alpena, Michigan, and is President of Besser Manufacturing Company, the corporation described in the attached agreement; that he knows the corporate seal of said Besser Manufacturing Co.; that the seal affixed to said agreement is said corporate seal; that the same was affixed to said agreement by authority of the Board of Directors; and that he signed his name thereto by like authority.

Miriam E. Chatfield.

[fol. 2835] In consideration of the approval of the attached license agreement dated the 7th day of December, 1942 by The Marine Midland Trust Company of New York, the undersigned hereby consent and agree that all of their rights and interests as licensors under the attached license agreement shall remain subject to the existing and outstanding assignment to The Marine Midland Trust Company of New York dated August 6, 1940 by Hamlin F. Andrus and Louis Gelbman and said assignment shall be deemed to include the rights and interests of the undersigned in the attached license agreement dated the 7th day of December, 1942 in substitution of and to the same extent as the rights and interests of the undersigned in the license agreements dated April 1, 1938 and March 1, 1940 which are superseded by the attached agreement, and the approval of the attached agreement shall not be deemed to release in any way the rights of The Marine Midland Trust Company of New York under said assignment. The undersigned further agree to execute new assignments and any other instruments or papers necessary to effectuate and carry out the agreement contained herein.

Hamlin F. Andrus; Louis Gelbman.

[fol. 2836] In consideration of the approval of the attached license agreement dated the 7th day of December, 1942 by the Executors of the Estate of Abraham A. Silberberg, the undersigned hereby consents and agrees that all

of his rights and interests as licensor under the attached license agreement shall remain subject to the existing and outstanding assignment to Abraham A. Silberberg dated December 9, 1940 by Hamlin F. Andrus, and said assignment shall be deemed to include the rights and interests of the undersigned in the attached license agreement dated the 7th day of December, 1942 in substitution of and to the same extent as the rights and interests of the undersigned in the license agreements dated April 1, 1938 and March 1, 1940 which are superseded by the attached agreement, and the approval of the attached agreement shall not be deemed to release in any way the rights of the Executor of the Estate of Abraham A. Silberberg under said assignment. The undersigned further agrees to execute new assignments and any other instrument or papers necessary to effectuate and carry out the agreement contained herein.

Hamlin F. Andrus.

[fol. 2837] EXHIBIT 11

J. W. Appley & Son, Incorporated
Phone 7558

829-831 Ninth Street North
P. O. Box 849 Station A
St. Petersburg 2, Florida

June 30, 1947.

Mr. Louis Gelbman
750 Edgewater Rd.
New York 59, N. Y.

Dear Mr. Gelbman:

Several of our customers have recently requested that we furnish them with a pressure head for their block machines. This would have been an infringement on your patent, and rather than do this, we have refused to furnish it.

Recently, several of our competitors, who build small machines similar in size to ours, have come out with a pressure attachment as part of their machine. This, of course, is hurting our business, as a man will purchase

a competitive machine if he feels that it has any advantage over yours.

Attached is a cut of our machine. We would appreciate your advice as to whether you think your attachment can be adapted to work with it, and if so, what you would consider as a fair royalty payment for its use. At the present time, we have approximately 1500 machines in use. All of these owners would be potential purchasers.

The selling price of the Little Giant is $1000; therefore, the cost of the pressure head would have to be kept in proportion to this.

An early reply will be appreciated.

Very truly yours, J. W. Appley & Son, Inc., Charles Smout, Office Manager.

COS:EH
Attach

[fol. 2838] EXHIBIT 12

August 11, 1947.

J. W. Appley and Son, Inc.,
829 Ninth Street, North,
St Petersburg, Florida.

Gentlemen:

We acknowledge receipt of your letter dated June 30, 1947 and postmarked August 8, 1947, the cut of your machine was not included, kindly sent one to each party concerned.

In that the Stearns Manufacturing Co., Inc., of Adrian, Michigan and the Besser Manufacturing Company of Alpena, Michigan have an exclusive license for the use of our patents, we are forwarding them a copy of your letter for their comment and consideration.

On receipt of their replies, we will communicate with you.

Very truly yours, Louis Gelbman.

lg.p

[fol. 2839] EXHIBIT 13

Stearns Manufacturing Co., Inc., Adrian, Mich.
Gene Olsen, President

Phone 1301

Stearns - Jolterete - Anchor - Ideal - Hobbs - Universal

August 25, 1947.

Mr. Louis Gelbman
Concrete Units, Inc.
750 Edgewater Rd.
Bronx, New York 59, N. Y.

Dear Louie:

Replying tardily to your letter of August 11 relative to the correspondence you have had with J. W. Appley and Son, Inc., of St. Petersburg, Florida.

The Stearns Company is not interested in approving a license to the above company. We suggest you advise Mr. Appley you are not in a position to grant a license to them and should you care to do so, I think it might be in order to state something to the effect that you are not unmindful of the alleged infringement on the part of certain others; further, that you are collecting information and data with a view to presenting infringement action against certain people.

Sincerely, Stearns Manufacturing Co., Inc., By Eugene F. Olsen, President.

EFO/k

[fol. 2840] EXHIBIT 14

August 27, 1947.

The Besser Manufacturing Co.,
Alpena, Michigan.
Attention Mr. Jessie Besser, Pres.

Dear Mr. Besser:

We had a reply to our letter of the 11th regarding Appley of St. Petersburg from Stearns Manufacturing Co., and in which they stated that they would not -- interested in granting Appley a license.

Enclosed please find a copy of letter to them.

Very truly yours, Louis Gelbman.

lg.p

[fol. 2841] EXHIBIT 15

August 27, 1947.

J. W. Appley and Son, Inc.,
829 Ninth Street, North,
St. Petersburg, Florida.

Gentlemen:

In reply to your letter in w-ich you requested consideration as to a license to permit you to make and sell a pressure head for use with your block machine.

In that we have licesened the Stearns Manufacturing Company and the Besser Manufacturing Company exclusively and as they are not interested we are in the position of being unable to do anything.

We are not unmindful of the fact that our patents are being infringed, information and data is being collected with the view of taking action at the proper time.

Thanking you for your letter, I am

Very truly yours, Louis Gelbman.

l.g

[fol. 2842] EXHIBIT 16

Tallahassee, Fla., March 27, 1948.

Besser Manufacturing Co.,
Alpena, Michigan.

Re: J. W. Appley & Son, Inc., St. Petersburg, Fla.

Gentlemen:

I called upon Mr. Appley while in St. Petersburg, and found him very cordial.

He asked me to write Mr. Besser and find out if he would allow him to use a pressure head attachment on the Appley block machine so he could improve the looks of the blocks made on his machine.

He said that he would be willing to pay a royalty for the right to use the same.

He said that he did not want to do anything regarding this matter that was not legal and upright. However, he would like very much to be able to do it.

Mr. Appley thinks that his machine is in a different class than the Besser Vibrapac, hence it would not be competing in any way with the Besser Manufacturing Company.

I trust that Mr. Besser will give this matter his prompt and careful attention, and let Mr. Appley know his decision in the matter as soon as possible. Mr. Appley wanted to be remembered to Mr. Besser.

I remain,

Sincerely yours, (signed) Fred M. Leach.
Copy (No reply to this)

[fol. 2843] EXHIBIT 17

Telephone Main 5373
Caswell & Lagaard
Attorneys at Law

1250 Northwestern Bank Building
Minneapolis 2, Minn.

November 14, 1947.

Messrs. Louis Gelbman and Hamlin F. Andrus
750 Edgewater Road
Bronx 59, New York.

Gentlemen:

We have a client who has noted your announcements of licenses granted to different concerns under United States Letters Patent Nos. 2,275,676 and 2,366,780. This client also may wish to obtain a license. Therefore, if you are interested in granting additional licenses under said patents, it is suggested that you advise us of the terms under which such a license could be obtained so that we can convey the information to our client.

Very truly yours, Caswell & Lagaard, By F. G. Caswell.

FC/ps

[fol. 2844] EXHIBIT 18

November 13, 1947.

Caswell and Lagaard
1250 Northwestern Bank Building
Minneapolis 2, Minn.

Gentlemen:

In reply to your letter of the 11th regarding the granting of a license under our patents 2,275,676 and 2,366,780.

In that we have entered into an exclusive license agreement with the Stearns Manufacturing Co., Inc., of Adrian, Michigan and the Besser Manufacturing Co., of Alpena, Michigan the matter is out of our hands.

Thanking you for your inquiry, we are

Very truly yours, Louis Gelbman and Hamlin F. Andrus, By Louis Gelbman.

LG.P

[fol. 2845] EXHIBIT 19

Atlanta, Georgia, October 11, 1946.

Besser Manufacturing Company
Alpena, Michigan.

Attention: Mr. Haakon Paulson.

Dear Haakon:

I had the privilege of meeting Roy Darden and also had lunch with him this noon. The following information, I believe, will be of interest to you.

Their new machine which has a syntron on the head and also on the mold is capable of producing 800-1200 8" equipment per hour. This machine is fully automatic and utilizes the plain pallet. They have decided that 800—8" units will be the maximum, inasmuch as this is the number of units which the off-bearer can take away. He has purchased the rights from Warren of Knoxville and Warren has the privilege of manufacturing three of these machines for his own use. Warren also has a very small block of stock, just enough in order that they can give him the title of Vice President in charge of Engineering. At the present, there are two machines in operation; one in the plant of Warren at Knoxville, and the other which has not yet been started but in a few days will be in Warren's plant in Chattanooga. Darden has retained 75% of the stock.

Another individual retains approximately 25% of the stock. The machine is manufactured by Link Belt Company, and some of the engineering is done by this company. Sooner or later they contemplate manufacturing this machine, and not only in Atlanta but in Dallas, Chicago, San Francisco and in other Link Belt plants. So far, Link Belt have extended themselves in excess of $1,000,000. This would indicate that these boys have something, and will also

present a situation which, I believe, should be cleared up very quickly.

Darden claims that he has patents on the hydraulic feeding and stripping and about seventeen other patents which he did not mention. Went over the various patents with him which are held by the Besser Manufacturing Company, Gelbman and Stearns. Also explained to him that it would be best to forego the manufacture in quantity of this machine, inasmuch as from information we have obtained, [fol. 2846] there will be many infringements which will cause him considerable embarrassment to say nothing of the financial loss. Darden explained that they do not intend to put this machine on a mass production basis, but rather to make six or a maximum of eight machines per year. They expect to concentrate their efforts on established block plants in the larger cities where this production could be used. He indicated that they have approximately four orders for this machine. Darden stated that they have checked all patents very thoroughly, and cannot see where they are infringing in any way whatsoever. However, he said that in the event that a suit was brought, it would be up to the Judge to decide whether or not any violations were committed, and in that case he would ask for a license to operate under those patents. He further indicated a willingness to become licensed immediately if it was agreeable with the companies involved controlling the patents. It was explained to him that the company that has spent their life developing a machine which is considered beyond a doubt the most outstanding block machine in the world would not be willing to relinquish for the sake of a few dollars the privilege of retaining that right.

The entire discussion was very pleasant, and arrangements were made to carry these discussions further in Chicago in about one week. If you deem it advisable, I will go to Knoxville in an attempt to see this machine in operation. Darden was doubtful as to whether or not Warren would allow me to see this machine operating. Nevertheless, he did extend an invitation to go with him to Chattanooga after that machine has been started. They intend to continue on with the present RockerCrete. Will try to get additional information and will transmit it to

you promptly. Incidentally, this machine is to be priced at $22,500.00 with an 8" mold box. Everything else is extra. It looks to me as if the Besser Super 6 will be very much in order for display and sale within the next three to four months in the event that Gelbman does not take immediate action to put a stop to the sale of this Darden machine.

With kindest regards.

Yours very truly, Besser Manufacturing Company,
D. R. Fox, General Sales Manager.

DRF:eh

[fol. 2847] EXHIBIT 20

January 15, 1947.

Besser Manufacturing Company,,
Alpena, Michigan.
Att'n Mr. Jessie Besser.

Dear Mr. Besser:

I had a visit today from Mr. Roy Darden and his attorney Mr. Rubin Garland.

Their purpose in comming was to see if amicable arrangements could be made to give them a license to manufacture under our patents.

Kindly advise me what your pleasure is in the matter.

I am writing Gene Olsen a similar letter this date.

Yours very truly, Louis Gelbman.

p.m

[fol. 2848] EXHIBIT 21

January 15, 1947.

Stearns Manufacturing Company, Inc.,
Adrian, Michigan.
Att'n Mr. Eugene F. Olsen, President.

Dear Gene:

I had a visit today from Mr. Roy Darden and his attorney Mr. Rubin Garland.

Their purpose in comming was to see if amicable ar-

rangements could be made to give them a license to manufacture under our patents.

Kindly advise me what your pleasure in the matter is.

I am writing Jessie Besser a similar letter this date.

Yours very truly, Louis Gelbman.

p.m

[fol. 2849] EXHIBIT 22

Stearns Manufacturing Co., Inc., Adrian, Mich.

Gene Olsen, President

Phone 1301

Stearns - Jolterete - Anchor - Ideal - Hobbs - Universal

January 21, 1947.

Mr. Louis Gelbman,
Concrete Units, Inc.,
759 Edgewater Road,
Bronx, New York 59, N. Y.

Dear Louis:

I have just received your letter January 15th relating that you had been called upon by Roy Darden and his counsel.

After giving this matter considerable thought and discussing it with some of my associates here, I am in favor of proceeding with the infringement suit.

There are a lot of angles to this and you, Jesse and I should have a heavy session on the matter the first time we can get together. This is likely to be at the Chicago meeting in February.

In the meantime—if you and Jesse can concur—I think we should continue the prosecution.

Sincerely, (Gene), Eugene F. Olsen.

EFO/h

cc—Mr. Besser.

[fol. 2850] EXHIBIT 23

Release

Whereas, Louis Gelbman and Hamlin F. Andrus, both of Yonkers, New York, are the owners of the following Letters Patents of the United States relating to methods and apparatus for making concrete blocks:

No. 1,867,144	No. 2,029,365
No. 2,003,632	No. 2,251,447
No. 2,069,880	No. 2,269,955
No. 2,366,780	No. 2,275,676

No. 2,360,122;

and

Whereas, John B. Lagarde, of Anniston, Alabama, has manufactured two concrete block making machines and is now using said machines in his block making business in Anniston, Alabama, and such manufacture and use of these machines may comprise an infringement of one or more of the Letters Patents recited above, and

Whereas, it is mutually desired by the parties that any differences between them regarding said possible infringement be settled without resorting to litigation;

Now therefore, for and in consideration of the sum of one dollar ($1.00) in hand paid by said John B. Lagarde to Louis Gelbman and Hamlin F. Andrus, and other good and valuable considerations, the receipt of which is hereby acknowledged, the parties agree as follows:

1. John B. Lagarde hereby agrees for himself, his heirs, assigns, or other legal representatives, that, with the exception of his continued use of said two machines, in his block making business at Anniston, Alabama, he will immediately refrain, cease and desist from the making, selling or using [fol. 2851] of any machines which are covered by any one or more of said Letters Patents, or any Letters Patents which, as the result of any patent applications now pending, may issue to, or become the property of, Louis Gelbman or Hamlin F. Andrus, or both.

2. In consideration of the agreement recited in the preceding paragraph, Louis Gelbman and Hamlin F. Andrus

by these presents do hereby release and discharge the said John B. Lagarde from any claim for damages, either equitable or legal, that they may have by reason of said possible infringement of any of said Letters Patents which has or may result from said manufacture or use of said two machines at Anniston, Alabama, said release to remain in full force and effect as long as the said John B. Lagarde complies with his agreement to refrain, cease and desist, as recited in the preceding paragraph.

In witness whereof, the parties have hereunto set their hands and seals on the dates appearing opposite their signatures.

Louis Gelbman.

March 21, 1947.

Hamlin F. Andrus.

March 21, 1947.

John B. Lagarde.

March 25, 1947.

[fol. 2852] State of New York,
County of New York, ss:

On this 21st day of March, 1947, before me personally appeared Louis Gelbman, to me known and known to me to be the person described in, and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same for the uses and purposes therein mentioned.

William B. Gurock, Attorney and Counsellor-at-Law, in the State of New York, with powers of a Notary Public, P. O. Address: 165 Broadway, New York City, Residing in New York County, N. Y. Co. Clk's No. 654-Reg. No. A-1030-G8, Commission expires March 30, 1943. (Seal.).

State of New York,
County of New York, ss:

On this 21st day of March, 1947, before me personally appeared Hamlin F. Andrus, to me known and known to me to be the person described in, and who executed the foregoing

ing instrument, and he duly acknowledged to me that he executed the same for the uses and purposes therein mentioned.

William B. Gurock, Attorney and Counsellor-at-Law, in the State of New York, with powers of a Notary Public, P. O. Address: 165 Broadway, New York City, Residing in New York County, N. Y. Cc. Clk's No. 654-Reg. No. A-1030-G8, Commission expires March 30, 1943. (Seal.)

STATE OF ALABAMA,
County of Calhoun, ss:

On this 25 day of March, 1947, before me personally appeared John B. Lagarde, to me known and known to me to be the person described in, and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same for the uses and purposes therein mentioned.

Lucy F. Roberts, Notary Public. (Seal) BMC-26(13).

[fol. 2853] EXHIBIT 24

Release

Whereas, Louis Gelbman and Hamlin R. Andrus, both of Yonkers, New York, are the owners of the following letters Patents of the United States relating to methods and apparatus for making concrete blocks:

No. 1,867,144	No. 2,029,365
No. 2,003,632	No. 2,251,447
No. 2,366,780	No. 2,269,955
No. 2,069,880	No. 2,275,676
No. 2,360,122	

and

Whereas, the Besser Manufacturing Company, a corporation organized under the laws of the State of Michigan, having a principal place of business in Alpena, Michigan is the legal holder by duly authorized mesne conveyances of the exclusive rights of the following Letters Patents of the

United States relating to apparatus for making concrete blocks:

No. 1,905,957 No. 2,106,329

And whereas, J. J. Hanneman, of the J. J. Hanneman Manufacturing Company, of, 21820 West Eight Mile Road, Detroit, Michigan both jointly and severally has manufactured, or is about to manufacture, ten concrete block making machines and has now sold, or about to sell, said machines, and such manufacture and use of these machines may comprise an infringement of one or more of the Letters Patents recited above, and

Whereas, it is mutually desired by the parties that any differences between them regarding said possible infringement be settled without resorting to litigation;

Now therefore, for and in consideration of the sum of one dollar ($1.00) in hand paid by said J. J. Hanneman and J. J. Hanneman Manufacturing Company, to Louis Gelbman and Hamlin F. Andrus, and the Besser Manufacturing Company, and other good and valuable considerations, the receipt of which is hereby acknowledged, the parties agree as follows:

[fol. 2854] 1. J. J. Hanneman and the J. J. Hanneman Manufacturing Company, both jointly and severally hereby agrees for himself, his heirs, assigns, or other legal representatives, that, with the exception of the sale of said ten machines, he will immediately refrain, cease and desist from the making, selling or using of any machines or encouraging others to make, use or sell any machines, which are covered by any one or more of said Letters Patents, or any Letters Patents which, as the result of any patent applications now pending may issue to, or become the property of, Louis Gelbman or Hamlin F. Andrus, or the Besser Manufacturing Company, or either of them.

2. In consideration of the agreement recited in the preceding paragraph, Louis Gelbman and Hamlin F. Andrus and the Besser Manufacturing Company, by these presents do hereby release and discharge the said J. J. Hanneman or the J. J. Hanneman Manufacturing Company jointly and severally from any claim for damages, either equitable or legal, that they may have by reason of said possible in-

fringement of any of said Letters Patents which have or may result from said manufacture sale or use of said ten machines, said release to remain in full force and effect as long as the said J. J. Hanneman or the J. J. Hanneman Manufacturing Company jointly and severally complies with this agreement to refrain, cease and desist, as recited in the preceding paragraph.

In witness whereof, the parties have hereunto set their hands and seals on the dates, appearing opposite thir signatures.

J. J. Hanneman & J. J. Hanneman Mfg. Co. duly authorized signature.

Sept. 11th, 1948.

Hamlin F. Andrus.

January 3rd, 1949.

Louis Gelbman.

Jan. 7, 1947.

Besser Mfg. Co. by J. H. Besser, Its President.

Dec. 11, 1948.

[fol. 2855] STATE OF N. Y.,
County of Bronx, ss:

On this 7 day of Jan. 1949, before me personally appeared Louis Gelbman, to me known and known to me to be the person described in, and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same for the uses and purposes therein mentioned.

Harry E. Edelsen, Notary Public, County of New York, Residing in New York County, Bronx Co. Clk's No. ——, Commission expires ——. (Seal.)

STATE OF NEW YORK,
County of Brooklyn, ss:

On this 3rd day of January, 1949, before me personally appeared Hamlin F. Andrus, to me known and known to me to be the person described in, and who executed the foregoing instrument, and he duly acknowledged to me that

he executed the same for the uses and purposes therein mentioned.

Frederick R. Warey, Notary Public. (Seal.)

STATE OF MICHIGAN,
County of Alpena, ss:

On this 11th day of Dec., 1948, before me personally appeared J. H. Besser, to me known and known to me to be the person described in, and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same for the uses and purposes therein mentioned.

Irving Christopher, Notary Public, My Commission expires June 12, 1951. (Seal.)

STATE OF MICHIGAN,
County of Wayne, ss:

On this 11th day of Sept., 1948, before me personally appeared J. J. Hanneman, of the J. J. Hanneman Manufacturing Co., to me known and known to me to be the person described in, and who executed the foregoing instrument and he duly acknowledged to me that he executed the same for the uses and purposes therein mentioned.

Helen Van Sickle, Notary Public, Expr. 2-6-49. (Seal.)

[fol 2856] EXHIBIT 25

Memorandum of Agreement by and between Roy W. Darden, individually, and Roy Darden Industries, Inc., with offices at Atlanta, Georgia, and Louis Gelbman and Hamlin F. Andrus, both of Yonkers, New York.

Whereas, Louis Gelbman and Hamlin F. Andrus have instituted a civil action in the District Court of the United States for the District of New Jersey against Landis Concrete Products, Inc., Landisville, New Jersey, for infringement of their United States Patents Nos. 2,275,676 and 2,366,780, said suit being designated Andrus and Gelbman vs. Landis Concrete Products, Inc., Civil Action No. 9580, and

Whereas, said Civil Action No. 9580 is based on the use of a concrete block machine sold to Landis Concrete Products, Inc. by Roy Darden Industries, Inc., and

Whereas, Roy W. Darden and Roy Darden Industries, Inc. have heretofore filed suit for unfair competition against Louis Gelbman and others in the Superior Court of Cook County, Illinois, Docket No. 47S 2844, entitled Roy W. Darden et al. vs. Louis Gelbman et al., and

Whereas, it is the mutual desire of the parties hereto to terminate the hereinbefore identified litigations and to avoid further litigation, and

Whereas, the said Roy W. Darden, Roy Darden Industries, Inc., and Louis Gelbman entered into a preliminary agreement on February 20, 1947, with the understanding that the same was to be supplemented and replaced by a more formal agreement, and it is now the desire of the parties to enter into such formal agreement;

Now, therefore, in consideration of One Dollar ($1.00) and other valuable considerations in hand paid to Louis Gelbman and Hamlin F. Andrus by Roy W. Darden and [fol. 2857] Roy Darden Industries, Inc., the receipt of which is hereby acknowledged, and in consideration of said preliminary agreement of February 20, 1947, and, further, in consideration of the promises herein contained, the parties hereto agree as follows:

Article I

Louis Gelbman and Hamlin F. Andrus, representing themselves to be the lawful owners of United States Patents Nos. 2,275,676 and 2,366,780, agree to grant and do hereby grant to Roy Darden Industries, Inc. a limited, non-assignable, non-exclusive license to complete, in its own plant or the plant of the Link-Belt Company at Atlanta, Georgia, the manufacture of any machines now in the process of manufacture, to use and to sell or otherwise dispose of any machines embodying the inventions claimed in said United States Letters Patent No. 2,275,676, said license and permission being limited to a total of thirty-five (35) machines, including not more than five (5) multiple block machines.

This license and permission shall in no manner restrict Roy Darden Industries, Inc. in the sale of repair parts or the rendering of services necessary for the maintenance of any such machines or any other machines heretofore sold by Roy W. Darden and Roy Darden Industries, Inc.

Louis Gelbman and Hamlin F. Andrus hereby also agree that purchasers of machines heretofore sold by Roy W. Darden and Roy Darden Industries, Inc. or further machines licensed in accordance with this agreement shall be free to continue to use such machines and to employ such machines in such manner as to practice the methods covered by the claims of United States Letters Patent No. 2,366,780.

[fol. 2858] Article II

Roy W. Darden and Roy Darden Industries, Inc. agree to mark each of such licensed machines with the number of said United States Letters Patent No. 2,275,676 and to advise purchasers thereof that with such machines they may practice the methods covered by United States Letters Patent No. 2,366,780.

Article III

In consideration of the license and permission granted under Article I hereof, it is agreed that after said total of thirty-five (35) machines has been completed and sold, the said Roy W. Darden and Roy Darden Industries, Inc., its successors and assigns shall cease and desist from the further making and selling of any machines embodying the inventions covered by any of the claims of said United States Letters Patent No. 2,275,676.

Article IV

In consideration of the license granted under Article I hereof the said Roy W. Darden and Roy Darden Industries, Inc. agree promptly to have dismissed, without prejudice, the suit for unfair competition heretofore instituted in the Superior Court of Cook County, Illinois, Docket No. 47S 2844, entitled Roy W. Darden et al. vs. Louis Gelbman, et al.

Article V

Said Roy W. Darden and Roy Darden Industries, Inc. and said Louis Gelbman and Hamlin F. Andrus hereby agree to instruct their counsel to enter into a stipulation to dismiss without prejudice, except insofar as the license herein granted is concerned, Civil Action No. 9580 (Andrus and Gelbman vs. Landis Concrete Products, Inc.) in the District Court of the United States for the District of [fol. 2859] New Jersey, which stipulation of dismissal shall be predicated on this agreement and license and particularly the provisions of Articles I and III hereof, and which stipulation shall be filed concurrently with the withdrawal of the unfair competition suit by Roy W. Darden et al., referred to in Article IV hereof.

It is further agreed that Roy W. Darden or Roy Darden Industries, Inc., shall pay a portion of the court costs in said Civil Action No. 9580, and shall also pay liquidated damages for past infringement, the amount payable in accordance with this paragraph to be One Hundred and Fifty Dollars ($150.00) but not greater.

Article VI

In consideration of the license granted under Article I hereof, the said Louis Gelbman and Hamlin F. Andrus or their duly authorized representatives, shall have the right, during the continuance in force of said license to inspect, at all reasonable times, such portions of the books of the said Roy Darden Industries, Inc. as shall be necessary for ascertaining that there has been compliance with the terms of said license.

Article VII

It is further agreed that in the event that either party hereto shall fail to comply with the terms of this license and agreement, the aggrieved party shall have the right to terminate this license and agreement on the giving of thirty (30) days notice in writing to the defaulting party, but any such termination of this license and agreement will in no wise affect the continuing right to use machines licensed under Article I hereof which shall have been manu-

[fol. 2860] factured and sold prior to any such termination of this license and agreement under this Article VII hereof.

Roy W. Darden. (Seal.)

March 17, 1947.

Roy Darden Industries, Inc., By Roy W. Darden. (Seal.)

April 7, 1947.

Louis Gelbman. (Seal.)

Mar. 21, 1947.

Hamlin F. Andrus. (Seal.)

Mar. 21, 1947.

CITY OF WASHINGTON,
DISTRICT OF COLUMBIA, ss:

On this 17th day of March, 1947, before me personally appeared Roy W. Darden, to me known and known to me to be the person described in, and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same for the uses and purposes therein mentioned.

Gloria McAnallen, Notary Public. (Seal.)

[fol. 2861] STATE OF GEORGIA,
County of Fulton, ss:

On this 7 day of April, 1947, before me personally appeared Roy W. Darden, to me known and known to me, who, being by me duly sworn, did depose and say that he resides at 921 Beaverbrook Drive, Atlanta, Ga.; that he is the President of Roy Darden Industires, Inc., the corporation described in and which executed the foregoing instrument; that he knows the corporate seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed to said instrument by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

Nelbrae Smith, Notary Public, Georgia, State at Large. My commission expires Feb. 9, 1948. (Seal.)

State of New York,
County of New York, ss:

On this 21 day of March, 1947, before me personally appeared Louis Gelbman, to me known and known to me to be the person described in, and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same for the uses and purposes therein mentioned.

Nathan Jelling, Notary Public, State of New York, Residing in Kings County, Kings Co. Cit's. No. 16, Reg. No. 39-J-8, N. Y. Co., Cit's. No. 29, Reg. No. 32-J-8, commission expires March 30, 1948. (Seal.)

[fol. 2862] State of New York,
County of New York, ss:

On this 21 day of March, 1947, before me personally appeared Hamlin F. Andrus, to me known and known to me to be the person described in, and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same for the uses and purposes therein mentioned.

Nathan Jelling, Notary Public, State of New York, Residing in Kings County, Kings Co. Cit's No. 16, Reg. No. 39-J-8, N. Y. Co. Cit's No. 29, Reg. No. 32-J-8. Commission expires March 30, 1948. (Seal.)

[fol. 2863] Exhibit 26

Memorandum of Agreement

This agreement made and entered into this twenty-first day of November, 1946, by and between Stephen Flam of Sherman Oaks, California, hereinafter referred to as Licensor, and Besser Manufacturing Company, a corporation duly organized and existing under and by virtue of the

laws of the State of Michigan, having a place of business in Alpena, Michigan, hereinafter referred to as Licensee;

Witnesseth:

Whereas, Licensor is the owner of the following four United States Letters Patent, and two applications for United States Letters Patent, and which patents and applications are based upon inventions made by the Licensor:

Patent	Date of Issue	Title
1,749,213	March 4, 1930	Process and Apparatus for Molding
1,754,087	April 8, 1930	Mold
1,806,620	May 26, 1931	Vibrator Mechanism
2,319,313	May 18, 1943	Molding Apparatus

Application	Date of Filing	Title
565,092	Nov. 25, 1944	Vibrator
670,710	May 18, 1949	Molding Machinery;

and

Whereas, the Licensor is about to file an application for United States Letters Patent for a concrete block molding [fol. 2864] machine; and

Whereas, Licensee is desirous of employing Licensor for a period of five years from January 1, 1947, in the capacity of consultant, and such other similar services as shall be determined by Licensee as coming within the scope of said employment; and

Whereas, Licensee is desirous of acquiring the exclusive right and license to make, use, and sell devices and apparatus described in said patents and in the said existing applications, as well as in the application about to be filed; and

Whereas, Licensee is desirous of acquiring the exclusive right and license to make, use, and sell devices and apparatus embodying any inventions made by Licensor during the period of his employment relating to the manufacture of concrete block, tile, and brick making machines, and concrete mixers,—

Now, therefore, to all whom it may concern:

Be it known that, for and in consideration of the sum of One Dollar ($1.00) and other valuable consideration received by the Licensor from the Licensee, receipt of which is hereby acknowledged, and in consideration of the mutual covenants of said parties as hereinafter set forth, it is covenanted and agreed by and between the said parties as follows:

1. Licensor hereby grants to the Licensee, for the lives of the aforesaid patents and any reissues and extensions thereof, and any patents that may be hereinafter granted as a result of the said existing applications, as well as of [fol. 2865] the application about to be filed, or any application to be applied for hereunder, the exclusive license and privilege of making, using, selling, or leasing embodiments of the inventions disclosed in the said four United States Letters Patent and in the said existing applications and applications to be applied for.

Any inventions made by Licensor during his employment hereunder relating to the manufacture of concrete block, tile, and brick making machines, and concrete mixers shall fall within the scope of this paragraph, and Licensee may cause applications for Letters Patent to be filed therefor.

This license is effective throughout the United States and all foreign countries.

This license is not divisible and not transferable except to the successor of the entire good will and business of Licensee.

2. Licensee hereby agrees to pay, for the said license granted in paragraph 1, the sum of Eighty Thousand Dollars ($80,000), payable as follows:

(a) Twenty Thousand Dollars ($20,000) to be paid promptly upon the execution of this agreement.

(b) A note for the principal sum of Sixty Thousand Dollars ($60,000), payable by Licensee to Licensor at the rate of One Thousand Dollars ($1,000) on the first day of [fol. 2866] each calendar month, beginning on the first day of February, 1947, together with interest on the unpaid balance at the rate of five per cent (5%) per annum, said interest to be paid monthly and at the same time as the

principal payments. Said note shall be secured by a second trust deed on the real property located at 15026 Oxnard Street in the City of Los Angeles, County of Los Angeles, State of California, and designated and described as Lots 3, 4, and 5 of Tract No. 13,504 in the City of Los Angeles, County of Los Angeles, State of California. The map for said tract is now in the process of being qualified for recordation purposes. This encumbrance shall be subject only to a first trust deed in favor of Stephen Flam, Incorporated, a California corporation.

3. If and when the said Eighty Thousand Dollars ($80,000) shall have been paid in full to the Licensor, or when the note and second deed of trust hereinabove specified are delivered to the Licensor, Licensor shall promptly execute an absolute assignment to Licensee of the whole right, title, and interest in, to, and under the said patents and applications, and agrees thereafter to assign to Licensee all other applications falling within the scope of this assignment.

4. The expenses involved in filing and prosecuting the said applications and future applications shall be borne by Licensee. However, control of the prosecution of the applications shall be joint.

[fol. 2867] 5. Licensor agrees to spend no more than a total of three months in the employ of Licensee in each calendar year up to the end of the year 1951, and no longer, in the capacity of consultant, or in any similar capacity, in connection with the development, manufacture, and sale of equipment, machinery, and apparatus for manufacturing concrete mixers, concrete block, brick, and tile.

This employment, however, shall not be required in the event Licensor's physical condition precludes performance of his duties as set forth in this paragraph.

Licensor shall not be required, without his consent, to perform duties in places other than west of the Rocky Mountains in continental United States.

No single period of consecutive days of employment hereunder shall be for less than one month; and Licensee shall give written notice to Licensor at his home address not less than fifteen days prior to the commencement of such periods.

In the event it be necessary for Licensor to travel in connection with his duties under this paragraph, then necessary traveling time shall be included as a part of the three month employment period. All traveling expenses, including hotel bills and transportation, shall be paid by Licensee, in addition to the compensation for employment [fol. 2868] as hereinafter set forth, upon delivery of receipted bills evidencing such expenditures, except as to employment in Los Angeles City, for which no expenses shall be allowed.

Compensation for said employment shall be at the rate of Six Thousand Dollars ($6,000) per annum, payable at the rate of Five Hundred Dollars ($500.00) per month on the first day of each calendar month, beginning on the first day of January, 1947. This compensation shall be paid even if Licensor be physically unable to perform his duties under this paragraph. However, in the event of death of Licensor, no further employment compensation shall be made.

6. Licensee covenants and agrees that it will purchase, for the use of the Licensor, a 1947 automobile within a period of four months from date; that, if possible, such automobile shall be the one selected by the Licensor; that it will be necessary for Licensor to accept delivery thereof either at the factory or at some point in the vicinity thereof. That, if said automobile, together with all taxes and license thereon, shall cost less than $2,600.00, then such difference between the sum of $2,600.00 and the cost of said automobile shall be paid to the licensor in twelve equal monthly installments as the cost of operation thereof in so far as the Licensee is concerned. The registered and legal owner of said automobile shall be Licensee and, during such [fol. 2869] period of time as the ownership and title is vested in Licensee, it agrees, at its own expense, to carry adequate insurance thereon to protect both Licensor and Licensee and said vehicle. The Licensor shall have the option to purchase said automobile at any time prior to December 30, 1951, for the sum of $50.00. At the time that such purchase is made and the title is vested in the Licensor, he shall thereafter carry all insurance upon said automobile during the term of this agreement, including public

liability and property damage, in an amount similar in character to that which will be carried by the Licensee during the period of its ownership.

7. As a further consideration for this agreement, Licensor agrees, for a period of eight years from January 1, 1947, that he will not engage or be employed, or permit his name to be used, in any business or enterprise for the manufacture of apparatus or machinery for making concrete block, tile, brick, or other wall building units, or concrete mixers, except in connection with Besser Manufacturing Company.

8. The Licensee agrees that, within fifteen days from the execution of this agreement by its officers, it will secure ratification by its Board of Directors of such execution, and will supply to the Licensor a certified copy of the resolution or resolutions hereunder, the execution whereof is ratified and approved.

[fol. 2870] In witness whereof, the Licensor has set his hand and the Licensee has caused its corporate name and seal to be hereunto affixed by its officers hereunto duly authorized this day and year.

Stephen Flam, Licensor.

Besser Manufacturing Company, By J. H. Besser, President, By Anna M. Besser, Secretary, Licensee.

Assignment by Licensee

For value received, we the Besser Manufacturing Company, the Licensee named in the within agreement, do hereby sell, assign and transfer all our rights, title and interest in the within agreement, and all rights and remedies thereunder to the Besser Foundation, a Michigan corporation.

Besser Manufacturing Company, By J. H. Besser, President, By Anna M. Besser, Secretary.

Dated at Alpena, Michigan, this 15th day of March, 1947.

[fol. 2871] EXHIBIT 27

Conditional Sales Agreement

This agreement made this 21st day of November, 1946, by and between Stephen Flam, Incorporated, a California corporation, First Party, and Besser Manufacturing Company, a corporation organized and existing under the laws of the State of Michigan, Second Party.

Witnesseth

Whereas, the First Party is the owner of certain personal property located at 15026 Oxnard Street, Van Nuys, California, all as described and set forth in an inventory thereof marked Exhibit "A" and hereby made a part thereof, as though fully set forth in this place, and

Whereas, the Second Party is desirous of acquiring said machinery and equipment, as hereinbefore described, upon the terms and conditions herein specified.

Now therefore it is agreed

1

That First Party agrees to sell, and Second Party agrees to buy, the said personal property, as listed in said Inventory, for the sum of Seventy-five Thousand ($75,000.00) Dollars, payable Twenty-one Thousand ($21,000.00) Dollars cash, paid simultaneously with the execution of this agreement, together with the further and additional sum of Two Thousand Two Hundred Fifty ($2,250.00) Dollars, constituting sales taxes imposed by the City of Los Angeles and the State of California, receipt whereof is hereby acknowledged, and the balance of Fifty-four Thousand ($54,000.00) Dollars shall be payable in monthly installments of One Thousand ($1,000.00) Dollars, payable on the 1st day of each and every month, commencing with February 1, 1947, and a like sum upon the 1st day of each subsequent month until the total of said balance of Fifty-four Thousand ($54,000.00) Dollars shall have been paid. Interest at five (5%) percent per annum on the unpaid balance shall also be paid each month, accruing from January 1, 1947.

[fol. 2872] II

Upon the completion of the payments herein specified, First Party agrees to give to Second Party a clear bill of sale for all of the items listed in said Exhibit "A".

It is specifically understood and agreed that Second Party shall not acquire any right or interest in the accounts receivable of First Party, cash on hand, bank accounts, or any assets or properties of First Party, other than such as are specifically described and inventoried.

III

It is specifically understood and agreed that the First Party shall be allowed to remain in possession of said property and equipment and to have the use thereof until January 15, 1947, at which time he agrees to deliver over possession of all of said property and equipment described in the said inventory, Exhibit "A", to Second Party, its agents or employees, in the same general condition in which the same now are, ordinary use and wear excepted.

IV

The Second Party agrees at all times after taking possession of said equipment to maintain the same in good order and condition and to be responsible for loss or theft occurring to any part thereof, if a breach occurs in this agreement. Second Party furthermore agrees to maintain adequate fire insurance upon said equipment, with losses payable to the parties hereto as their interests may appear, in sufficient amount to protect the First Party on the balance owing in connection with this agreement. In addition, Second Party agrees to pay all taxes, assessments and levies which may be hereafter levied against said property, or any part thereof, and also one-half of the 1946-1947 personal property taxes which will be payable before December 5, 1946, with first installment of real estate taxes. It is specifically understood and agreed that should the First Party find it necessary or proper to pay any tax, charge or lien against said property, or any part thereof,

[fol. 2873] in order to protect the same from loss, it may do so and Second Party agrees to reimburse First Party forthwith in connection with such payment.

V

Should the Second Party fail to make any of the payments required to be made hereunder within thirty (30) days after such payment becomes due, or otherwise to perform any of the terms, covenants and conditions herein contained at the times and in the manner herein specified, then the First Party shall notify the Second Party in writing at its principal place of business at Alpena, Michigan, of such breach and should Second Party not completely comply therewith within thirty (30) days after receipt of said notice, First Party shall be entitled, with or without legal process, to retake possession of said machinery and equipment, free of any claim or right of Second Party and to retain all monies received hereunder as liquidated damages for breach suffered because of the failure of Second Party to complete the terms of this agreement.

VI

It is specifically understood and agreed that no part of said equipment shall be removed from said premises without the written consent of First Party, and that First Party shall have reasonable access thereto for the purpose of inspection until the full purchase price herein specified shall have been paid.

VII

The respective parties hereto agree that within fifteen days from the execution of this agreement by their respective officers, they will secure ratification of such execution by their respective Boards of Directors, and each will supply to the other a certified copy of the resolution or resolutions whereunder the execution hereof is ratified and approved.

In witness whereof, the respective parties hereto have caused their corporate names and seals to be hereunto

affixed by their officers thereunto duly authorized, the day [fol. 2874] and year first above written.

Stephen Flam, Incorporated, By Stephen Flam, President, By Edward Flam, Secretary, First Party.

Besser Manufacturing Company, By J. H. Besser, President, By Anna M. Besser, Secretary, Second Party.

[fol. 2875] EXHIBIT 28

Agreement for Sale of Inventories

This agreement made this 21st day of November, 1946, by and between Stephen Flam, Incorporated, a California corporation, First Party, and Besser Manufacturing Company, a corporation organized and existing under the laws of the State of Michigan, Second Party.

Witnesseth

Whereas, the First Party is the owner of a concrete machinery manufacturing business located at 15026 Oxnard Street, Van Nuys, California, and

Whereas, the Second Party is desirous of acquiring said business and the assets and properties thereof, and

Whereas, as part of said business, the First Party has accumulated inventories consisting of finished goods, work in process, and raw materials, and

Whereas, it is intended that the First Party shall remain in possession of said property and operate its business at said property until January 15, 1947, at which time the Second Party intends to acquire the same.

Now therefore it is agreed

I

That the parties hereto, as soon after January 10, 1947 as practicable, will jointly take an inventory of the finished products, work in process and raw materials on hand at the said place of business of the First Party, and First Party agrees to sell, and Second Party agrees to buy, the

same and the whole thereof on the following basis, to-wit: all finished products of First Party's manufactured equipment and replacement parts of current models, except automatic hydraulic machines, which are optional, shall be purchased by the Second Party at First Party's listed retail price as of November 16, 1946, less forty (40%) percent. As to work in process which may be uncompleted by January 10, 1947, it is agreed that First Party shall pay for the [fol. 2876] labor and material necessary to complete the same, and when completed the same shall be purchased by the Second Party at First Party's listed retail price as of November 16, 1946, less forty (40%) percent. Should the First Party, between January 2, 1947 and January 15, 1947, have labor available for which it shall have no use, such labor shall be available to Second Party for employment by it, and thereafter such labor shall be paid for by Second Party, and any materials utilized in the employment of such labor shall be considered as part of the inventory for which the Second Party agrees to pay on January 15, 1947, in accordance with this agreement. Should any orders undertaken by First Party be delayed in completion subsequent to January 10, 1947, First Party shall nevertheless be entitled to complete the same as rapidly as possible and shall bear the expense of any labor and material which may be required for such completion. That in addition thereto, the Second Party will at said time pay to the First Party the additional sum of Twenty Thousand ($20,000.00) Dollars for services rendered in purchasing, handling, storing and caring for such manufactured products, materials and equipment up to the time of the delivery of possession thereof to Second Party. All parts purchased from other manufacturers and raw materials shall be priced at First Party's invoice cost.

II

On or before the 15th day of January, 1947, the Second Party shall pay to the First Party cash in full for whatever inventories may be on hand as determined by the joint inventory taken, as hereinbefore mentioned, and which are accepted by Second Party, together with the aforementioned additional sum of Twenty Thousand ($20,000.00) Dollars, and shall thereupon and thereafter take possession

of the whole thereof, it being specifically understood and agreed that First Party will pay all balances, if any, owing in connection therewith.

III

The First Party has been engaged in business in the State of California for a number of years manufacturing [fol. 2877] and selling over the entire State machines for the manufacture of concrete wall building blocks, building tile and brick, and ancillary equipment in connection therewith, and in connection with the sale of the property hereinbefore described the First Party does hereby transfer and assign unto the Second Party the good will of the First Party and the full benefit thereof, and the First Party hereby covenants with the Second Party that it will refrain from carrying on a similar business within any county of the State of California so long as the Second Party, or any person deriving title to the good will from it, carries on a like business therein; provided, further, that if this clause, or any portion thereof, relating to the area to which this restriction applies, should be held invalid, then in any event the First Party covenants and agrees to refrain from carrying on a similar business within the County of Los Angeles so long as the Second Party, or any person deriving title to the good will from it, carries on a like business therein.

IV

It is also agreed that First Party shall complete all orders now in its hands by January 10, 1947, and that it will not accept any orders hereafter which it cannot reasonably complete by that time; however, the foregoing is subject to the matters set forth in Paragraph I, with reference to uncompleted orders. As to business tendered to it which cannot be completed before January 10, 1947, the First Party agrees to submit the same to the Second Party for determination as to whether or not the same should be accepted, and if determined in writing by Second Party or its legally authorized representative that such order should be accepted, then Second Party shall undertake thereby to effect delivery thereof subsequently to taking possession of the property and plant of the First Party and the profit,

if any, realized in connection therewith shall belong to Second Party.

[fol. 2878] That Second Party will supply replacement parts and render service in connection with the equipment and machinery heretofore sold by First Party on a reasonable basis, and will fully cooperate with the former customers of First Party in maintaining their equipment in working order upon a reasonable basis, so that the owners of equipment heretofore sold by First Party, may have a source for replacement parts and service during the reasonable life of their machinery.

V

The services of the personnel of First Party's Sales and Order Departments shall be made available to Second Party on January 2, 1947; and the same shall thereafter be employees of Second Party and shall be compensated by Second Party.

First Party, on and after December 1, 1946, agrees to provide space in its offices for several of Second Party's office employees, not exceeding three in number, and First Party will assist said employees in becoming acquainted with the business contemplated to be acquired by Second Party.

First Party will make accessible to Second Party by January 2, 1947 the names and addresses of its customers and prospects with available information thereon, including access to correspondence relating thereto. In addition, First Party will deliver to Second Party by said date drawings, engineering data, price lists, advertising copy, cuts, literature, forms and other information relating to the current model and replacement parts manufactured by First Party.

VI

The respective parties hereto agree that within fifteen days from the execution of this agreement by their respective officers, they will secure ratification of such execution by their respective Boards of Directors, and each will supply to the other a certified copy of the resolution or reso-
[fol. 2879] lutions whereunder the execution hereof is ratified and approved.

In witness whereof, the respective parties hereto have caused their corporate names and seals to be hereunto affixed by their officers thereunto duly authorized, the day and year first above written.

Stephen Flam, Incorporated, By Stephen Flam, President, By Edward Flam, Secretary, First Party.

Besser Manufacturing Company, By J. H. Besser, President, By Anna M. Besser, Secretary, Second Party.

[fol. 2880]

EXHIBIT "A"

Equipment Inventory

Located at 15026 Oxnard Street

Misc. Equipment:

1—Nelson Stud Welder (Single Prod. Unit)
1—Lemco Battery Charger—600 Watt
1—36"—16 gauge forming roll
4—Victor Cutting Torch
2—Oxweld Cutting Torch
1—Torchweld Cutting Machine
1—Oxweld Cutting Machine
1—Essick Air Compressor
5—Oxygen Regulator
5—Acetylene Regulator
3—220 Volt 500# Comet Hoists
8—Soda & Acid Extinguisher
3—CO2 Extinguisher
2—Carbon Tetrachloride Extinguisher
1—50 Ton Punch Press
1—65 Ton Punch Press

Power Saws:

1—#18 Marvel Hack Saw
1—#10 Marvel Hack Saw
1—10 X 10 Saw More Rasmussen
1—Kalamazoo Metal Cutting Saw
1—Delta Metal Cutting Band Saw

Drill Presses:

1—Cannedy Otto Drill Press #T1853
1—Cannedy Otto Bench Drill
1—Milwaukee Drill Press
1—Cannedy Otto Drill Press
1—Delta Drill Press

Machine Tools:

1—Van Norman Milling Machine #26
1—U. S. Hand Miller
1—Ohio 20" shaper
1—Delta "Toolmaker" Surface Grinder
1—Planer
1—Universal Iron Worker
1—9" Logan Engine Lathe
1—Porter Cable Disc. Sander
1—18" Hendy Lathe
1—1½ H. P. Cochin Air Compressor
1—5' Radial Drill

Miscellaneous Items:

Jigs and fixtures, small hand tools, small tools, such as drills, reamers, cutters

[fol. 2881] End Grinders:

4—2 H. P. U. S. Autostart Grinder
1—Hisey Wolf Double End Grinder
4—½ H. P. Double End Grinders

Hand Tools:

1—Buckeye Air Sander #115-5
1—Buckeye Air Grinder #50908
1—½ Thor Drill
1—½ U. S. Electric Tool ½" drill
1—Stanley Grinder
1—Gaston Portable Grinder Style 4110
1—1" Black & Decker Drill
1—7" Black & Decker Jr. Sander
2—7" Black & Decker Standard Sander
1—¼ Thor Electric Drill
1—¼ Black & Decker Electric Drill

1—5" Black & Decker Grinder
1—Van Dorn ¼ Die Grinder
1—Chicago Hi Power Die Grinder

Electric Welders:

9—400 Amp Lincoln Welders
5—300 Amp Lincoln Welders
2—200 Amp Lincoln Welders
1—175 Ampt D. C. Lincoln Jr.
1—A. C. Hollup Welder 275 Amp
1—A. C. Marquette 200 Amp
About 25 vises
benches
1—crane truck—Chevrolet (unlicensed)
1— yard truck (unlicensed)
1—1½ ton 1945 Chevrolet Truck (stake body)
Serial No. 6 YR 04-7015
Engine No. BV 662178

Office Equipment

4—Desks
3—Swivel Chairs
1—Straight Chair
2—File Cabinets
2—Benches
1—Counter
1—Friden Calculator
1—R. C. Allen Adding Machine
1—Check Writer
1—Postal Scale
2—Typewriters
2—Smoking Stands
1—Electric Clock
3—Card Cabinets

[fol. 2882] Stephen Flam's Office:

1—Desk
1—Table
1—Bookcase
1—Smoking Stand
1—Davenport

1—Easy Chair Leatherett
1—Swivel Chair
2—Straight Chairs

Foreman's Office:

2—Desks
3—Chairs
1—Drafting Table

Sales Office:

2—Desks
3—File Stands
1—Blue Print Cabinet
2—Typewriter Stands
4—Straight Chairs
2—Swivel Chairs
1—Table
1—Smoking Stand

Drafting Room:

1—Old Desk
3—Bookcases
5—Drawing Boards
5—Draft-man's Chairs
2—Blueprint Cabinets

Bernard Flam's Office:

1—Bookcase
1—Table
2—Chairs

It is the intent of the parties hereto to set forth in this inventory all personal property of every kind and character belonging to First Party now situated in or upon the premises located at 15026 Oxnard Street, Van Nuys, California.

It is specifically understood and agreed that the following property is not included in the foregoing inventory:

1—Office desk and chair, belonging to Bernard Flam
1—4-drawer steel letter-size file cabinet, belonging to Stephen Flam

[fol. 2883] Corporation and personal books, records, papers, accounting books, records and ledgers.
2—rented typewriters
1—Stanley Grinder, loaned by General Concrete Products, Inc.
1—½" electric power drill, loaned by General Concrete Products, Inc.

Stephen Flam, Incorporated, By Stephen Flam, President, By Edward Flam, Secretary, First Party.

Besser Manufacturing Company, By J. H. Besser, President, By Anna M. Besser, Secretary, Second Party.

[fol. 2884] EXHIBIT 29

Agreement for the Sale of Real Estate

This agreement made this twenty-first day of November, 1946, by and between Stephen Flam, Incorporated, a California corporation, First Party, and Besser Manufacturing Company, a corporation organized and existing under the laws of the State of Michigan, Second Party.

Witnesseth

Whereas, the First Party is acquiring title to certain real property under a contract of purchase, improved with buildings and other improvements, located and described as hereinafter specifically set forth, and

Whereas, the Second Party is desirous of acquiring title to same and the whole thereof upon the terms and conditions hereinafter provided.

Now therefore it is agreed

I

That the land herein involved is located in the City of Los Angeles, County of Los Angeles, State of California, and is designated and described as Lots #3, 4, and 5 of Tract #13504 in the City of Los Angeles, County of Los Angeles, State of California, being an area approximately 300 feet by 300 feet, comprising approximately two acres,

and being the property occupied and used by First Party on Oxnard Street and described in that certain agreement between Barney Rubin and Stephen Flam, Inc.; that the map of said tract is in the process of being qualified for recordation purposes, and it is contemplated that the same will become a recorded tract as soon as the requirements of the public authorities have been met with. That meanwhile the First Party is holding a contract for the purchase of said property from the owner thereof. That as soon as all legal matters regarding said tract are completed so that the sub-divider thereof can convey a marketable title to the First Party, then the First Party agrees [fol. 2885] promptly to execute and deliver a deed to the Second Party for the said property, together with a policy of title insurance executed by the Title Insurance & Trust Company in the sum of Eighty Thousand ($80,000) Dollars, showing title vested in the Second Party, subject only to conditions, restrictions, and covenants of same.

II

The First Party agrees to sell, and the Second Party agrees to purchase, the aforementioned real estate for Twenty Thousand ($20,000) Dollars and existing improvements at a price of Sixty Thousand Dollars ($60,000) for a total consideration of Eighty Thousand ($80,000) Dollars, which the Second Party agrees to pay as follows, to-wit: Twenty-three Thousand ($23,000) Dollars cash, paid simultaneously with the execution of this agreement, receipt whereof is hereby acknowledged, and the balance of Fifty-Seven Thousand ($57,000) Dollars shall be payable in monthly installments of One Thousand ($1,000) Dollars, payable on the first day of each and every month, commencing with February 1, 1947, and a like sum upon the first day of each subsequent month until the total of said balance of said Fifty-Seven Thousand ($57,000) Dollars shall have been paid. Interest at five per cent (5%) per annum on the unpaid balance shall also be paid each month, starting to accrue January 1, 1947.

III

Simultaneously with the delivery of the deed referred to in paragraph 1, the Second Party agrees to deliver to First

Party its promissory note for such amount of the balance of the purchase price as may then be owing upon the same monthly terms as are herein specified, and to secure the same with a Deed of Trust on the standard form provided by Title Insurance & Trust Company, naming First Party as beneficiary, the said Deed of Trust constituting a first lien and encumbrance against the above-entitled property.

[fol. 2886]

IV

It is specifically understood and agreed that First Party shall be allowed to remain in full and undisturbed possession of all of the properties and premises herein described until January 15, 1947, at which time First Party agrees to deliver possession thereof to the Second Party, its duly authorized agents or employees.

V

During all times subsequent to the date of this agreement, Second Party agrees to maintain full and adequate fire insurance upon the buildings and improvements described in this agreement, with losses payable to the parties hereto as their interests may appear; and, in addition, will pay all taxes, assessments, levies and charges which may arise or accrue in connection with said property, levied hereafter and commencing with the tax payment due on or before April 20, 1947, and one-half of taxes now levied for personal property tax for the years 1946-1947; and to protect the same from mechanic's liens or encumbrances of all kinds, it being specifically understood and agreed that, should the First Party find it necessary or proper to pay any tax, charge, or lien against said property, or any part thereof, in order to protect the same from losses, it may do so and Second Party agrees to reimburse First Party forthwith in connection with such payment.

VI

Should the Second Party fail to make any of the payments required to be made hereunder within thirty days after such payment becomes due, or otherwise to perform any of the terms, covenants, and conditions herein con-

tained at the times and in the manner herein specified, prior to the execution of said deed, then the First shall notify the Second Party in writing at its principal place of business at Alpena, Michigan, of such breach, and should Second Party not completely comply hereunder within thirty days after the receipt of said notice, then First Party shall be entitled, with or without legal process, to retake [fol. 2887] possession of said lands and properties, free of any claim or right of Second Party, and to retain all monies received hereunder as liquidated damages for breach suffered because of the failure of Second Party to complete the terms of this agreement: provided that, after said deed is executed and a deed of trust given thereon, the First Party or its successors or assigns shall be required to foreclose said deed of trust in any manner provided therein.

VII

The respective parties hereto agree that within fifteen days from the execution of this agreement by their respective officers, they will secure ratification of such execution by their respective Boards of Directors, and each will supply to the other a certified copy of the resolution or resolutions whereunder the execution hereof is ratified and approved.

In witness whereof, the respective parties hereto have caused their corporate names and seals to be hereunto affixed by their officers thereunto duly authorized, the day and year first above written.

Stephen Flam, Incorporated, By Stephen Flam, President, By Edward Flam, Secretary, First Party.

Besser Manufacturing Company, By J. H. Besser, President, By Anna M. Besser, Secretary, Second Party.

1250

[fol. 2888]

EXHIBIT 30

BESSER MANUFACTURING COMPANY

Alpena, Michigan

BALANCE SHEET

as at December 31, 1946

Assets

Current Assets:			
Cash on Hand and in Banks		$ 372,425.61	
Notes Receivable and Accrued Interest (Collateral to Notes Payable—See Contra)	$ 754,460.91		
Accounts Receivable—Customers	730,255.04		
	$1,484,715.95		
Less: Reserve for Doubtful Accounts	15,000.00	1,469,715.95	
Accounts Receivable—Officers		80,000.00	
Advances to Salesmen		3,165.33	
Deposits on Current Purchases		1,025.00	
Inventory Merchandise		1,952,829.70	
Total Current Assets			$3,879,161.59
Other Assets:			
Cash Surrender Value Life Insurance		$ 10,787.00	
Accounts Receivable Officer		58,197.26	
Accounts Receivable Employees		3,854.87	
Total Other Assets			72,839.13
Fixed Assets:			
Land, Buildings, Machinery, Office Equipment, Autos, Trucks, Siding, etc.		$1,457,733.94	
Less: Reserve for Depreciation		489,330.78	
Net Fixed Assets			968,403.16
Deferred Charges to Future Operations:			
Prepaid Insurance			11,246.50
Total Assets			$4,931,650.38

Liabilities and Capital

Current Liabilities:			
Notes Payable Bank—Secured		$350,000.00	
Notes Payable Bank and Others		204,800.00	
Vouchers Payable		564,914.45	
Customer Deposits		493,143.10	
Accounts Receivable Credit Balances		26,778.15	
Income Tax Withholdings		10,756.90	
Sales Agents Commissions:			
Current	$283,101.73		
Deferred	38,998.74	322,100.47	
Royalties Payable		4,275.00	
Federal Income and Excess Profits Tax		644,618.78	
Employees Bond—Withholdings		278.50	
Purchase Contracts Payments Due 1947		34,266.00	
Accrued Liabilities:			
Old Age Benefit Tax	$ 3,653.20		
Unemployment Tax	2,865.35		
Compensation Insurance	792.42		
Interest	2,225.23		
Sales and State Tax	1,170.22		
Payroll and Bonus	170,425.30		
Taxes	3,034.04		
Total Accruals		184,165.76	
Total Current Liabilities			$2,840,097.11
Term Liabilities:			
Purchase Contract Payments due after 1947			25,506.50
Capital Stock			300,000.00
Surplus (Exhibit B)			1,766,046.77
Total Liabilities and Capital			$4,931,650.38

Note: The company has entered into an agreement to purchase in January, 1947, properties having an aggregate cost of approximately $385,000.00 of which $64,000.00 represents a down payment.

[fols. 2889-2905] EXHIBIT 32

February 11, 1948.

Mr. Henry Selz
C/O Chicago Stock Exchange
Chicago, Illinois

Mr. Hal H. Smith, Jr.
C/O Smith, Hague & Company
Detroit 26, Michigan

Dear Sirs:

This letter is your authority to buy for my account or other accounts designated by me, all or any part of 87,000 shares of the common stock of the Stearns Manufacturing Company of Adrian, Michigan.

It is understood and agreed that I will pay to you a commission of five per cent of the purchase price of such stock. If you are not successful in purchasing for me as per these instructions any of the common stock of the Stearns Manufacturing Company of Adrian, Michigan, I agree to pay the expenses incurred of Mr. Henry Selz in attempting to negotiate such purchase.

These shares are being purchased for investment and not for resale or distribution. You are instructed to pay no more than $10 per share for any shares so purchased under this letter of instructions.

Very truly yours, J. H. Besser.

[fol. 2906] EXHIBIT 36

March 25, 1948.

Mr. Edward Adams, Jr., Vice President
National Bank of Detroit
Detroit 32, Michigan

Dear Mr. Adams:

We enclose herewith our check drawn on your bank and payable to National Bank of Detroit for $813,750.00 for which we request that you issue to Smith, Hague and Com-

pany for like amount in payment for 61,325 shares of Stearns Manufacturing Company stock which is to be delivered to you on payment of the above amount.

Will you please arrange to have one of your representatives deliver this draft to Mr. Pierce Wright who will in turn see that this stock is delivered to your representative which we request you hold in your safe keeping department for our account.

Yours very truly, Besser Manufacturing Company,
F. C. Burnett, Assistant Secretary.

FCB:msk

Enc: Check
Note

12541

EXHIBIT 37

BESSER MANUFACTURING CO.
CONCRETE MACHINERY

NO. 191

ALPENA, MICH. March 26, 1948

PAY TO THE ORDER OF National Bank of Detroit $813,750.00

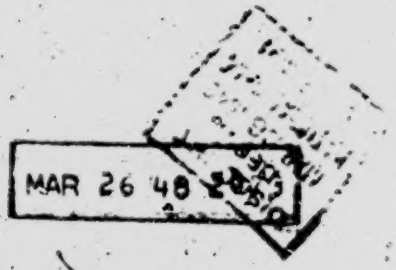
Eight Hundred Thirteen Thousand Seven Hundred Fifty and NO/100- - - - - - DOLLARS

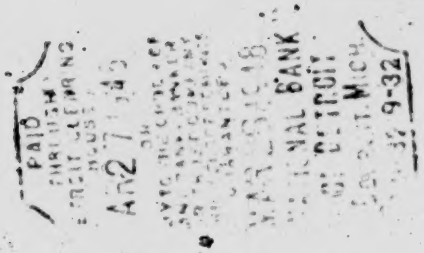
NATIONAL BANK OF DETROIT

9-32 DETROIT, MICHIGAN

BESSER MANUFACTURING CO.

J. N. Besser





2907

[fols. 2908-2922] EXHIBIT 38

Besser Manufacturing Company

Plain Pallet Tampers and Vibrators

Complete Equipment for Concrete Products Plants
Alpena, Michigan

Phone: Alpena 291

March 16, 1949.
Via: Special Delivery

Mr. Robert L. Tollefsen,
Department of Justice,
Federal Building,
Detroit, Michigan

Dear Sir:

Heretofore you have been furnished with copies of blank endorsements of stock certificates signed by the following persons:

Vera Dixon	41
Stanley Fildew	45
Myron Hultmark	1
H. Matchner	48
J. H. MacDonald	3
A. H. Pearson	33
W. K. Stanley	35
Pierce Wright	1

This will certify that there appears in the possession of the Besser Manufacturing Company the number of identical endorsements indicated by the figure following each of the above names.

Besser Manufacturing Company, F. C. Burnett,
Assistant Secretary.

FCB:msk

The Saving in Pallet Cost Will Pay for Any Besser Plain Pallet Stripper

[fol. 2923]

EXHIBIT 40

BESSER MANUFACTURING COMPANY

Alpena, Michigan

BALANCE SHEET

As at December 31, 1948

Assets

Current Assets:			
Cash on Hand and in Banks (Note A)		$ 215,914.46	
Cash on Deposit with Trustee		5,839.89	
Customers Notes Receivable and Accrued Interest (Note A)	$1,001,991.97		
Accounts Receivable—Customers (Note A)	609,481.36		
Accrued Rentals on Leased Equipment (Note A)	50,563.20		
	$1,662,036.53		
Less: Reserve for Doubtful Accounts	50,000.00		
Net Receivables from Customers		1,612,036.53	
Accounts Receivable—Employees		5,359.89	
Prepaid Expenses and Deposits		62,158.45	
Inventory of Material, Work in Process and Finished Stock		1,817,324.70	
Inventory of Concrete-Block Machinery and Allied Equipment on Lease (Note A)	$1,605,444.13		
Less: Reserve for Depreciation	85,870.34		
Net Equipment on Lease		1,519,573.79	
Total Current Assets			$5,238,207.71
Other Assets:			
Cash Value of Life Insurance		$ 12,635.00	
Securities—Wholly Owned Subsidiary—Cost	$ 100,000.00		
Advances to Wholly Owned Subsidiary	201,558.68		
Investment in Wholly Owned Subsidiary		301,558.68	
Securities—Minority Interest Other Corp.—Cost	$1,060,800.82		
Less: Reserve to Market Estimate	560,800.82	500,000.00	
Total Other Assets			814,193.68
Fixed Assets:			
Land, Buildings, Machinery, Equipment, Autos, Trucks, Patents, etc.		$1,527,339.37	
Less: Reserve for Depreciation		525,001.10	
Total Fixed Assets			1,002,338.27
Total Assets			$7,054,739.66

Liabilities, Capital and Surplus

Current Liabilities:		
Notes Payable to Bank—Secured by Notes and Accounts Receivable and Leased Equipment (Note A)	$1,150,000.00	
Accounts Payable	356,023.78	
Contracts Payable on Purchase of Real Property	10,653.54	
Customers Deposits	78,949.67	
Accrued Sales Commissions, Wages and Bonuses	598,537.33	
Federal Income Tax Payable	332,937.57	
Employees Payroll Deductions	13,546.18	
Royalties Payable	2,565.00	
Other Accrued Expenses	9,738.28	
Account Payable to J. H. Besser	151,589.18	
Total Current Liabilities		$2,704,540.53
Notes Payable Besser Foundation due 1953		73,064.60
Deferred Income:		
Sales of Equipment	$ 23,184.25	
Leased Equipment Rentals	791,917.83	
Total Deferred Income		815,102.08
Capital Stock:		
Authorized and Outstanding 30,000 shares, Par Value $100.00		3,000,000.00
Earned Surplus:		
Balance January 1, 1948	$3,584,476.24	
Add: Net Income to Surplus—Year ended December 31, 1948	138,357.03	
	$3,722,833.27	
Deduct: Stock Dividend Paid $2,700,000.00		
Provision for Decrease Security Holdings to Estimate Market 560,800.82	3,260,800.82	
Surplus Balance December 31, 1948		462,032.45

Note A: The National Bank of Detroit had as collateral for the loan of $1,150,000.00, cash funds on deposit in the collateral account, included in cash on hand and in banks, $104,790.02, chattel mortgages covering 10 Victory Vibrapacs and 56 Super Vibrapacs, on lease and a general assignment of Accounts Receivable and Customers Notes Receivable and supporting contracts.

Contingent Liability: Besser Manufacturing Company of California indebtedness on purchase of plant, $65,000.00, has the Michigan corporation as original purchaser.

Total Liabilities, Capital and Surplus	$7,054,739.66

[fol. 2924] EXHIBIT 51

June 12, 1946.

Besser Manufacturing Co.

Alpena, Michigan

Att'n Mr. Jesse Besser

Dear Jesse:

Quite some time has elapsed since your last visit to New York and I am wondering how you made out with Roy Darden in Atlanta.

You were going to send me a report on the Atlanta trip but to date I have had no word from you.

The Darden matter is of importance to all of us and in view of conditions in the "Industry" I believe it should be taken care of at once. However, nothing can be done until I have a report on your inspection trip to Atlanta. If I or my organization can do anything to expedite the matter let me know.

I am coming along with my "Sinter-lite" plant just as fast as conditions will let me. The terrific shortages of all materials has held me up considerable but I expect to get it running shortly. The only thing I can do is to be patient and wait for every thing to come in. The strain on the nerves is terrible but there is nothing I or any one else can do to hurry things along. I will keep in touch with you and let you know when you can see our finished "Sinterlite" plant in operation.

In the meantime please let me know the status of the "Darden" matter.

Very truly yours, Louis Gelbman.

[fol. 2925] EXHIBIT 52

Stearns Manufacturing Co., Inc., Adrian, Mich.
Gene Olsen, President

Phone 1301

June 27, 1946.

Louis Gelbman
Concrete Units, Inc.
750 Edgewater Road
Bronx
New York 59, N. Y.

Dear Louis:

I am curious to know the status of your investigation of this chap Darden who is advertising and selling block machines which, as you told us in Chicago, you feel are a definite infringement on one or more of your patents, under which the Besser Company and the Stearns Company are exclusive licensees.

Stories are persistent to the effect that Darden is doing quite a lot of business and is rather rapidly expanding his organization. It might be easier to knock his ears down now than later.

If this matter is at a standstill, I believe it should be revived and proceeded with, without too much delay.

I am sending a copy of this letter to Jesse Besser and hope he will write you giving you his comments.

Cordially, Gene, Eugene F. Olsen, President.

EFO:h
c/c J. Besser

Stearns - Jolterete - Anchor - Ideal - Hobbs - Universal

[fol. 2926] EXHIBIT 53

July 1, 1946.

Eugene F. Olsen
Stearns Manufacturing Company
Adrian, Michigan

Dear Gene:

Re. your letter of June 27.

I discussed the Darden matter with you at the Convention and when I arrived back in New York was all set to go to Atlanta and see what was going on.

However, the day before I was to leave for Atlanta Jesse Besser visited the plant and said he had just been to Atlanta to see Darden and had come to New York for some information and copies of our patents. I gave him the information he wanted and he went back to Atlanta for further investigation. He was to get in touch with me after his second trip.

I have not heard from Besser since then and wrote to him on June 12 asking where the matter stood. He has not answered this letter.

The entire matter is now waiting for Besser. Write to him and see what you can find out and let me know what is going on.

As far as our "Sinter-lite" plant is concerned we are now setting up the rotary sintering machine and it looks like about another month before we are in operation. However, you can feel at liberty to visit the plant at any time and I will be glad to discuss the entire matter with you.

Very truly yours, Louis Gelbman.

[fol. 2927] EXHIBIT 54

July 8, 1946.

Mr. J. H. Besser, President
Besser Manufacturing Co.
Alpena, Michigan

Dear Jesse:

Last month I wrote Louis Gelbman asking him what progress he was making in the matter of proposed prosecution of Darden at Atlanta for alleged infringement.

I now have reply from Louie reading as follows:

"I discussed the Darden matter with you at the Convention and when I arrived back in New York was all set to go to Atlanta to see what was going on.

However, the day before I was to leave for Atlanta Jesse Besser visited the plant and said he had just been to Atlanta to see Darden and had come to New York for some information he wanted and he went back to Atlanta for further investigation. He was to get in touch with me after his second trip.

I have not heard from Besser since then and wrote him on June 12 asking where the matter stood. He has not answered this letter.

The entire matter is now waiting for Besser. Write to him and see what you can find out and let me know what is going on."

Apparently Louie feels that no more should be done until you give him further comment.

I think it is important that we move in on this case (if it is justified at all) because I know that Darden has some rather ambitious plans including the manufacture of a high-production vibrator machine which has been pretty well proven out in the field in a way that would make it really effective competition.

[fol. 2928] I believe that Darden's equipment is being made by a branch plant of the Link Belt Company. It occurs to me that if we should start any litigation that the home office of the Link Belt might decide that they would

not want to get involved in such, which in turn would result in a loss of source for Darden.

Your prompt reply will be appreciated.

Very truly yours, Stearns Manufacturing Co., Inc.,
By Eugene F. Olsen, President.

EFO; h
c/c L. Gelbman

[fol. 2929] EXHIBIT 55

July 23, 1946.

Mr. Jesse Besser
c/o Besser Manufacturing Co.
Alpena, Michigan

Dear Jesse:

Your accounting for the month of June has not arrived as yet. This accounting was due on July 10th so please take care of this matter at once.

I have received several letters from Mr. Olsen who is very much concerned about the Darden machine. You were going to send me a report on your inspection trip to Atlanta. I have never received this report. You are now holding up all action on this matter as I cannot make any move until I hear from you.

Please get the report on the Darden machine out at once as it is of importance to all parties concerned.

Very truly yours, Louis Gelbman.

[fol. 2930] EXHIBIT 56

Besser Manufacturing Company

Plain Pallet Tampers and Vibrators

Complete Equipment for Concrete Products Plants

Alpena, Michigan

Phone: Alpena 291

July 31, 1946.

Mr. Louis Gelbman
Concrete Units, Inc.
750 Edgewater Road
Bronx 59, New York

Dear Louis:

This will confirm our telephone conversation of July 30. As I mentioned to you by telephone, I talked to Mr. Besser last Saturday and Mr. Gene Olsen today and they are both in accord to have you start action against Darden Industries at Atlanta, Georgia.

This company is definitely infringing on Gelbman patents and also on other patents owned by Stearns and Besser. We believe that we should protect our rights in the industry in which we have money invested and we can do so by definitely stopping infringers on patents held by this group.

We can further protect the future of the industry in which we are all interested by greatly reducing or eliminating the avalanche of small machines that are now flooding the market. Many of these machines make an inferior block and this, together with the lack of information for these small operators and the lack of interest of the sellers of this equipment, will make for another period of inferior blocks and thereby greatly retard the industry.

We would appreciate it if you would give this pending suit a reasonable amount of publicity and we would also appreciate it if you would keep us informed as to your progress.

It is particularly important that you get in touch with the home office of the Link Belt Company and advise them that their branch plant in Atlanta is making a block ma-

chine for a party whose name is Darden Industries and that the machines they are making are a definite infringement on existing United States patents.

With kindest regards and looking forward to hearing from you soon, we are

Yours very truly, Besser Manufacturing Company,
Haakon Paulson, Distribution Manager.

HP/mg
cc: Mr. Olsen

The Saving in Pallet Cost Will Pay for Any Besser Plain Pallet Stripper.

[fol. 2931] EXHIBIT 57

August 7, 1946.

Mr. Hamlin F. Andrus
350 Madison Avenue
New York City

Dear Ham:

Both Besser and Olsen seem to think that it is time to take a bite out of the infringers on our "Jolterete" patents.

We will have to stand one third the cost, which I don't cherish but I suppose they are entitled to this cooperation.

What do you think?

Very truly yours, Louis Gelbman.

[fol. 2932] EXHIBIT 58

August 8, 1946.

Mr. Eugene F. Olsen
c/o Stearns Manufacturing Co.
Adrian, Michigan

Dear Gene:

Re: Darden suit.

I am making arrangements for going ahead with this suit as soon as possible.

You stated that you would like to have as much publicity

as possible along these lines so I am making the following suggestion:

You now run a full size advertisement in most of the trade magazines every month. Why not devote one months advertisement to stressing the patent situation. Remind the trade that you are manufacturing machines under my patents. It would also be a good idea to publish the entire list of patent numbers in the same advertisement. I believe that it would make the industry patent minded. What do you think of this?

I am also working on a write up on the patent situation which you as an advertiser could get published in the trade papers.

Let me know what you think about the above and if I can count on your cooperation.

Very truly yours, Louis Gelbman.

[fol. 2933] EXHIBIT 59

August 8, 1946.

Mr. Haakon Paulson
c/o Besser Manufacturing Co.
Alpena, Michigan

Dear Haakon:

Re. Darden suit.

As I mentioned in my last letter to you I am making arrangements for going ahead with the Darden infringement suit.

You stated that you would like to have as much publicity as possible along these lines so I am making the following suggestion:

You run a full size advertisement in most of the trade magazines each month. Why not devote one advertisement to stressing the patent situation. Remind the trade that you are manufacturing machines under my patents. It would also be a good idea to publish the list of patent numbers in the same advertisement. I believe that it would make the industry patent minded. What do you think of this?

I am also working on a write up on the patent situation which you as an advertiser could get published in the trade papers.

Let me know what you think of the above and if I can count on your cooperation.

Very truly ours, Louis Gelbman.

[fol. 2934] EXHIBIT 63

Besser Manufacturing Company

Plain Pallet Tampers and Vibrators

Complete Equipment for Concrete Products Plants
Alpena, Michigan

Phone: Alpena 291

October 21, 1946.

Mr. Louis Gelbman
Concrete Units, Inc.
750 Edgewater Road
Bronx 59, New York

Dear Louis:

Our Mr. Del Fox has just been down to Atlanta. He called on Mr. Roy Darden and had quite a visit with him and got some information. We are enclosing herewith an exact copy of the letter he just wrote us.

We have not heard from you now since last August, as far as my files show and in your letter of August 8 you mentioned that you were going ahead with the Darden infringement suit. We are anxious to know just what progress you have made. They are going ahead at a pretty rapid pace both with their Rockercrete and a larger machine with which they are getting started. We are keenly interested in hearing from you just how soon your action can start to show results.

We look forward anxiously to your early reply.
Very truly yours, Besser Manufacturing Company,
By —— ——, Distribution Manager.

Haakon Paulson/dak
Enc: Copy of Letter
cc: Eugene Olsen—Stearns Mfg. Co.

[fol. 2935] EXHIBIT 67

November 4, 1946.

Besser Manufacturing Company
Alpena, Michigan

Attention Mr. Haakon Paulson

Dear Haakon:

Enclosed you will find a copy of Larson's letter to Greenwald and a report from the International Service Corp. both of which are self explanatory.

I still have to get Larson's opinion but it looks like we have a job to do. I will forward Larson's opinion to you when I receive it at which time I believe it would be advisable for all of us to get together and meet with Mr. Larson.

Very truly yours, Louis Gelbman.

c.c. to
Eugene Olsen
Edward Gottlieb
Hamlin F. Andrus

[fol. 2936] EXHIBIT 68

Stearns Manufacturing Co., Inc., Adrian, Mich.

Gene Olsen, President

Phone 1301

November 29, 1946.

CC: Besser Mfg. Co.
Mr. Louis Gelbman
c/o Concrete Units, Inc.
750 Edgewater Road
Bronx, New York 59, New York

Dear Louie:

Immediately upon receipt this morning of your letter November 17th, I placed a phone call for you to discuss this matter. However have not reached you up to now (early afternoon) so will write you the following in the event I am not able to get through on the phone. I am sending a copy of this to the Besser Company.

We heartily approve of the action you have taken to date in the matter of the patent suit. I only hope it can be expedited.

Will enclose herewith our check for $257.76, being one-third of the amount you have paid Roberts M. Larson in the matter of the patent investigation and retainer.

While we have no hesitancy in making patent references in our advertising copy, it is my feeling that the reference which Stearns and Besser should make in their ads should be relatively brief and should make reference to prominent ad which I think you should run. Your ad could be very effective if modeled along the lines of your suggested copy.

If you follow this suggestion then I think you should state emphatically in the ad that only the Stearns Company and the Besser Company are licensed under your patents.

Now about the conference which you think we should have next week. I have got to be in Chicago and Cincinnati the bulk of next week on appointments which I cannot [fol. 2937] at this late date alter. However, if the Besser

Company can have an authorized representative present at a conference next week. I will send a like person from here. Certainly we should countenance no preventable delay.

I will be in Adrian next Monday afternoon, so if I have not talked with you before then will you please phone me indicating what arrangements you have been able to conclude. Perhaps I should add that I will also be at the office in Adrian on Tuesday afternoon and then gone for the balance of the week.

Cordially, Stearns Manufacturing Co., Inc., By Eugene F. Olsen, President.

efo/f

[fol. 2938] EXHIBIT 69

Louis Gelbman

c/o Concrete Units, Inc.
750 Edgewater Rd.

Bronx 59, N. Y.

December 16, 1946.

Besser Manufacturing Company
Alpena Michigan

Attention Mr. Jesse Besser
Mr. Haakon Paulson

Paid to Roberts Larson 11/26/46		
Services of Investigation Co.	$ 273.27	
Retainer in infringement suit	500.00	
	$ 773.27	
Due from Besser Mfg. Co. 1/3 of $773.27 12/16/46		$ 257.76
Retainer fee to Roberts Larson in infringement suit	$1000.00	
Due from Besser Mfg. Co. 1/3 of $1000.00		$ 333.33
Total due from Besser Mfg.		$ 591.09

[fol. 2939] EXHIBIT 70

Stearns Manufacturing Co., Adrian, Mich.

Gene Olsen, President

Phone 1301

Via Air Mail
Special Delivery
December 17, 1946.

Mr. Louis Gelbman
Concrete Units Inc.
750 Edgewater Rd.
Bronx, New York 59, N. Y.

Dear Louis:

Replying immediately to your letter of December 16.

Attached herewith is Stearns check for $333.33 as our share of the $1,000.00 advance being made to Larson at this time.

We are in favor of going ahead vigorously.

We also enthusiastically approve the idea of your running a prominent ad with respect to patents. We know nothing about what it is legitimate to say in such an ad, but I think your suggested copy is good providing you have assurance of your attorney that you are within your legal rights.

Our only suggestion—and this is a minor one—in the copy is that you start the first sentence of the ad as follows:

"Only Stearns Manufacturing Co., Inc. and Besser Manufacturing Company are licensed to make block machinery under his patents."

I think it is highly important that your ad appear in the February issues of the trade journals and that one or more suits be actually filed before the Convention.

Please let me know promptly when there is anything that can be done in the way of getting closer to an arrangement between you and Stearns in the manufacture of the sintering equipment. We are so enthusiastic about the demand for a manufactured light weight aggregate and the production of equipment for producing such. We do not want to go to the expense and time of investigating

other possibilities if we are going to be able to build yours. Therefore we are awfully anxious to get some kind of commitment from you at your earliest reasonable date.

Sincerely, Eugene F. Olsen.

EFO/h
Encl.

Stearns - Jolterete - Anchor - Ideal - Hobbs - Universal

[fol. 2940] EXHIBIT 71

Besser Manufacturing Company

Plain Pallet Tampers and Vibrators

Complete Equipment for Concrete Products Plants
Alpena, Michigan

Phone: Alpena 291

December 21, 1946.

Mr. Louis Gelbman
750 Edgewater Road
Bronx, New York 59, N. Y.

Dear Mr. Gelbman:

As per your recent letter and per your invoice of December 16th we are enclosing check to take care of our part of the expenses on the infringement suite.

We also wish to give our enthusiastic approval to the advertisement which you propose to run in the various magazines and which gives the numbers of your patents and the warning, etc. Please go right ahead with this Louis.

We appreciate your energetic handling of this matter which means so much for the upbuilding of this industry as well as incidentally, the continued success of your licensees.

About the worse thing that could happen to this industry would be to have it wide open so that anybody and everybody could make machines and thus have no control on

quality and no opportunity for anyone to do anything very important. That is the way this industry was until a certain measure of control was secured through Gelbman vibration patent and Besser plain pallet stripper patents.

We will support you in every way on this Louie and we will work together and use every proper means to take care of this situation.

With best wishes, I remain

Yours very truly, Besser Manufacturing Co., By J. H. Besser, President.

JHB:mvs

Enc: Check $591.09

The Saving in Pallet Cost Will Pay for Any Besser Plain Pallet Stripper

[fol. 2941] EXHIBIT 72

December 26, 1946.

Roberts B. Larson
National Press Building
Washington 4, D. C.

Dear Mr. Larson:

Re: your letter of December 11 addressed to Harold Greenwald.

I am enclosing check for $1000 as per your request.

This will authorize you to send letters of notification to stop infringing our patents to:

Landis Concrete Products Corp.
or Roy Darden Industries
313 Bona Allen Building
Atlanta 3, Georgia
and F. C. George Machine Company
100 South Moreland Drive
Orlando, Florida

If you will proceed with this at once we will gather the rest of the information as requested in your letter and forward same to you as soon as possible.

Very truly yours, Louis Gelbman.

c.c. to
Harold Greenwald
Hamlin F. Andrus
Eugene F. Olsen
Jesse H. Besser

[fol. 2942] EXHIBIT 75

March 3, 1947.

Cost of Advertising in Trade Papers on Darden Patent Suit

Concrete Manufacturer (Pit & Quarry)	$370.00	
Concrete (Concrete Publishing Co.)	270.00	
Concrete Products (Rock Products)	407.80	
Total		$1047.80
Besser 1/3	$349.26	
Stearns 1/3	349.26	
Andrus 11/20 of 1/3	192.10	
Gelbman 9/20 of 1/3	157.18	
Total		$1047.80

[fol. 2943] EXHIBIT 76

Preliminary Agreement

This Preliminary Agreement made this 20th day of February, 1947 is made between Roy Darden individually and Roy Darden Industries, Inc. hereinafter referred to as Party of the First Part, and Louis Gelbman, hereinafter referred to as Party of the Second Part.

Whereas, a suit has been instituted in the District Court of the United States, District of New Jersey entitled "Hamlin Andrus and Louis Gelbman et al. vs. Landis Concrete Products Company, Landisville, N. J.", Civil Action #950 to adjudicate the validity of Patents Number 2275676 and Patents Number 2366780 owned and controlled by the plaintiffs in said Civil Action.

And, whereas, it is the desire of the said Party of the First Part to avoid further litigation on the aforementioned suit with said Party of the Second Part and to accept a license among other things to use the principles enumerated in said patents,

Now, therefore, the said Party of the Second Part agrees to license the said Party of the First Part to manufacture,

sell and service the following machines and these machines only:

A total number of 32 Rocker Crete and D400 Machines
A total number of 3 Warren machines #800
A total of 30 Mixers

Further, the party of the Second Part also agrees to permit said Party of the First Part to dispose of machines now made which are to be included in the quantities aforementioned.

In consideration of the foregoing license, the said Party of the First Part agrees to further cease and desist from the manufacture, selling or using concrete block machinery including machines of the type aforementioned; that is to say Rockercrete D400 and Warren #800 and other mixers after the above quantities have been completed and disposed of.

Further, in consideration of this license agreement, the said Party of the First Part agrees to withdraw a suit instituted in the Superior Court of Cook County, Docket No. 47S 2844 entitled Roy W. Darden, et al. vs. Louis Gelbman, et al., being an action for unfair competition.

It is understood this preliminary agreement is to be supplemented and replaced by a formal agreement to be subscribed to by the Party of the First Part at a later date, and said Party of the First Part agrees to sign such document.

Roy W. Darden. (Seal.)
Louis Gelbman. Seal.)

Witnesseth:

John F. Stark.

[fol. 2944] EXHIBIT 77

February 20, 1947.

Mr. Roy W. Darden
313 Bona Allen Bldg.
Atlanta, Ga.

Dear Mr. Darden:

Attached hereto is a preliminary agreement which you have this day entered into between yourself individually and for the Roy W. Darden Industries, Inc. and Louis Gelbman, et al. The other parties interested in this agreement as the Stearns Manufacturing Co. by Eugene F. Olsen, president and the Besser Manufacturing Co. represented by Jesse Besser, president. The parties to the said preliminary agreement have expressed their desire to terminate any litigation in the foregoing matter and agreed to be bound thereby.

Very truly yours, Eugene F. Olsen, Pres., Stearns Manufacturing Co., Jesse Besser, Pres., Besser Manufacturing Co.

P. S. It is understood that the aforementioned preliminary agreement will be supplemented by a more formal agreement in the near future.

[fol. 2945] EXHIBIT 78

February 24, 1947.

Mr. John Stark
c/o Besser Manufacturing Company
Alpena, Michigan

Dear Sir:

I wish to take this opportunity to thank you for your assistance in the Darden matter. The papers were given to our General Counsel who will get in touch with you very soon.

I hope that you will be able to get your advertising department give some attention to the matter of patent notices in their advertisements. It seems a shame that after

the good job we have done on our patents a matter so important as this is so neglected.

I trust that you will be able to make your people see the light and take care of the patent notices in your future advertisements.

Very truly yours, Louis Gelbman.

[fol. 2946] EXHIBIT 79

Western Union

Washington, D. C.,
March 12, 1947, 4:37 P.M.

Louis Gelbman

750 Edgewater Rd., Bronx, N. Y.:

If you think it is alright it is approved by me for you to publish announcement that Darden has been given license on his machine in use and also on those in process of manufacture. This may strengthen our position further as it is convenient, way inform others again to not overstep. Regards. I will be Shoreham Hotel at Washington next several days.

J. H. Besser.

[fol. 2947] EXHIBIT 80

April 14, 1947.

Mr. Jesse Besser
c/o Besser Manufacturing Company
Alpena, Michigan

Dear Mr. Besser:

I have this date received a statement from Roberts B. Larson, Attorney, with reference to this work on the Darden Infringement Suit. Also additional bills on the advertisements in the February issues of the Trade Magazines.

The statement on both is as follows:

Roberts B. Larson		
Services & Expenses to 3/27/47		$1963.29
Retainer fee paid 11/26/46	$ 500.00	
Retainer fee paid 12/27/46	1000.00	$1500.00
Balance due Larson 3/27/47		$ 463.29
Advertisements		
3/27/47 Pit & Quarry		
Engraving for Ad	$7.94	
3/27/47 Concrete		
2 halftones for Ad	8.14	$ 16.08
Total		$479.37

Your share of the $479.37 amounts to $159.79. Please send me a check for this amount ($159.79) as soon as possible so that I can pay all parties concerned.

Very truly yours, Louis Gelbman.

Besser 1/3	159.79
Olsen 1/3	159.79
Gelbman & Andrus 1/3	159.79
	$479.37

[fol. 2948] EXHIBIT 81

Stearns Manufacturing Co., Inc., Adrian, Mich.
Gene Olsen, President
Phone 1301

April 17, 1947.

Mr. Louis Gelbman
Concrete Units Inc.
750 Edgewater Road
Bronx, New York 59, N. Y.

Dear Louis:

Replying immediately to your letter of April 14th, we enclose herewith our check for $159.79 as Stearns share of the patent litigation expense recited in your letter.

We think it would be wise to start suit against some user of one of the other infringing machines. Our opinion—based on all the angles—is that maybe we should check up on "Lith-*O*-Bar" next.

Cordially, (Gene), Eugene F. Olsen, President.

EFO/h
Encl.
cc—J. H. Besser

Besser Mfg. Co.
Alpena, Michigan

Stearns - Jolterete - Anchor - Ideal - Hobbs - Universal

[fol. 2949] EXHIBIT 84

Stearns Manufacturing Co., Inc., Adrian, Mich.

Gene Olsen, President

Phone 1301

November 20, 1946.

Mr. Louis Gelbman
c/o Concrete Units, Inc.
750 Edgewater Road
Bronx, New York 59, New York

Sub: Lithiblock Machine

Dear Louie:

Undoubtedly you are familiar with this machine in information that might have come to you in the past, but I thought it well to send you a tear sheet from the November 1946 issue of Pit & Quarry.

Two of our men were in Grand Rapids the other day and saw the machine, but it was not as yet wired up so did not see it in operation. Our men were not very cordially received at this Grand Rapids plant, so could not get into the complete mechanics of its operation, but it was determined that the pressure head is hydraulically operated.

The story on this machine is that it has been developed during the past several years by Mr. Ralph Samuelson of Concrete Service Company, Traverse City, Michigan. To our knowledge, the first machine installed outside of his own plant is at the plant of what we know at this time to be Lloyd Pender & Associates, Grand Rapids, Michigan. Whether they have a new name at this time or not, I do not know. Mr. Pender is a representative of the Peerless Cement Company and is starting this block plant in Grand Rapids.

I thought it best to give you what up-to-date information we had on this particular machine, and perhaps you would feel that you ought to put your scouts out on this particular machine also. The machine, I understand, is going to be produced by the Lith-I-Bar Company, Holland, Michigan.

[fol. 2950] Your comments on this matter will be greatly appreciated.

C. S. DeLamater, Vice President & Secretary.

Cordially yours, Stearns Manufacturing Co. Inc., By csd/f

Stearns - Jolterete - Anchor - Ideal - Hobbs - Universal

[fol. 2951] EXHIBIT 85

November 23, 1946.

Stearns Manufacturing Compa[illegible]
Adrian, Michigan

Att'n C. S. De Lamater

Dear Del:

I have received your letter of November 20 reference to the Lithoblock machine.

I have read this artfele in "Pit & Quarry" and although the machine uses vibration as it's basic principle I believe that we should concentrate all our efforts on Darden as he seems to be the largest thorn in our side at the present time.

I have an appointment with Mr. Larson, our patent attorney, in Washington on Tuesday, November 26, to discuss the entire matter.

I will keep you posted as to developments at this meeting.

Very truly yours, Louis Gelbman.

cc to

Haakon Paulson
Besser Mfg. Co.

[fol. 2952] EXHIBIT 86

March 12, 1948.

Mr. Louis Gelbman
Concrete Units, Inc.
750 Edgewater Road
Bronx, New York 59, N. Y.

Dear Louie:

Pursuant to the conference that you and Gene and I had at New York regarding possible infringes of your patents we have followed through on this matter further for you.

Attached is a copy of a letter we received from George Friel showing the location of a Syntro-Pac block machine at Bolivar, West Virginia.

This information ought to be helpful to you and the attorney. You will recall that we gave you authority at the convention to follow through on this particular machine as well as the Lith-i-Bar machine.

You were then going to contact Jesse Besser and get his approval also.

Please let us know as early as possible what action is being taken.

Best regards.

Cordially yours, Stearns Manufacturing Co., Inc.,
By —— ——, Vice President-Secretary.

CSDeLamater/1

[fol. 2953] EXHIBIT 87

March 15, 1948.

Besser Manufacturing Company
Alpena, Michigan.
Attention Mr. Jesse Besser, President.

Dear Mr. Besser:

I am enclosing copies of letters from Stearns Manufacturing Company and their representatives, the Anchor Concrete Machinery Company regarding the matter of the Syntro-Pac Block Machine.

This is the matter I discussed with you and John Stark

at the convention and of which Mr. Stark was not much concerned about. He felt that due to the small work shop they had, not much competition would be coming from them.

Kindly advise us of your attitude in this matter and also the Lith-i-Bar machine.

Trusting we may have the pleasure of an early reply, we are

Very truly yours, Louis Gelbman.

p.m

[fol. 2954] EXHIBIT 88

Stearns Manufacturing Co., Inc., Adrian, Mich.

Gene Olsen, President

Phone 1301

October 14, 1947.

Mr. Louis Gelbman
750 Edgewater Rd.
Bronx, New York 59, New York

Dear Louie:

We are beginning to encounter fairly substantial competition from this George outfit at Orlando, Florida. It seems their latest machine is not a bad outfit and they are creeping north in their sales. The most recent ones I have heard of probably have been at Cincinnati, Ohio and Marion, Ohio.

It is my recommendation that we start the same routine investigation and, if indicated, litigation against some user of the George machine, that we did a year or so ago against Darden.

You will probably want to know where there is one of the George machines down your way. I don't know of any, but wish you would call both Jack Franklin and Ted Merriam (Ted's phone number is Newark, Humboldt-2-4224). Either or both of these fellows should be able to tell you if there is a George machine in that part of the country.

If there is none down there, let's consider the Cincinnati

installation, which is just being made. That plant is the Potter Block Company (Mr. Fred B. Dickman, 3400 Duck Creek Road, Cincinnati, Ohio).

I am informed that the George Company is growing rapidly. It may be wise to see what we can do about it at an early date.

Am sending Mr. Besser a copy of this letter and hope that he will write you his opinion.

Sincerely, Stearns Manufacturing Co., Inc., By (Gene), Eugene F. Olsen, President.

EFO/k

cc—Mr. Besser

Stearns - Jolferete - Anchor - Ideal - Hobbs - Universal

[fol. 2955] EXHIBIT 89

November 10, 1947.

The Besser Manufacturing Company
Alpena, Michigan.
Attention Mr. Jessie Besser.

Dear Mr. Besser:

On October the 16th we received a letter from the Stearns Manufacturing Company re infringement of our patents by the F. O. George Machine Company of Orlando, Florida.

A copy of this letter was sent you by Stearns Manufacturing Company. To date we have had no comment from you as to whether or not you want to go along in prosecuting this matter.

Will you kindly give this matter your attention and advise us as to your position. Trusting we shall have the pleasure of an early reply, I am

Very truly yours, Louis Gelbman.

LG.P

[fol. 2956] EXHIBIT 90

Concrete for Permanence
Concrete Units Inc.
Dayton 3-4161-2

750 Edgewater Road, Bronx, New York 59, N. Y.

November 11, 1947.

F. C. George Machine Company
100 South Westmoreland Drive
Orlando, Florida

Dear Sirs:

It has been brought to my attention that the block machine advertised in the November issue of "Concrete Manufacturer" of Pit & Quarry magazine is an infringement of my patent.

Would you kindly advise me of the nearest machine to New York City so that I may inspect the same.

Very truly yours, Louis Gelbman.

Approved by the Board of Standards and Appeals under Calendar Number 1345-39-SM and 1346-39-SM

[fol. 2957] EXHIBIT 91

November 24, 1947.

Harold Greenwald
165 Broadway
New York 6, N. Y.

Re: F. C. George Machine Company
Your letter of Nov. 21, 1947

Dear Harold:

Since we sent you our letter of November 20 Mr. Stark of the Besser Manufacturing Company has called us on the above.

He stated that he has talked the situation over with Mr. Larson when he was in Washington.

It seems that the F. C. George Machine Company is going to make an installation in Bowie, Maryland and every one concerned thought it wise to wait and see this machine in actual operation before any decisions are made.

That is the way the matter stands at present and we will keep you posted on any new developments.

Very truly yours, Louis Gelbman.

[fol. 2958] EXHIBIT 92

Agreement

This agreement entered into this first day of April, 1947, is made by and between the following parties who have duly subscribed their legal signatures at the end hereof, and agree to be bound thereby, namely,

John B. Lagarde, individually, and doing business as John B. Lagarde Company of Anniston, Alabama, hereinafter referred to as "Lagarde", and the Besser Manufacturing Company, a corporation licensed under the laws of the State of Michigan, and having its principal offices located at Alpena, Michigan, hereinafter referred to as "Besser".

Whereas, said party Lagarde has conceived and built certain machines and related equipment now employed in his plant for the manufacture of concrete products, and upon which he has filed one or more applications for United States Letters Patent identified as Serial No. 691,649, filed August 19, 1946, and Serial No. 727,639, filed February 10, 1947; and,

Whereas, said party Besser has certain patents which it owns or controls, or patents to be owned or controlled in the future, which may be infringed in part by the aforementioned Lagarde machines; and,

Whereas, said Lagarde or his employees may from time to time in the future conceive or invent certain new ideas concerned with machines employed in the manufacture of concrete products or related mechanisms or products and

in which said party Besser may, at its discretion, be interested; and,

[fol. 2959] Whereas, it is the desire of both parties to peacefully settle any differences which may exist without resorting to litigation;

Now, therefore, in view of the foregoing premises and in consideration of the following covenants the parties mutually agree as follows:

1. The party Besser grants to the party Lagarde a royalty free, non-exclusive license under all patents now owned or controlled, or to be owned or controlled in the future by Besser.

2. Subject to the right of termination hereinafter set forth, Lagarde grants to Besser an exclusive license in any patentable subject matter that may result from said identified patent applications, or any future patent applications based thereon that may be necessary, such as divisions, continuations, or reissues thereof. Further, the party Lagarde agrees to execute any documents or papers presented to him necessary for the proper protection of said subject matter or any litigation founded thereon.

[fol. 2960] 3. In the event Letters Patent are issued to Lagarde on the said applications hereinbefore referred to, and in the event Besser desires to manufacture machines covered thereby, then Besser shall pay to Lagarde the sum of One Hundred Dollars ($100.00) as royalty for each machine so made.

4. The license herein granted shall cease and terminate, at the option of Lagarde, in event that the royalties or amounts paid hereunder to Lagarde, together, shall, beginning six (6) months from the date of issue of said first Letters Patent to Lagarde, fall below $600.00 per year.

5. The royalty payments provided for in paragraph 4 shall be made quarterly for the respective quarters ending upon the first days of January, April, July and October; the payments for the preceding quarters are to be made respectively on or before the tenth days of January, April, July and October; on such days Besser, in addition to making such payments is also to furnish Lagarde certified statements of all transactions relating to the subject

matter of this agreement which have been made during the preceding quarter; and Lagarde is hereby given the right of access, through a certified public accountant, to those books of Besser involved in these transactions, for the purpose of verifying statements as to royalty payments, said access to be at reasonable business hours.

6. The party Besser agrees to reimburse Lagarde for all monies already expended on patent expenses for said identified applications for United States Letters Patent, Serial Numbers 691,549 and 727,639, and further to pay all future normal necessary patent application expenses in connection therewith until said applications issue into United [fol. 2961] States Letters Patent or are finally rejected in the Patent Office.

7. The party Besser agrees to pay Lagarde the sum of Fifty Dollars ($50.00) per month beginning the first day of April, 1947, and continuing for a period of three (3) years thereafter for the privilege of Besser, or its employees, having access from time to time in the future to Lagarde's plant, during normal business hours, to observe any new developments or ideas Lagarde, or his employees, may suggest or employ in the field of machinery related to the manufacture of concrete products and related mechanisms or products. At the end of the three year period above prescribed, the privileges granted by this paragraph to Besser shall continue without the payment of the $50.00 per month herein provided if Besser mantains the minimum yearly payments set forth in paragraph 4.

8. In the event the parties to this agreement mutually agree that one or more patent applications should be filed on any subject matter arising under the conditions enumerated in paragraph 7, then Besser will pay any normal necessary patent expenses thereon. However, in the event Besser does not concur in the belief that one or more patent applications should be filed on such subject matter, then Lagarde shall have the right to file any such patent applications, at his own expense, and Letters Patent issuing from such applications shall not be covered by this agreement, but Lagarde agrees to give Besser the first option

to purchase such patent or patents or to obtain a license [fol. 2962] thereunder, on mutually agreeable terms.

9. The payment of any money by Besser under the conditions enumerated in paragraph 7 is understood to be only for the privilege of meeting with Lagarde or his employees from time to time to observe any new developments that Lagarde may employ in the normal and expected improvement of Concrete Block making Machinery, products, or processes relating thereto. In event any novel patentable ideas or devices that Lagarde or his employees, may conceive in the field of machinery employed in the manufacture of concrete products or related mechanisms or products are considered by Lagarde to be too large for him to undertake to develop without disrupting the normal conduct of his business, Besser may, at its option, undertake to develop such mechanisms or products in the Besser Laboratories for the mutual benefit of both parties.

10. This agreement shall be binding upon the heirs, administrators or executors of Lagarde or the successors or assigns of the entire Lagarde business, and upon successors or assigns of the entire business of Besser unless sooner terminated as provided hereinafter.

11. It is understood that, due to the substantial personal equation and the nature of the factors involved in paragraphs 7, 8, and 9 imparted to this agreement by the party Lagarde, personally, and individually, Besser may, at its option, terminate payment of any monies as provided in paragraph 7 after the decease of Lagarde, or after any conveyance of the entire business of Lagarde or his withdrawal from active participation therein.

[fol. 2963] 12. In the event of a final adjudication of bankruptcy, or assignment for the benefit of creditors, by either party to this agreement, this agreement shall be binding except as provided in paragraph 11 upon the heirs, successors, or assigns of the entire business of either party.

13. The agreement set forth in paragraph 7 may be terminated by Lagarde upon failure of Besser to pay monthly the monies mentioned in paragraph 7, but the remainder of this agreement shall in no wise be affected by the parties terminated under the terms of this agreement.

14. Besser hereby releases Lagarde from any claims for damages by reason of any prior acts or infringement if any, of any patents owned by Besser.

John B. Lagarde. (L. S.)

John F. Stark, Witness.

Besser Manufacturing Company, Jesse H. Besser, President. (L. S.)

John F. Stark, Witness.

[fol. 2964] EXHIBIT 93

Western Union

Washington, D. C.,
March 21, 1947, 5:51 P. M.

Louis Gelbman

750 Edgewater Rd.

Confirming today's phone conversation we are as license-s agreeable to permitting one Mr. Lagarde of Alabama to continue to use two block machines heretofore built which we understand are pos-ible infringements of patents under which we are licensed provided we secure appropriate agreement from Lagarde whereby he agrees not to infringe further.

Stearsn Mfg. Co. Inc., Eugene F. Olsen, President.

[fol. 2965] EXHIBIT 95

Phone Beacon 7197

February 7, 1948.
Detroit, Michigan,

Columbia Machine Works
105 Main Street
Vancouver, Washington

Attention: Mr. Fred Neth

Re: Patent Nos. 2,366,780; 2,275,676; 2,106,329

Gentlemen:

In accordance with Mr. Besser's recent and pleasant visit to your plant, at his instruction, I am enclosing copies of the above identified patents for inspection and consideration by you and/or your patent counsel.

These patents are under exclusive license to Besser and carefully protected by the patentee, sometimes to a degree and with a vigorousness that is embarrassing to Besser. Therefore, it seems appropriate that you should examine the enclosed property matter at this time in view of any long range plans you may contemplate investment-wise for the coming year.

Of course, there are further and other numerous patents related to this subject matter either owned or controlled by Besser under which you may, or may not, be innocently operating. However, not having had the opportunity to inspect your machine, I am unable to make a statement at this time.

In this connection, the writer plans to be in your state sometime later this month and would appreciate the courtesy at that time of going over this matter more in detail with you, especially after you have had the opportunity to confer with your patent counsel. In the event you do not have a patent attorney the writer would consider it a favor to give you an unbiased opinion after inspection of your machines, subject to confirmation, of course, by an attorney of your own choosing.

[fol. 2966] Any further correspondence you may desire to have prior to my visit may be directed to my home where I expect to be generally until my projected trip.

Very truly yours, Besser Manufacturing Company, John F. Stark, Patent Counsel, 1074 Maryland Ave., Detroit 30, Michigan.

JFS:ms

[fol. 2967] EXHIBIT 96

W. Elmer Ramsey
Attorney at Law
Suite 515 Pacific Building
Telephone Beacon 7187-8
Portland, Oregon

September 21, 1948.

J. F. Stark, Esq.
1074 Maryland Avenue
Detroit 30, Michigan

Dear Mr. Stark:

When you were in my office last spring, you charged my client with possible infringement of United States Patent No. 2,366,780, issued January 9, 1945 to Louis Gelbman et al., entitled Method for Making Building Blocks. At the same time, you called attention to United States Patent No. 2,275,676, also to Louis Gelbman et al., and entitled Concrete Block Machine. At such time, the patent to Scott, United States Patent No. 2,106,329, entitled Apparatus for Treating Materials, issued January 25, 1938, was discussed. I thought it was agreed between us that there was no charged infringement of the Scott and Gelbman concrete block machine patents. Later, over the telephone, you said that my client was charged with infringement of the Scott and Gelbman machine patents.

This has required that the problem be examined piecemeal and explains the delay in forwarding my client's viewpoint to you.

Over the telephone a few days ago, you told me you did

not feel that the Scott patent was up for consideration, and wished an answer only on the two Gelbman patents.

I can not find in the Gelbman et al. concrete block machine, Patent No. 2,275,676, anything which approaches my client's machine, either in structure, function or result, and thus have advised them that there is no possibility of infringement of said patent.

With regard to the Gelbman et al. patent entitled Method for Making Building Blocks, No. 2,366,780, I concur with the contention of the attorney for Gelbman et al. before the Board of Appeals that "Applicants' invention and method is specific. It is not broad and does not dominate any apparatus using vibration, or using vibration during the charging of the mold, or using vibration after the charging operation to pack the mold." Applicants, through their attorney, thereafter specifically limited the claims to [fol. 2968] the clear wording thereof to provide that vibration starts when the feed drawer is first moved over a vibrating mold. My client's machine does not follow this method, nor would it operate satisfactorily if it did.

The file wrapper, the patent art, the practical art, and applicant's actions throw grave doubt on the validity even of this very specific coverage. I have thus advised my client that there is no infringement of the Gelbman method patent.

My client is proceeding to develop its own invention and to prosecute patent protection thereon.

Kindest regards.

Yours very truly, W. Elmer Ramsey.

WER:dr

[fol. 2969] EXHIBIT 97

October 23, 1948.

Mr. W. Elmer Ramsey, Esq.
515 Pacific Building

Re: Columbia Machine Works

Dear Mr. Ramsey:

This will reply to your letter of September 21st and our conversation in Portland recently regarding your above identified client.

With further reference to your aforementioned letter and the discussion therein relative to the Gelbman method Patent No. 2,366,780 may I offer for your consideration the fact that there are two claims in this patent. You have apparently only read one of these claims and it happened to cover the method which your client was not practicing, namely the movement of the reciprocable feed drawer from one side of a *vibrating* mold to the other. The second claim which is also pertinent, and apparently followed by your client recites that the feed drawer is moved from one side of a mold to the other and *then the mold is vibrated*. Obviously, your clients machine operates in one manner or the other as defined in these claims. That is to say, either the mold is initially at rest when the feed drawer is moved across it and then vibration is started, or the feed drawer is moved across a mold already vibrating. May I have your further comments and/or consideration on this matter which you conceded to be a point.

Since our discussion a further inspection of the operation and construction of the subject machine relative to the Scott Patent No. 2,106,329 has revealed an interesting and apparently quite pertinent point. At a dinner engagement with Mr. Fred Neth, we discussed the mold box mounting and construction of his machine in view of claim 6 of the Scott patent. Mr. Neth attempted to point out that his mold was rigidly secured to the machine and vibration means and that due to the great difference in mass between the mold box per se and the frame, as a whole, per se, that vibration of the mold did not effect vibration in the machine. It was pointed out to him on that basis that, that was the reason that a resilient relation did in fact exist

because of this great difference in mass and insured the resiliency.

In addition to the foregoing, and as a matter of actual construction, it is now apparent that the mold box is resiliently or freely supported on a shoulder stat or ledge within the frame structure. Therefore, it is capable of being displaced from its original position and returning thereto, without transmission of vibration to the frame, within Websters generic meaning of the word "resilient". [fol. 2970] In conclusion, since the mold has a resilient mounting in the frame and vibration is isolated therefrom, the track system or slide which provides a "way" for the feed drawer to reciprocate on between the supply hopper and the mold, as defined in Cl. 1 of the Gelbman apparatus Patent No. 2,275,676 is also protected from the vibrations of the mold and thus it also comes into the picture. Therefore, may we be favored with a reply at your early convenience of a review of these important matters in the light of these latest developed facts.

Yours very truly, Besser Manufacturing Co., John F. Stark, Patent Counsel.

JFS:msk
cc Mr. Fred Neth

[fol. 2971] EXHIBIT 98

Besser Manufacturing Company

Alpena, Michigan

Detroit, Michigan
February 3, 1948

Scripps Pearson Machine Company
Edmonds, Washington

Attention: Mr. Pearson

Re: Patent Nos. 2,366,780; 2,275,676; 2,106,329

Gentlemen:

In accordance with Mr. Besser's instructions, I am enclosing copies of the above identified patents for inspec-

tion by you and/or your patent counsel on the assumption that they might have been overlooked in your previous search of patents on concrete block machinery.

These patents are under exclusive license to Besser and carefully protected by the patentee, sometimes to a degree and with a vigorousness that is embarrassing to the Besser Company. Therefore, it seems appropriate that you should examine the enclosed property matter at this time in view of any long range plans you may contemplate investment-wise for the coming year.

Of course, there are further and other numerous patents related to this subject matter either owned or controlled by Besser under which you may, or may not, be innocently operating. However, not having had the opportunity to personally inspect your machine I am unable to make a statement at this time.

In this connection, the writer plans to be in your city sometime later this month and will appreciate the courtesy at that time of going over this matter in more in detail with you, especially after you have had the opportunity to carefully consider this matter with your patent counsel.

Any further correspondence you may desire to have prior to my visit may be directed to my home where I expect to [fol. 2972] be generally until my projected trip.

Very truly yours, Besser Manufacturing Company, John F. Stark, Patent Counsel, 1074 Maryland Ave., Detroit 30, Michigan.

cc: Mr. Scripps
Mr. J. H. Besser
Mr. E. Flewelling

JFS:ms

[fol. 2973] EXHIBIT 99

Memorandum of Agreement

This agreement, made and entered into this seventh day of December, 1948, by and between Bernard Flam of 15025 Oxnard Street, Los Angeles, California, hereinafter re-

ferred to as Licensor, and Besser Manufacturing Company, a corporation duly organized and existing under and by virtue of the laws of the State of Michigan, having a principal place of business in Alpena, Michigan, hereinafter to as Licensee,

Witnesseth:

Whereas, Licensor is the owner of the following application for United States Letters Patent, and which application is based upon an invention made by Licensor:

Application	Date of Filing	Title
758,097	June 30, 1947	Vibratory Mechanism for Molds

and whereas, the Licensor is about to file one or more applications for United States Letters Patent for a concrete block molding machine; and

Whereas, Licensee is desirous of acquiring the exclusive right and license to make, use, and sell devices and apparatus described in said application, as well as the application about to be filed; and

Whereas, Licensee is desirous of acquiring the exclusive right and license to make, use, and sell devices and apparatus embodying any inventions heretofore made by Licensor relating to the manufacture of concrete block, tile, and brick making machines, and stationary concrete mixers, and to have the option to rights, as hereinafter provided for, in any future invention,

Now, therefore, to all whom it may concern:

Be it known that, for and in consideration of the sum of One Dollar ($1.00) and other valuable considerations received by the Licensor from the Licensee, receipt of which [fol. 2074] is hereby acknowledged, and in consideration of the mutual covenants of said parties as hereinafter set forth, it is covenanted and agreed by and between the said parties as follows:

1. Licensor hereby grants to the Licensee, for the life of any patent, reissue, or extension thereof, that may be granted as a result of the said existing application, as well as the application about to be filed, or any application to be applied for hereunder, the exclusive license and privi-

lege of making, using, selling, or leasing embodiments of the inventions disclosed in the said existing application and applications to be applied for.

Licensee shall have the first option to acquire exclusive rights and licenses in the field of machinery and equipment intended for the manufacture of concrete block, structural tile, and brick making machines, and stationary concrete mixers (saving and excepting so-called "transit" concrete mixers and machinery for manufacturing roof covering tile) under any inventions, and under any Letters Patent granted on said inventions, that may be made by Licensor during the term of this agreement. Licensor shall promptly submit for the consideration of Licensee any such invention, and Licensee shall have an option for a period of one year to acquire said rights.

This license is effective throughout the United States and all foreign countries.

This license is not divisible and not transferable except to the successor of the entire good will and business of Licensee.

2. Licensee hereby agrees to pay, for the said license granted in paragraphs 1, the sum of sixty-five thousand dollars ($65,000.00), payable as follows:

(a) The sum of Three Thousand Dollars ($3,000.00) payable by Licensee to Licensor on the signing of this agreement and One Thousand Dollars ($1,000.00) on the first day [fol. 2975] of each calendar month thereafter, beginning on the first day of March, 1949, and continuing for a period of sixty-two months until the principal sum of Sixty-Five Thousand Dollars ($65,000.00) has been paid. Said payments shall be secured by a third trust deed on the real property located at 15026 Oxnard Street, in the City of Los Angeles, County of Los Angeles, State of California and designated and described as Lots 3, 4, and 5 of Tract No. 13504 in the City of Los Angeles, County of Los Angeles, State of California. Said third trust deed shall secure a promissory note executed by Licensee for Sixty-Two Thousand Dollars ($62,000.00) payable as aforesaid. This encumbrance shall be subject to a first trust deed in favor of Stephen Flam, Incorporated, a California corpo-

ration, and a second trust deed in favor of Stephen Flam individually.

3. If and when the said Sixty-Five Thousand Dollars ($65,000.00) shall have been paid in full to the Licensor, or when the third deed of trust hereinabove specified is delivered to the Licensor, Licensor shall promptly execute an absolute assignment to Licensee of the whole right, title and interest in, to, and under the said applications and for patents, as the case may be.

4. The normal expenses involved in filing and prosecuting the said application and future applications shall be borne by Licensee. However, control of the prosecution of the applications shall be joint, both parties assisting in same.

5. As a further consideration for this agreement, Licensor agrees that, during the period of time provided for the payment of the sum of Sixty-Five Thousand Dollars ($65,000.00) enumerated in paragraph 2 above, and for an additional period of five years after said payment has been made in full, he will not engage in, be connected with, or be employed, or permit his name to be used in any way, shape, or manner in any business or enterprise for the manufacture of apparatus, equipment, or machinery for [fols. 2976-2977] making concrete block, structural tile, brick, or other wall building units or concrete mixers (saving and excepting so-called portable "transit" mixers, and roof covering tile) except in connection with any consultant services which may be rendered under any agreement with the Licensee.

As a further consideration for this agreement, Licensor further agrees to immediately change the present name of his company to some other designated name; but, in no event, shall such company, or any other company hereafter created by the Licensor, use the name of "Flam", or any name of a similar character.

6. Licensee agrees to permit Licensor to dispose of his stock of mold parts on hand, or in process of manufacture, to the extent of a total of ten (10) complete mold attachments.

7. Licensee further agrees to permit Licensor to dispose of, or otherwise utilize in whatever manner he chooses, a

total of three (3) concrete block making machines of the single prototype he has now made; and exclusive licenses under any patentable improvements now incorporated therein, or during the process of completing them, shall pass to Licensee without further compensation and

(a) To furnish normal service parts and mold attachments for use on said three (3) machines, but not to rebuild the same.

In witness whereof, the Licensor has set his hand and the Licensee has caused its corporate name to be hereunto affixed by its president, each of whom represents it to be their free act and deed and hereunto duly authorized this day and year.

Bernard Flam, Licensor. Besser Manufacturing Company, By ——— ———, Its President, Licensee.

[fol. 2978] EXHIBIT 100

Page 1 of 2
January 20, 1948.

Description of Besser Vibrapac With Use Agreement

1. There are many important Advances in 1948 Vibrapacs which give a further Decrease in Costs along with a further Step Up in Quality and Quantity of Product and Ease of Operation.

2. These Vibrapac machines which have been doing such good work in Concrete Block Plants everywhere have now reached a new high in Infallability and Productivity.

3. The Additional Savings and Advantages from these new Vibrapacs are so great that Harold Spaight said "What is going to become of all these Savings. How can they be used best to Advance this Industry."

4. Roy McCandless said, "Besser should put out these new Vibrapacs *with care* so that they will have *some but not too much advantage* over the 600 Vibrapacs already in use. Something highly constructive should be accomplished."

5. Other Blockmakers have also stressed the above points. The Besser Company is also interested only in the Ad-

vancement and Strengthening of this Industry to the utmost.

6. Therefore 1948 Vibrapacs are now going out on a *Use Agreement* whereby the Use of the machines is taken care of from *Part of the Additional Savings and Advantages* which these new machines give.

7. Part of the Savings to the extent of One Cent per 8 x 8 x 16 Block Equivalent take care of the Use of the Vibrapac and Mixer, Attachments, Front Pallet Feed and other features. The minimum has been placed at One Third the Eight Hour capacity of the machine or $500.00 per month.

8. Additional Equipment is also furnished when desired for One Half Cent per block which is paid only for a limited time or until Face Value of Additional Equipment has been cancelled.

9. An Advance Deposit is also made by the User which is returned to him at the rate of One Per Cent per month. This Advance Deposit is the Down Payment which is made the same as if the Equipment were being sold. In that respect there is no difference between selling Vibrapacs or putting them out on a Use Agreement.

10. It is not the intention and nothing is to be gained by putting too many Vibrapacs in use under this arrangement. The tendency and the advantage is the other way, to have each machine operating full capacity as much as possible.

[fol. 2979]

Page 2 of 2
January 20, 1948.

Advantages of Besser Vibrapac With Use Agreement

1. New 1948 Vibrapacs are furnished and they are with latest Advances Including Front Pallet Feed, Improved Offbearing and other features, together with 30% Greater Production. These new Vibrapacs give large Savings and Advantages over older machines.

2. Under this Use Agreement the new 1948 Vibrapacs are given *some but not too much advantage* over the 600 Vibrapacs already in use. This seems highly desirable for the protection of Old Time Blockmakers who already have

Vibrapacs in their plants and for the accomplishment of great things for this Industry.

3. The Industry is being stabalized and Considerable protection given to it because it is now more to everyone's advantage to get large production from each machine.

4. The incentive to get large production from each machine and not have too many machines in use is inherent in this arrangement.

5. The Use Payments *do not* come out of the Pocket of the Blockmaker. They come from a part of the Additional Savings and Advantages which these new Vibrapacs give. *They come out of something that no one ever had before.*

6. The Blockmaker can use his money for Working Capital and does not have it tied up in Equipment.

7. All Use Payments are charged immediately against Income Tax so that 40% or more of all Use Payments are paid by Uncle Sam.

8. The Used Machine menace is taken care of. It seems that the accomplishment of just this point makes this arrangement highly advisable.

9. Income Taxes for Besser are spread out over ten years instead of being paid immediately to the extent of 40%. This releases funds with which much can be accomplished for the Industry.

10. A large number of the most important Blockmakers have given their approval to this Use Agreement by taking Vibrapacs in this way.

EXHIBIT 101

LEASE

BESSER MANUFACTURING COMPANY, ALPENA, MICHIGAN, U.S.A.

Date _____ 19__

Lessee _____ P.O. Box _____

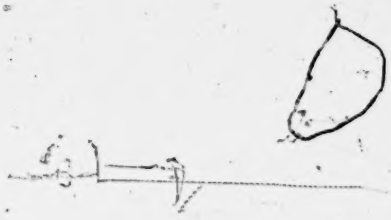
Street _____ County _____

City _____ State _____

Ship to this Address
if Different from Above _____

How Ship _____

Quantity	Description of Equipment
	Electric Current. Ph. Cycle _____ Volts
	Mixer Height



1304

Page 2

Quantity	Description of Equipment

2981

Agreement to Lease

1. BESSER MANUFACTURING COMPANY of Alpena, Michigan, hereafter called "Besser" agrees to furnish and to lease to Lessee named on Page 1 the Equipment listed on Pages 1 and 2 upon the conditions stated herein and Lessee agrees to take and rent said equipment upon said conditions, title to said equipment and additions thereto to be and remain in Besser at all times. The leased Equipment shall not be transferred or delivered or sublet to any other person or corporation, and neither this agreement nor the lease hereby granted can be assigned by the Lessee by his own act or by operation of law.

Payments

2. Lessee will make following Rental Payments.

_____ Advance Rental. Payable as follows:

$_____ At Signing of Lease.

$_____ Balance at Time of Shipment

3. Regular Monthly Rental as follows:

$500.00 Per Month Minimum Monthly Rental.

Or One (1) Cent per 8 x 8 x 16 Block Equivalent when that is greater.

4. Additional Monthly Rental as follows:

$_____ per Month.

Or One Half (1/2) Cent per 8 x 8 x 16 Block Equivalent when that is greater until

5. $_____ in additional equipment has been offset from this additional rental.

6. Payment of Additional Rental as above is to be full Rental Payment and the only Rental required on Additional Equipment for the Full Five Year period or optional Ten Year period of this lease.

Return of Advance Rental

7. One (1) Per Cent of Total Advance Rental is to be deducted from each Regular Monthly Payment. If this Lease is renewed after the first period, these deductions shall continue in the new period until all advance rental is returned to Lessee. If Lease is not renewed any balance of Advance Rental will be returned to Lessee when Equipment is returned to Besser in good condition provided all rent is paid.

Yearly Minimum

8. When, with the help of Per Block Payments, enough Rent has been paid to equal the monthly minimums for the whole year, any further monthly minimums for said year can be omitted and payments made on per block basis only for balance of said year.

Time of Production Reports and Payments

9. Lessee is to make the monthly payments and also make accurate monthly Production Reports of the product of this equipment on blanks furnished by Besser, and send same to Besser by tenth of each month for preceding calendar month.

Location of Equipment

10. This Equipment is to be placed in Lessee's plant at

Street _____ County _____

City _____ State _____

and is not to be moved from this location except by written consent of an authorized Besser officer.

The additional conditions on back hereof are made a part of this Lease Agreement.

The Above is Agreed to:

Date _____ 19__

_____
Lessee

By _____

_____
Officers Title

BESSER MANUFACTURING COMPANY

By _____
Besser Representative

Approved at Alpena, Michigan

Date _____ 19__

BESSER MANUFACTURING COMPANY

By _____
Authorized Signature

Checking Production

11. Besser representatives shall have free access at reasonable times to Plant and records of Lessee to check production reports called for above and may place counters on said equipment. These counters will be arranged to give important information to both parties and both parties hereto will cooperate for the maintenance and proper operation of said counters.

Time of Lease

12. This lease shall begin and monthly payments and reports shall begin to accrue when operation of equipment begins in Lessee's plant and at any time within thirty days from time of shipment to Lessee. This Lease shall continue for five (5) years from its beginning. Besser also hereby gives Lessee an option and the right to renew this Lease for a second five (5) year period, said option to continue to within six months of expiration of first five (5) year period.

_____ is the time of beginning of this lease.

Shipping Installing Starting

13. Besser will furnish this equipment FOB Alpena, Michigan or other point of manufacture and will furnish proposed plant layout and suggestions for installation, when Lessee has installed the equipment and has it ready for operation, Besser will send its Expert who will instruct Lessee in the use of the equipment and the manufacture of the Product.

Working Together for Good Results

14. Besser will maintain a staff of Engineers who will make periodic visits to Lessee's plant to inspect the operation of said Plant and Equipment and make suggestions for securing high grade results and a high grade product. Both parties hereto will actively work together for this purpose.

Guarantee and Care of Equipment

15. Besser guarantees this equipment to do good work when properly operated with good material and will replace without charge FOB Alpena, Michigan any parts which require replacement within one (1) year because of defective material or workmanship. Lessee will take good care of this Equipment and will keep it in good working condition and will make necessary replacement of parts at expense of Lessee, except as stated above, and will return said equipment at direction of Besser by freight prepaid at end of Lease period in good condition except for natural wear.

Expiration of Lease, Return of Equipment

16. If this Lease expires and the Equipment is not returned by Lessee or retaken by Besser then Lessee shall continue to make regular monthly reports and payments as called for herein. Upon expiration of this Lease and failure to renew, or in case of non-payment of rent or failure by Lessee to carry out the conditions of this Lease, Besser shall have the right immediately after thirty (30) days written notice to enter the plant of Lessee and take possession of and remove said equipment without process of law.

Insurance Taxes

17. Besser at its own expense shall carry the responsibility of Fire insurance and of loss by fire. Lessee shall be responsible and will make good for loss or damage in any other way except by fire and will also pay all taxes which are assessed on this Equipment after it is placed in Lessee's plant and until redelivery to Besser.

18. Machines and attachments, in addition to the above, or to replace any Lessee may have in use, will be furnished Lessee in accordance with the conditions of this lease at the rates prevailing at the time Lessee's order for same is received.

[fol. 3016] EXHIBIT 108

CENSUS OF MANUFACTURES: 1929

Table 1.—Machinery—Production of Principal Classes, for the United States, by Number and Value, 1929, and by Value, 1927 and 1925—Continued

Class	1929		1927	1925
	Number	Value	Value	Value
Cement and concrete machinery, total		$19,924,105	$20,533,525	$23,830,391
Cement-making machinery		4,387,383	4,619,269	4,146,083
Cement and concrete block machines, total		1,147,021	655,788	1,460,515
Reported with number	2,106	918,467		
Reported without number		228,554		
Concrete mixers, total		11,404,923	12,673,978	12,619,755
Reported with number	16,145	8,809,519		
Reported without number		2,595,404		
Other cement and concrete machinery		2,984,778	2,584,490	5,604,038

[fol. 3017]

Cement and concrete machinery, total	19,924,105
Cement-making machinery, total	4,387,383
Pennsylvania	586,266
Mich., N. J., N. Y., Ohio, and Wis.	3,781,488
Other States (Kans., Tex., and Wash.)	19,629
Cement and concrete block machines, total	1,147,021
Michigan	624,616
Ohio	322,601
N. J. and Pa.	124,079
Other States (Calif., Ind., Minn., N. Y., Oreg., and Tex.)	75,725
Concrete mixers, total	11,404,923
California	288,104
Michigan	558,401
Pennsylvania	209,276
Wisconsin	5,255,058
Ill., Ind., Iowa, and Kans.	697,746
N. J., N. Y., and Ohio	4,383,330
Other States (Ark., Mass., Tex., and Wash.)	13,008
Other cement and concrete machinery, total	2,984,778
California	106,493
Illinois	90,915
Iowa	250,161
Ohio	320,186
Pennsylvania	54,618
Wisconsin	801,026
Other States (Ark., Ind., Mass., Mich., Minn., N. J., Oreg., Tenn., and Tex.)	1,361,979

[fol. 3018] EXHIBIT 109

Table 1.—Machinery—Production of Principal Classes, by Number and Value, for the United States: 1931 and 1929—Continued

[All the figures for 1931 and a minor part of those for 1929 represent production, but the major part of the 1929 figures refer to manufacturers' sales (shipments or deliveries)]

Kind	1931			1929		
	Number of establishments reporting	Number	Value	Number of establishments reporting [1]	Number	Value
Cement and concrete machinery, total	..	.....	$7,393,936	..	.....	$19,924,105
Cement-making machinery	16	.....	1,579,346	18	.....	4,387,383
Cement and concrete-block machines, total	18	.....	416,823	22	.....	1,147,021
Number reported	..	320	224,066	..	2,106	918,467
Number not reported	..	.....	192,757	..	.....	228,554
Concrete mixers, total	38	.....	4,357,157	44	.....	11,404,923
Number reported	..	4,197	4,168,780	..	16,145	8,809,519
Number not reported	..	.....	188,377	..	.....	2,595,404
Other cement and concrete machinery	21	.....	1,040,610	43	.....	2,984,778

[fol. 3019] Table 2.—Machinery—Value of Production of Selected Classes, for Selected States: 1931

[This table gives statistics for each State which reported products of the specified kind to the value of at least $250,000, except in cases where it is necessary to withhold the figures to avoid disclosing exactly or approximately, the values reported by individual establishments.]

Kind and State	Value
Cement-making machinery, total	$1,579,346
Pennsylvania	695,297
Cement and concrete-block machines, total	416,823
Michigan	282,932

[fol. 3020] EXHIBIT

This agreement, made June 26, 1934, between Besser Manufacturing Company, a corporation of Alpena, Michigan, First Party and Eugene F. Olsen, of Adrian, Michigan, Second Party, witnesseth:

Whereas the parties entered into an agreement on July 16, 1932, providing for certain exchanges of stock and property upon the terms and conditions therein set forth, to which agreement reference is made, and

Whereas paragraph 5 of said agreement provides, in part:

> "First party agrees to pay taxes on the Adrian property for 1931 and prior years with interest and penalties on or before July 1, 1933, such taxes now amounting to $2008.47."

And, whereas, first party has paid a part of such taxes but has not paid a balance now amounting to $776.07, and

Whereas second party agreed in paragraph 7 to not use or permit the use of the Adrian property for the manufacture of Concrete Products Machinery or Hot-Process Coal Block Machinery for ten-year period, and

Whereas second party now proposes to engage in the business of manufacturing such machinery and could advantageously use the property covered by the above restriction for that purpose, and

Whereas second party has proposed to first party that in consideration of relieving the property of the restrictions of paragraph 7 of the agreement of July 16, 1932, second party will assume and pay the unpaid balance of taxes which first party has heretofore agreed to pay, which proposal is acceptable to the first party. Now, therefore,

The parties agree that the July 16, 1932 agreement be and the same is changed as follows:

1. Paragraph 7 is stricken and the restrictions therein impressed are released.

2. The second party hereby releases the first party from further liability for the payment of taxes and upon execution of this agreement will deliver a release from the

Adrian State Bank of any claim it may have against first party growing out of his guarantee of the mortgage and the date of the delivery thereof shall be the effective date of release.

3. Both parties declare the requirements of each under the agreement of July 16, 1932, to have been fully performed and each party releases the other from all claims and demands thereunder.

In witness whereof the parties have caused this agreement to be executed the day and year first above written. In presence of:

Besser Manufacturing Company, By J. H. Besser, President, First Party, Eugene F. Olsen, Second Party.

Carl R. Henry.
Thelma M. Burkert.

[fol. 3020A] EXHIBIT 111

License Agreement

Agreement made and entered into as of April 1, 1938 by and between Joltcrete, Inc., a corporation duly organized and existing under and by virtue of the laws of the State of New York, with its office and principal place of business located in the City of New York, County of New York, and State of New York, hereinafter referred to as "Licensor", party of the first part, and Stearns Manufacturing Co., Inc., a corporation duly organized and existing under and by virtue of the laws of the State of Michigan, with its office and principal place of business located in the City of Adrian, County of Lenawee, and State of Michigan, hereinafter referred to as "Licensee", party of the second part, and Eugene F. Olsen, a resident of Adrian, in the State of Michigan, hereinafter referred to as "Olsen", party of the third part;

Witnesseth:

Whereas, the Licensor and Olsen have heretofore entered into three certain license agreements dated the 13th day of

November 1934, the 1st day of July 1936, and the 6th day of August 1937, respectively, pursuant to the terms of which certain license fees and royalties were promised and agreed to be paid by Olsen to the Licensor; and

Whereas, default has been made in the payment of said license fee and royalties, and the parties hereto are desirous of terminating the said license agreements and entering into a new and different agreement; and

Whereas, the Licensor is the sole owner of and has the sole and exclusive right and authority to issue licenses under and pursuant to certain inventions, discoveries and patents, applying to and covering a certain new and useful molding machine and process, which said inventions and discoveries are described and embraced in the letters pat- [fol. 3020B] ent and applications for letters patent, as follows: United States Patents #1,867,144; #2,003,632; #2,029,365 and #2,069,880. United States Patent Application #741,090. Canadian Patent #302,597; and

Whereas, Licensee is desirous of obtaining and Licensor is desirous of granting, the right and license to make and sell building units machines of the design and description hereinafter set forth described and limited, only, and not otherwise, and upon and pursuant to the terms and conditions, limitations and restrictions hereinafter set forth, and not otherwise; and

Whereas, Licensor is desirous of retaining, for its own benefit and advantage, the sole and exclusive right and privilege to use, exploit and enjoy its said inventions and discoveries, patents and patent applications, and each of the same, including the right to manufacture concrete units within the area comprising the five borough limits of New York City, except as herein specifically granted. Nothing in this paragraph, however, shall prevent Mahlstadt Materials, Inc., from continuing to manufacture concrete units under an agreement with the Licensee, in its present plant located in the Borough of Bronx at 233rd Street and Provost Avenue.

Now, therefore, in consideration of the sum of One Dollar and other good and valuable considerations by each of the parties to the other paid, receipt whereof is hereby acknowledged, and of the mutual promises herein contained,

the parties hereto have agreed and do hereby covenant and agree as follows:

First: Subject to the due and proper performance of all of the terms, covenants and conditions, restrictions and limitations herein set forth by the parties hereto, Licensor has given and granted, and by these presents does hereby give and grant unto the Licensee the sole and exclusive license and privilege of making and selling building units machines of the design and description, only, as hereinafter set forth pursuant to said inventions and all im- [fol. 3020C] provements thereon applicable to building units machines of said design and description, only, and not otherwise, both for the term and upon the conditions, and subject to rights of cancellation, as hereinafter set forth.

Second: This license applies and is limited to the manufacture and sale of concrete building units machines of such design and construction, only, as to be adaptable to and useful in the manufacture of concrete building units, only, not greater, in any dimension, than twenty-four (24) inches in length, twelve (12) inches in height and twenty-four (24) inches in width. The license hereby granted to make said machines is limited and restricted to, and specifically conditioned upon, the enjoyment thereof in the manufacture of concrete building units of said size and description, only, and not otherwise, and is not to extend to, or be employed in any other or different purpose, or in the manufacturing or processing of any other or different article or object whatsoever, unless the consent of the Licensor therefor is first obtained in writing.

Third: It is expressly understood and agreed that the take-off device shall not be made, or used, or distributed for use, for or with any apparatus or machine, or for any purpose other than or except in conjunction with building units machines as licensed herein.

Fourth: Unless sooner terminated, as herein provided, this license shall extend to the remainder of the terms of said letters patent and any of the same issued or to be issued upon applications for letters patent relative to said improvements, now pending or hereafter to be filed, and to any reissue or reissues thereof, and to any assignments

which the Licensee may make to the Licensor under the terms of paragraph "Seventeenth" hereof. The license herein granted shall be exclusive to Licensee.

[fol. 3020D] Fifth: The license herein granted to make said building units machines shall extend and be restricted to Licensee's factory or factories, operated under Licensee's exclusive control, located in the City of Adrian, State of Michigan, and to such other places located within the continental United States and Dominion of Canada as Licensee may hereafter designate to Licensor, in writing. The license herein granted to sell building units machines and appliances in connection therewith shall extend to or include the said City of Adrian and such other places located within the continental United States and Canada wherein Licensee's factory or factories may hereafter be designated, as aforesaid. Licensee promises and agrees that it will manufacture any and all building units machines hereunder within the said City of Adrian and in such other place or places within the continental United States and Canada, only, and that it will not manufacture or cause to be manufactured or associate itself in the manufacture, directly or indirectly, of building units machines as herein described, in an city, place or places other than as hereinbefore provided.

Sixth: License covenants and agrees to pay to Licensor, during the continuance of this agreement, for the enjoyment of the right herein granted, a license fee or royalty as follows:

A license fee or royalty equal to 20% of the sales price, exclusive of any and all discounts and allowances, of each and every such units machine, but in no event less than $300.00 upon each and every such machine.

[fol. 3020E] A license fee or royalty equal to 10% of the sales price, exclusive of any and all discounts and allowances, of each and every repair and/or replacement part or parts, except that pallets and dividing plates shall be free of said royalty.

Said royalties shall be due and payable to the Licensor in the following manner:

In the case of a sale of a unit for cash, the Licensee shall pay to the Licensor $300 or 20% of said sales price if more

than $300 on the day following the receipt of said sales price by the Licensee.

In the case of sale of a unit on terms by the Licensee, then the Licensee shall pay to the Licensor 20% of each collection, including among said collections, the down payment on the day following the receipt of each of said payments by the Licensee. There shall be included, in said payments for the purpose of measuring said 20%, 6% simple interest on all instalments received by the Licensee after the down payment. The royalty on each unit exclusive of the interest factor, shall be not less than $300.00.

In any case in which the Licensee credits the purchaser against the sales price with the value of a concrete block machine unit, then the 20% royalty on the amount of said credit shall not be paid, but instead, royalties shall be paid by the Licensee to the Licensor upon the sale of said unit received in trade in the same manner as if it were a new unit.

In the case of the repossession of a unit sold by the Licensee on the instalment plan, the royalty applicable to [fol. 3020F] the unpaid balance of the sales price of said unit shall be cancelled, and thereafter, royalties shall be payable on said units only upon its resale, and then in the same manner as it were a new unit.

In the case that the Licensee, however, effects additional collections on the sales price of a repossessed unit after the repossession, the Licensee shall pay to the Licensor 20% of such additional collections in the same manner as in the case of all other collections.

Upon the receipt by the Licensee of any units either as trade-in or repossessions, the Licensee shall advise the Licensor of the reasonable value of said unit; and if any of said units are unsold by the Licensee upon the termination of this agreement, the Licensee shall thereupon forthwith pay to the Licensor 20% of said reasonable value.

In the case of the sale of repair and/or replacement part or parts, the Licensee shall pay unto the Licensor 10% of the selling price the day after the receipt of said price by the Licensor.

Minimum sales shall be consummated and royalty payments thereon shall be made upon the following basis, and

in default thereof, the Licensor may, at its option, cancel this agreement.

(a) From April 1, 1938 to December 31, 1938, the Licensor shall pay to the Licensor total minimum royalties of not less than $10,000. exclusive of an in addition to the sum of $2,157.65 paid by Olsen to the Licensor in April 1938.

(b) From and after January 1, 1939, the Licensee shall make sufficient sales to pay royalties and shall pay royalties during each three month period to the Licensor thereon of not less than $3,750. quarter-annually. Said minimum quarter-annual payments shall be due on the first day of April, July, October and January:

[fol. 3020G] provided, however, nothing in this paragraph shall obligate the Licensee to make any payments to the Licensor of any sum in excess of the license fee or royalty on such machines, parts and accessories as may actually be sold by Licensee, and said Licensor shall not be entitled to any damages for failure on the part of the Licensee to sell any specified number of said machines. In the event that Licensee make, sell and pay royalties upon said units machines, as aforesaid, during any three (3) month period, in excess of the minimum amount for that period, as above provided, such excess, should the amount of all royalties therefore made hereunder aggregate, at least, the minimum for such period as above set forth, may be applied upon and credited to the subsequent period next following.

Seventh: Licensee agrees to properly affix all necessary statutory patent notices and labels, to all machines licensed hereunder. Each of such labels shall also bear the name "Jolterete" in conspicuous lettering as per trade mark registration and shall be consecutively numbered in such manner that all such machines may be identified by reference to the respective invoices thereon as hereinafter provided.

Eighth: The license herein granted shall not in any manner whatsoever be subljcensed or encumbered by Licensee without the written consent of the Licensor first had and received.

Ninth: Licensee promises and agrees that it will not enter

into any agreement to, nor shall it by any other means, restrict the sale of any such machines to any area, nor limit the number of machines sold or to be used within any area, nor shall it rent or lease or distribute said machines upon any basis whatever, except upon outright sale, subject to the payment of royalty to Licensor, as aforesaid, without [fol. 3020H] the specific consent of the Licensor in each and every case first had and received, in writing, to Licensee. The Licensor, in the event of termination of this agreement, agrees to honor any special arrangement regarding territory or restrictions of sale which the Licensee may have made with any customer with the written consent of the Licensor.

Tenth: Licensee shall make written reports to Licensor monthly on the first day of each and every month during the term of this agreement commencing June 1, 1938, addressed to Licensor, at its office, setting forth in detail all building units machines and/or repair and/or replacement parts made by him hereunder, including the identifying number thereof, as hereinbefore provided, together with true carbon copies of invoices of each and every sale subject to royalty hereunder. Licensee shall also promptly furnish to Licensor true copies of any and all drawings, in sufficient detail to enable Licensor to ascertain whether invention or improvement has been made by Licensee pursuant to Par. 17 herein contained.

Eleventh: Licensee hereby admits the validity of said letter patent, and each of the same, issued and to be issued upon application for letters patent relative to any said improvements now pending or hereafter to be filed, and agrees not to dispute the validity thereof, or title of the Licensor thereto, and further agrees that it will not at anytime contest the same directly or indirectly in any way whatsoever, or aid others in so going.

Twelfth: The Licensee agrees to keep full, accurate and complete books of account, records, data and memoranda in sufficient detail to enable the royalties hereunder by the Licensee to be determined, and further agrees to and does hereby give to Licensor the privilege of examining its fac-

tories, machinery and equipment and books and records, during usual business hours, for the purpose of verifying [fol. 30201] the reports hereinbefore.

Thirteenth: Licensee covenants to use its best efforts and endeavors to exploit, to the fullest extent, the license herein granted, for the mutual benefit and advantage of the respective parties hereto, and the Licensor hereby grants to Licensee the right and privilege to use the name "Jolt-crete" in the enjoyment of said license.

Fourteenth: If Licensee shall at any time make default in the payment of any royalty, or making of any report hereunder, or shall commit any breach of any covenant or agreement herein contained, or shall make any false or incomplete report, provided for herein, the Licensor may notify Licensee of any default, breach, and or error, and of Licensor's intent to cancel, in writing, and should Licensee fail to correct said default, breach, and or error, within fifteen (15) days of such notice and explain said default, breach, and or error, to the satisfaction of the Licensor, the Licensor may at its option, cancel this agreement and revoke the license herein granted by notice in writing to such effect, but such act shall not prejudice the right of the Licensor to recover any royalty or other sum due at this time of such cancellation and shall not prejudice any cause of action or claim of the Licensor accrued or to accrue, on account of any breach or default made by the Licensee.

Fifteenth: If the Licensee shall become insolvent, or shall make an assignment for the benefit of creditors, or proceedings in voluntary or involuntary bankruptcy shall be instituted in behalf of or against the Licensee, or a receiver or trustee of the Licensee's property shall be appointed, or it shall invoke the benefit of any Federal or State insolvency or bankruptcy law, the license herein granted shall terminate forthwith, but the Licensor shall be entitled to recover royalties due and unpaid.

Sixteenth: If this agreement shall be terminated for any reason, Licensee shall have the right to complete any machines then in process of manufacture and to sell the same paying the License Fee or Royalty thereon as hereinbe-

fore set forth, provided, however, that Licensor shall, at its [fol. 3020J] option, within sixty days after such termination, have the right to purchase at Licensee's cost price all such machines and parts thereof then on hand.

Seventeenth: Licensee and Olsen covenant and agree to disclose and assign to Licensor all inventions and improvements heretofore made or conceived by Olsen pursuant to said agreements of November 13, 1934, July 1, 1936, and August 8, 1937, and all inventions and improvements hereafter made or conceived by them during the life of this agreement with respect to molding machines of the vibrating and/or jolting type, or parts thereof, which said inventions and improvements are to be and become and remain the property of Licensor, whether or not applications for letters patent are filed thereon, and Licensee and Olsen agree to execute or cause to be executed from time to time, and upon request of Licensor or its attorney, applications for letters patent of the United States and any or all countries, on said inventions and improvements, and to assign or cause to be assigned all said applications and inventions, to Licensor, or its order, and from time to time to execute, upon request, any further papers which might be necessary or proper in further assurance of Licensor's title therein and thereto, all, however, at Licensor's sole cost.

Any assignments by Licensee and Olsen to Licensor made by reason of this paragraph shall be included in the license granted by this agreement.

Eighteenth: The Licensor hereby agrees that it will, within a reasonable time, institute suit or suits on said letter patents, and prosecute the same at Licensor's expense for the purpose of enjoining infringers. It is understood, however, that the place where and the manner in which such suit or suits shall be instituted or prosecuted and the number of such suits shall be in the sole discretion [fol. 3020K] of the Licensor.

Nineteenth: Any and all notices to be given by either party to the other shall be given by registered mail addressed to the last known address of the addressee, the present addresses of each being, in the case of the Licensor, Room 2001, #350 Madison Avenue, New York, N. Y., and

in the case of the Licensee and Olsen, Adrian, Michigan, except the monthly reports provided for herein and remittances each by the Licensee may be sent by ordinary mail.

Twentieth: It is understood and agreed that by no provision of this agreement has the Licensee been constituted the agent of the Licensor, for any purpose.

Twenty-first: The failure to exercise any right or to terminate this agreement for any breach thereof, shall not be deemed a waiver of the right so to do, either in the case of a breach of continuing nature, or in the case of any subsequent breach of similar other nature, but all of Licensor's rights shall continue in full force and effect unimpaired by any such waiver or waivers.

Twenty-second: It is understood and agreed, by and between the parties hereto, that except as herein provided, said prior agreements, dated November 13, 1934, July 1, 1936 and August 6, 1937, be, and the same hereby are terminated.

Twenty-third: This agreement shall be construed according to and be governed by the laws of the State of New York.

[fol. 3020L] Twenty-four: This agreement shall insure to and bind the Licensor, its successors and assigns, and shall bind the Licensee, its successors and assigns. This agreement shall also bind Olsen, his heirs, successors, representatives and assigns, and Olsen by his signature to this agreement, guarantees the performance of the Licensee of all of its obligations hereunder. The heirs, successors, representatives and assigns of Olsen shall not be liable for any acts or omissions of the Licensee occuring after Olsen's death. The liability of Olsen hereunder shall be direct and not conditional upon the pursuit by the Licensor of whatsoever remedy it may have against the Licensee. Olsen hereby waives all notice of default by the Licensee, waives notice of acceptance of the guarantee by the Licensor and waives all other notices to which he might otherwise be entitled.

In witness whereof, the parties hereto have duly executed these presents and cause their respective seals to be hereto affixed.

Jolterete, Inc., by Louis Gelbman, President.

Attest:

Jolterete Inc. Arthur W. Peterson, Secretary. (Seal.)
Stearns Manufacturing Co., Inc., By Eugene F. Olsen, President, Eugene F. Olsen.

Attest:

C. A. DeLamater, Secretary.

[Fol. 3020M] STATE OF NEW YORK,
County of Westchester, ss:

On this 8th day of September, 1938, before me, the undersigned notary public, personally appeared Louis Gelbman, who, being by me duly sworn, did depose and say, that he is the president of Jolterete, Inc., which executed the foregoing instrument; that he knows the seal of said corporation and that the seal affixed to said instrument is the said corporate seal; that it was thereunto affixed by order of the Board of Directors and that he signed his name thereto by like order.

David Friedman. (Seal.)

STATE OF MICHIGAN,
County of Lenawee, ss:

On this 27 day of Aug., 1938, before me, the undersigned notary public, personally appeared Eugene F. Olsen, who, being by me duly sworn, did depose and say, that he is the president of Stearns Manufacturing Co., Inc., which executed the foregoing instrument; that he knows the seal of said corporation and that the seal affixed to said instrument is the said corporate seal; that it was thereunto affixed by order of the Board of Directors and that he signed his name thereto by like order.

Josephine S. Kramer. (Seal.)

STATE OF MICHIGAN,
County of Lenawee, ss:

On this 27th day of Aug., 1938, before me, the undersigned notary public, appeared Eugene F. Olsen, to me known and known to me to be the individual described in

and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

Josephine S. Kramer. (Seal.)

[fol. 3020N] STATE OF MICHIGAN,
County of Lenawee, ss.

I, R. B. King, County Clerk of the County of Lenawee and also Clerk of the Circuit Court for said county, the same being a court of record having by law a seal, do hereby certify that Josephine S. Kramer before whom the foregoing Acknowledgment was taken and who subscribed his name to the certificate of the proof or acknowledgment of the annexed instrument was at the time of taking such proof, or acknowledgment, a Notary Public, in and for the said county, and residing therein, duly commissioned and sworn and authorized by the laws of said state, to take and certify affidavits and the acknowledgment and proof of deeds and other written instruments to be recorded in said state, and further that I am well acquainted with the hand writing of such Josephine S. Kramer and verily believe the signature to the said certificate of proof or acknowledgment is his genuine signature.

In witness whereof I have hereunto set my hand and official seal at Adrian, Michigan, this 26th day of August, 1936.

R. B. King, County Clerk. (Seal.)

[fol. 3020O] EXHIBIT 7

(Copy)

Know All Men by These Presents:

That Jolterete, Inc., a corporation duly organized and existing under and by virtue of the laws of the State of New York, does hereby transfer, assign, deliver and set over unto Hamlin F. Andrus of 650 North Broadway, Yonkers, New York, and Louis Gelbman of 64 Crosshill

Avenue, Yonkers, New York, all of its right, title and interest in a certain license agreement with Stearns Manufacturing Co., Inc., a corporation duly organized and existing under and by virtue of the laws of the State of Michigan, made and entered into as of April 1, 1938 and duly executed by Stearns Manufacturing Co., Inc. on the 27th day of August, 1938 and by Jolterete, Inc. on the 8th day of September, 1938, and all its rights to recover for past infringements on the patents embodied in said agreement, the interest of said Hamilin F. Andrus hereafter in said license agreement to be 11/20 and the interest of said Louis Gelbman hereafter in said license agreement to be 9/20.

In witness whereof, Jolterete, Inc. has caused its corporate name to be hereunto subscribed by the hand of its President, and its corporate seal to be hereunto affixed by the hand of its President and attested to by its Secretary this 20th day of March, 1939.

Jolterete, Inc., by Louis Gelbman, President.

Attest:

Arthur W. Peterson, Secretary, Jolterete, Inc. (Seal.)

[fol. 3020P] STATE OF NEW YORK,
County of New York, ss:

On the 20th day of March, 1939, before me came Louis Gelbman, to me known, who, being by me duly sworn did depose and say that he resides in Yonkers, New York; that he is the President of Jolterete, Inc., the corporation described in, and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation; and that he signed his name thereto by like order.

Herbert Weinberg, Notary Public, Kings County, Kings County Clerk's No. 405, Cert. filed in N. Y. Co. Clk's No. 323, Commission expires March 30, 1941.

We, the undersigned, Hamlin F. Andrus and Louis Gelbman, hereby accept the license agreement which is assigned to us, herein, and agree to accept the property embodied in said license agreement and to carry out the terms thereof.

Hamlin F. Andrus, Louis Gelbman.

[fol. 3020Q] EXHIBIT 112

Agreement made and entered into as of March 1, 1940, by, between and among Messrs. Hamlin F. Andrus of 650 No. Broadway, Yonkers, New York, and Louis Gelbman of 64 Crosshill Avenue, Yonkers, New York, hereinafter jointly referred to as the "Licensors"; Stearns Manufacturing Co., Inc., a corporation duly organized and existing under and by virtue of the laws of the State of Michigan, with its office and principal place of business located in the City of Adrian, County of Lenawee, and State of Michigan, hereinafter referred to as "Licensee", and Eugene F. Olsen, of Adrian, Michigan, hereinafter referred to as "Olsen":

Witnesseth:

Whereas, license agreements have heretofore been entered into under dates of November 13, 1934, July 1, 1936, August 6, 1937, and April 1, 1938, between the Licensee and/or Eugene F. Olsen of Adrian, Michigan, and Jolterete, Inc., a New York Corporation, pursuant to the terms of which certain license fees and royalties were paid by the Licensee and/or Olsen to Jolterete, Inc.; and

Whereas, Jolterete, Inc. on March 20, 1939, assigned its right, title and interest in said license agreements to the Licensors, and pursuant to said assignment, license fees and royalties have been paid by the Licensee and/or Olsen since March 20, 1939 to the Licensors; and

Whereas, the parties hereto are desirous of terminating the said license agreements and entering into a new and different agreement as hereinafter provided; and

Whereas, the Licensors are the sole owners of and have the sole and exclusive right and authority to issue licenses under and pursuant to certain inventions, discoveries and

patents, applying to and covering a certain new and use-
[fol. 3020R] ful molding machine and process, which said inventions and discoveries are described and embraced in the letters patent and applications for letters patent, as follows:—United States Patents #1,867,144 (Louis Gelbman, July 12, 1932); #2,003,632 (Louis Gelbman, June 4, 1933); #2,029,365 (Louis Gelbman, February 4, 1936); and #2,069,880 (Louis Gelbman, et al. February 9, 1936;) United States Patent Applications #161,370 and #191,640; Canadian Patent #302,597; and invention and patent application on a vibrated pivoted mold building unit machine; and

Whereas, Licensee is desirous of obtaining and Licensors are desirous of granting, the right and license to make and sell building units and coal briquetting machines of the design and description hereinafter set forth, described and limited, only, and not otherwise, and upon and pursuant to the terms and conditions, limitations and restrictions hereinafter set forth, and not otherwise; and

Whereas, Licensors are desirous of retaining, for their own benefit and advantage, the sole and exclusive right and privilege to use, exploit, and enjoy their said inventions and discoveries, patents and patent applications, and each of the same, including the right to manufacture concrete units, within the area comprising the five borough limits of New York City, except as herein specifically granted.

Now, therefore, in consideration of the sum of One Dollar and other good and valuable considerations by each of the parties to the other paid, receipt whereof is hereby acknowledged, and of the mutual promises herein contained, the parties hereto have agreed and do hereby covenant and agree as follows:

First: Subject to the due and proper performance of all of the terms, covenants and conditions, restrictions and limitations herein set forth by the parties hereto, Licensors [fol. 3020S] have given and granted, and by these presents do hereby give and grant unto the Licensee the sole and exclusive License and privilege of making and selling building units machines and coal briquetting machines of the design and description, only, as hereinafter set forth embodying, employing and containing the inventions disclosed

in the letters patent and applications for letters patent hereinbefore enumerated, and the improvements thereon as hereinafter provided, applicable to said machines of said design and description, only, and not otherwise, both for the term and upon the conditions, and subject to rights of cancellation, as hereinafter set forth.

Second: This license applies to concrete molding machines for making units of all sizes and description and coal briquetting machines, except that Licensors may at their option, by giving sixty (60) days advance notice by registered mail to Licensee of their desire so to do, cause this license to apply and be limited to the manufacture and sale of said machines of such design and construction, only, as to be adaptable to and useful in the manufacture of concrete building and coal briquetting units, only, not greater, in any dimension, than twenty-four (24) inches in length, twelve (12) inches in height and twenty-four (24) inches in width. The License hereby granted to make said machines is limited and restricted to, and specifically conditioned upon, the enjoyment thereof in the manufacture of machines for making concrete building units or coal briquettes of the size and description as aforesaid, only, and not otherwise, and is not to extend to, or be employed in any other or different purpose, or in the manufacturing or processing of any other different article or object whatsoever.

Third: It is expressly understood and agreed that the take-off device, covered by said patents, shall not be made, [fol. 3020T] or used, or distributed for use, for or with any apparatus or machine, or for any purpose other than or except in conjunction with building units and coal briquetting machines as licensed herein.

Fourth: Unless sooner terminated, as herein provided, this license shall extend to the remainder of the terms of said letters patent and any of the same, issued or to be issued, upon application for letters patent relative to said improvements, now pending or hereafter to be filed, and to the term of any reissue or reissues thereof, and of any assignments which the Licensee may make to the Licensors under the terms of paragraph "Seventeenth" hereof, and

to the date of expiration of the last expiring thereof. The License herein granted shall be exclusive to Licensee.

Fifth: The license herein granted to make said building units and coal briquetting machines shall extend and be restricted to Licensee's factory or factories, operated under Licensee's exclusive control, located in the City of Adrian, State of Michigan, and to such other places located within the continental United States and Dominion of Canada as Licensee may hereafter designate to Licensor, in writing. The License herein granted to sell building units and coal briquetting machines and appliances in connection therewith shall extend throughout the world except that it shall not extend to or include the area comprising the five boroughs of New York City. It is expressly understood and agreed that Licensors do hereby reserve and retain, for their own sole and exclusive benefit and advantage the exclusive right and privilege to exploit and enjoy and to make, use and sell under their discoveries, patents and patent applications, aforesaid, and each of the same including but not limited to the right to the exclusive manufacture of concrete units thereunder within the five borough limits of the City of New York, to the same extent as though this [fol. 3020U] agreement had never been entered into. Nothing in this paragraph, however, shall prevent Maulstedt Materials, Inc. from continuing its present manufacture of concrete units, under agreement with Licensee, in its present plant located at 233rd Street and Provost Avenue, in the Borough of Bronx. Licensee promises and agrees that it will manufacture any and all building units and coal briquetting machines hereunder within the said City of Adrian and in such other place or places within the continental United States and Canada, only, and that it will not manufacture or cause to be manufactured or associate itself in the manufacture, directly or indirectly, of building units or coal briquetting machines as herein described, in any city, place or places other than as hereinbefore provided.

Sixth: The Licensee has heretofore been manufacturing under the patents referred to on page 2 of this agreement a machine which it has been selling, exclusive of any and all discounts and allowances, at an amount in excess of $4,000., and another machine which it has been selling, exclusive of

any, and all discounts and allowances, at an amount of $4,000. or less. All prices referred to in paragraph "Sixth" herein are F.O.B. Licensee's plant and are exclusive of any and all discounts and allowances. The Licensee covenants and agrees to pay to the Licensors during the continuance of this agreement for the enjoyment of the rights herein granted, a license fee or royalty as follows:

On any machine, sold or to be sold, for more than $4,000. a license fee or royalty equal to 20% of the sales price, without deduction of any and all discounts and allowances. On any machine sold or to be sold, for $4,000. or less, a license fee or royalty equal to 10% of the sales price and, likewise, on each and every repair and/or replacement part or parts, at the rate of 10%, without deduction [fol. 3020V] of any and all discounts and allowances, except that pallets and dividing plates shall be free of said royalty.

The Licensee shall report to the Licensors on or before the tenth day of each month, the collections made during the preceding month, and the Licensee shall pay to the Licensors upon the submission of said report, the 10% or 20% royalty rate on said collections, as the case may be.

In all cases in which the Licensee receives interest on deferred collections, the royalty rate shall apply to said interest as well.

In any case in which the Licensee credits the purchaser against the sales price of a machine, sold for more than $4,000 as aforesaid, with the value of used equipment, then the royalty on the amount of said credit shall not be paid, royalties in such case being 20% of the sales price less credit, but, royalties shall nevertheless be paid by the Licensee to the Licensors upon the sale of said used equipment received in trade at the 20% royalty rate and in the same manner as if it were part of the original unit sold. In the case of sales of any machine for $4,000 or less, this trade-in provision shall not apply, and, instead, the Licensee shall pay to the Licensors the applicable 10% royalty rate on the full sales price, without deduction for the trade-in allowance.

In the case of the repossession of any machine sold by the Licensee on the instalment plan, the royalty applicable to the unpaid balance of the sales price of said machine

shall be cancelled, and thereafter, royalties shall be payable on said machine only upon its resale, and then in the same manner, and at the same rate as if it were part of the original unit sold. In any case in which the Licensee effects additional collections from the original debtor on the sales price of a repossessed machine after its repossession, [fol. 3020W] the Licensee shall pay to the Licensor the applicable royalty rate on such additional collections in the same manner and at the same time as in the case of other collections.

Upon the receipt by the Licensee of any machine either as trade-in or by repossession, the Licensee shall advise the Licensors of the reasonable value of said machines, and if any of said machines are unsold by the Licensee upon the termination of this agreement and any royalties have not been paid upon the sales price represented by said machines, the Licensee shall thereupon forthwith pay to the Licensors 10% or 20% of said reasonable value, depending upon the original royalty rate.

Nothing in this agreement shall obligate the Licensee to make any payments to the Licensors of any sum in excess of the license fee or royalty on such machines, parts and accessories as may actually be sold and collected for by Licensee, and said Licensors shall not be entitled to any damages for failure on the part of the Licensee to sell any specified number of said machines. However, the Licensors may, at their option, cancel this agreement, if on any April 1, July 1, October 1, or January 1, the Licensee shall not have sold sufficient machines, parts, and accessories so that the license fee on such items totals a minimum of $3,750. for the three calendar months immediately preceding; provided, however, that any excess over $3,750 for any of above quarter-annual periods will be applied to the total of the quarter-annual period immediately following for purposes of determining whether minimum requirements have been met; and further provided that notice of Licensors' desire to cancel be given Licensee within thirty (30) days of the close of the quarter-annual period during which minimum requirements were not met.

[fol. 3020X] Seventh: Licensee agrees to properly affix all necessary statutory patent notices and labels, to all

machines licensed hereunder. Each of such labels shall also bear the name "Jolterete" in conspicuous lettering as per trade mark registration and shall be consecutively numbered in such manner that all such machines may be identified by reference to the respective invoices thereon as hereinafter provided.

Eighth: The License herein granted shall not in any manner whatsoever be assigned, sublicensed or encumbered by Licensee without written consent of the licensors first had and received.

Ninth: Licensee promises and agrees that it will not enter into any agreement to, nor shall it by any other means, restrict the sale of any such machines to any area outside New York City nor limit the number of machines sold or to be used within any area outside New York City, nor shall it rent or lease or distribute said machines upon any basis whatever, except upon outright sale, subject to the payment of royalty to Licensors, as aforesaid, without the specific consent of the Licensors to each and every case first had and received, in writing, to Licensee. The Licensors in the event of the termination of this agreement, agree to honor any special arrangement regarding territory or restrictions of sale which the Licensee may have made with any customer with the written consent of the Licensors.

Tenth: Licensee shall make written reports to Licensors not later than the tenth day of each month during the term of this agreement, addressed to Licensors, at their office, setting forth in detail all building units and coal briquetting machines and/or repair and/or replacement parts made by it hereunder, including the identifying number thereof, as hereinbefore provided, together with true carbon copies of invoices of each and every sale subject to royalty here- [fol. 3020Y] under. Licensee shall also promptly furnish to Licensors true copies of any and all drawings, in sufficient detail to enable Licensors to ascertain whether invention or improvement has been made by Licensee pursuant to paragraph "Seventeenth" herein contained.

Eleventh: Licensee and Eugene F. Olsen, and each of them jointly and severally, hereby admits the validity of said letters patent, and each of the same, issued and to be

issued upon application for letters patent relative to any said improvements now pending or hereafter to be filed, and agrees to dispute the validity thereof, or title of the Licensors thereto, and further agrees that they and each of them will not at any time contest the same directly or indirectly in any way whatsoever, or aid others in so doing.

Twelfth: The Licensee agrees to keep full, accurate and complete books of account; records, date and memoranda in sufficient detail to enable the royalties hereunder by the Ligensee to be determined, and further agrees to and does hereby give to Licensors the privilege of examining its factories, machinery, and equipment and books and records, during usual business hours, for the purpose of verifying the reports hereinbefore provided and Licensee's due performance of the terms hereof.

Thirteenth: Licensee covenants to use its best efforts and endeavors to exploit, to the fullest extent, the license granted herein, for the mutual benefit and advantage of the respective parties hereto, and the Licensors hereby grant to Licensee the right and privilege to use the name "Jolterete" in the enjoyment of said license.

Fourteenth: If Licensee shall at any time make default in the payment of any royalty, or making of any report hereunder, or shall commit any breach of any covenant or agreement herein contained, or shall make any false [fol. 3020Z] or incomplete report, provided for herein, the Licensors may notify Licensee of any default, breach, and/or error, and of Licensors' intent to cancel in writing, and should Licensee fail to correct said default, breach, and/or error, within fifteen (15) days of such notice and explain said default, breach, and/or error, to the satisfaction of the Licensors, the Licensors may at their option cancel this agreement and revoke the license herein by notice in writing to such effect, but such act shall not prejudice the right of the Licensors to recover any royalty or other sum due at the time of such cancellation and shall not prejudice any cause of action or claim of the Licensors accrued or to accrue, on account of any breach or default made by the Licensee.

Fifteenth: If the Licensee shall become insolvent, or

shall make an assignment for the benefit of creditors, or proceedings in voluntary or involuntary bankruptcy shall be instituted in behalf of or against the Licensee, or a receiver or trustee of the Licensee's property shall be appointed, or it shall invoke the benefit of any federal or state insolvency or bankruptcy law, the license herein granted shall terminate forthwith, but the Licensors shall be entitled to recover royalties due and unpaid.

Sixteenth: If this agreement shall be terminated for any reason, Licensee shall have the right to complete any machines then in process of manufacture and to sell the same, paying the Licensee fee or royalty thereon as hereinbefore set forth, provided, however, the Licensors shall, at their option, within sixty days after such termination, have the right to purchase at Licensee's cost price all such machines and parts thereof then on hand.

Seventeenth: Licensee covenants and agrees to disclose and assign to Licensors all inventions and improvements [fol. 3020AA] heretofore made or conceived by Eugene F. Olsen pursuant to said agreements of November 13, 1934, July 1, 1936, August 6, 1937 and April 1, 1938 and any and all inventions and improvements made by said Eugene F. Olsen directly or indirectly, or by any company in which said Eugene F. Olsen may directly or indirectly be financially interested during the life of this agreement with respect to molding machines of the vibration and/or jolting type, or parts thereof, provided, however, that in the event Eugene F. Olsen ceases to be an employee or officer of and ceases to own directly or indirectly any of the stock of Licensee corporation, then having so notified Licensor of such situation in writing, neither the Licensee nor Eugene F. Olsen shall be responsible to Licensor for any of the acts of Eugene F. Olsen performed after date of such notification except that said Eugene F. Olsen and Licensee shall continue for the term stated in paragraph "Fourth" hereof to be bound by the admission of validity of patents set forth in paragraph "Eleventh" hereof. Licensee further covenants and agrees to disclose and assign to the Licensors and cause to be disclosed and assigned to the Licensors by any and all of its officers and, insofar as Licensee has the legal claim or right so to do, by any

and all of its agents, employees and any and all persons engaged in work upon or in connection with the said machines, all inventions and improvements made or conceived by it or them or any thereof during the life of this agreement with respect to the molding machines of the vibrating and or jolting type and parts thereof, which said inventions and improvements are to be and become and remain the property of the Licensor whether or not applications for letters patent are filed thereon, and the Licensee agrees to execute or cause to be executed by its said officers, agents and employees and those engaged in work in connection with said machines as aforesaid, and from time to time and upon request of Licensor or its attorney, applications for letters patent of the United States and [fol. 3020BB] any and all other countries on said inventions and improvements and to assign or cause to be assigned all said applications and inventions to licensor, or its order, and from time to time, to execute, upon request any further assurances of Licensors' title therein and thereto, all however, at Licensors' sole cost and expense. Licensee further promises and agrees to protect and enforce Licensors' rights and interests in and to any and all said inventions and improvements by appropriate agreements, in writing, in form satisfactory to Licensors. Any assignments by Licensee to Licensors made by reason of this paragraph shall be included in the License granted by this agreement.

Eighteenth: The Licensors hereby agree that they will, within a reasonable time; institute suit or suits on said letter patents, and prosecute the same at Licensors' expense for the purpose of enjoining infringers. It is understood, however, that the place where and the manner in which suit or suits shall be instituted or prosecuted and the number of such suits, shall be in the sole discretion of the Licensors.

Any amounts collected by Licensors from infringers of the patents and or rights covered herein shall be first applied to reimburse the Licensors for all infringement proceedings, and after providing a reasonable reserve for pending and future litigation in infringement proceedings,

the remainder shall be divided equally between the Licensors and the Licensee.

Nineteenth: Any and all notices to be given by either party to the other shall be given by registered mail addressed to the last known address of the addressee, the present addresses of each being, in the case of the Licensors, Room 2001, No. 350 Madison Avenue, New York, New York, and in the case of the Licensee, Adrian, Michigan, except the monthly reports provided for herein and [fol. 3020CC] remittances each by the Licensee may be sent by ordinary mail.

Twentieth: It is understood and agreed that by no provision of this agreement has the Licensee been constituted the agent of the Licensors, for any purpose.

Twenty-first: The failure to exercise any right or to terminate this agreement for any breach thereof, shall not be deemed a waiver of the right so to do, either in the case of a breach of continuing nature, or in the case of any subsequent breach of similar or other nature, but all of Licensors' rights shall continue in full force and effect unimpaired by any such waiver or waivers.

Twenty-second: It is understood and agreed by and between the parties hereto, that except as herein provided, said prior agreements, dated November 13, 1934, July 1, 1936, August 6, 1937 and April 1, 1938, be, and the same hereby are terminated.

Twenty-third: This agreement shall be construed according to and be governed by the laws of the State of New York.

Twenty-fourth: This agreement shall inure to and bind the Licensors, their successors and assigns, and shall bind the Licensee, its successors and assigns.

Par. 25. As an inducement to Licensors for the execution of this amended agreement and without, in any manner, affecting the obligations of Licensee herein contained, including, particularly its acknowledgment of the validity of patents, it is further agreed that, should it be finally adjudged that Licensee shall possess the legal right to manufacture and sell coal briquetting and or concrete molding machines of the vibrating and or jolting type under the patent or patents of a person other than the parties hereto without infringing any valid claim of Licensors'

patent or patents and without being obligated to make payment to Licensors of the royalties hereinbefore set [fol. 3020DD] forth, Licensee shall pay to Licensors the difference between 10% of the net amount received by the Licensee from such sales and the royalty paid to said person other than the parties hereto, but in no event less than 5% of the net amount received by Licensee for such machines, in the same manner as all said royalty payments aforesaid, for the period of time stated in paragraph "Fourth" hereof; and should licensee, under and subject to the the same conditions, purchase said other patent or patents and pay therefor a lump sum royalty for their use, then 5% shall be considered the royalty so paid others until the total of said 5% amounts equals the amount of said purchase or lump sum royalty thereafter said 10% shall be applicable to Licensors. In the event that a patent hereafter issue exploitation of which the parties hereto agree, in writing, does not infringe any valid claim of Licensors' patent or patents and under which Licensee would have the right to manufacture machines of the type aforesaid without making payment of royalties pursuant to the schedule in paragraph "Sixth", then the royalty provision set forth in this paragraph shall be operative forthwith upon such agreement without awaiting such final adjudication.

In witness whereof, the parties hereto have duly executed these presents and caused their respective seals to be hereunto affixed.

Hamlin F. Andrus (L. S.)

Harold Greenwald, Witness.

Louis Golbman (L. S.)

Harold Greenwald, Witness.

Stearns Manufacturing Co. Inc., By: Eugene F. Olsen, President. (Seal.), Eugene F. Olsen, (L. S.)

Attest:

A. D. DeLamater, Secretary.

[fol. 3020EE] STATE OF NEW YORK,
County of New York, ss:

On this 6th day of August 1940, before me, the undersigned Notary Public, personally appeared Hamlin F. Andrus, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

Nathan Jelling, Notary Public, Kings Co. Clk. No. 47, Reg. No. 2059, N. Y. Co. Clkes No. 138, Reg. No. 2-J-84, Commission expires March 30, 1942.

STATE OF NEW YORK,
County of New York, ss:

On this 6th day of August, 1940, before me, the undersigned Notary Public, personally appeared Louis Gelbman, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the name.

Nathan Jelling, Notary Public, Kings Co. Clk. No. 47, Reg. No. 2059, N. Y. Co. Clkes No. 138, Reg. No. 2-J-84, Commission expires March 30, 1942.

STATE OF NEW YORK,
County of New York, ss:

On this 6th day of August, 1940, before me, the Undersigned, Notary Public, personally appeared Eugene F. Olsen, who, being by me duly sworn, did depose and say, that he is the President of Stearns Manufacturing Co., Inc., which executed the foregoing instrument; that he knows the seal of said corporation and that the seal affixed to said instrument is the said corporate seal; and that it was thereunto affixed by order of the Board of Directors and that he signed his name thereto by like order.

Nathan Jelling, Notary Public, Kings Co. Clk. No. 47, Reg. No. 2059, N. Y. Co. Clkes No. 138, Reg. No. 2-J-84, Commission expires March 30, 1942.

[fol. 3020FF] STATE OF NEW YORK,
County of New York, ss:

On this 6th day of August, 1940, before me, the undersigned Notary Public, personally appeared Eugene F. Olsen, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

Nathan Jelling, Notary Public, Kings Co. Clk. No. 47, Reg. No. 2059, N. Y. Co. Clkes No. 138, Reg. No. 2-J-84, Commission expires March 30, 1942.

[fol. 3021]

EXHIBIT 113

Table 5.—Products of the Industries, by Kind, Quantity, and Value, for the United States: 1939 and 1937

	1939				1937
	Produced in the industry	Produced in other industries in the Machinery (Except Electrical) group	Produced in industries outside the Machinery (Except Electrical) group	Aggregate	
Total value	$403,194,596	$43,653,487	$26,832,071	$473,680,154	$584,439,783
Cement and concrete machinery (not including cement-making machinery or concrete mixers)[1]:					
Cement and concrete-block machines—					
Reported by number—					
Number	881	746		1,627	1,021
Value	$643,193	$448,813		$1,092,006	$767,641
Not reported by number, value					$26,364
Other cement and concrete machinery	$493,092	$153,962		$647,054	$3,259,459

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[fol. 3022] EXHIBIT 114

Agreement

This memorandum of agreement, made July 16, 1932, between Besser Manufacturing Company, a corporation, of the City of Alpena, County of Alpena and State of Michigan, first party, and Eugene F. Olsen, of the same place, second party, witnesseth:

Whereas, the second party is the owner of 200 shares of capital stock of Besser Manufacturing Company, which he is willing to surrender and deliver to first party in exchange for certain physical assets of said first party and which first party is willing to convey and transfer to second party upon the terms and conditions herein contained. Now, therefore,

In consideration of the sum of One Dollar by each of the parties paid to the other, the receipt whereof is acknowledged, and for the mutual covenants herein contained, the parties agree:

1. Second party agrees to assign his 200 shares of stock in the Besser Manufacturing Company to said company.

2. The first party agrees to convey to second party by quitclaim deed all real estate owned by it situate in the City of Adrian and to furnish such abstracts of title as they may have affecting the title to such real estate.

3. First party agrees to transfer by bill of sale the contents of said buildings and including:

> All personal property pertaining exclusively to the business known as the Ste-rns Manufacturing Company, including machinery, tools, inventory, patterns, patents, accounts or notes receivable and transit c.o.d. items paid after July 15, 1932, files and stationery, now located at Alpena, Michigan, Adrian, Michigan, or elsewhere, also all other personal property belonging to the Besser Manufacturing Company now located at the City of Adrian, except such concrete products, machinery or parts thereof as may now be in storage. Also the following office equipment: One desk, chair, typewriter desk and chair, one typewriter and dictaphone with equipment and supplies.

[fol. 3023] The concrete machinery excepted in the Bill of Sale may remain in storage at the Adrian plant without charge until April 1, 1933, and first party agrees to remove the same on or before said date and any machinery not so removed shall then belong to second party. The Ryerson Punch and Milling Machine now at the Adrian plant is subject to the mortgage to the Adrian State Savings Bank. It is agreed that so far as the party's interest therein permits that if a sale thereof is arranged that first party may have first chance to purchase at the sale price, provided that first party may buy the same at the listed price at any time.

4. First party agrees to deliver such assets pertaining to the Ste-rns Manufacturing Company business as may be in Alpena, Michigan, f.o.b. cars or motor trucks at Alpena, properly crated or boxed, also all accounts and notes receivable, records, correspondence, literature, stationery and also the office furniture and equipment other than such items thereof as are now in Adrian.

5. First party agrees to pay taxes on the Adrian property for 1931 and prior years with interest and penalties on or before July 1, 1933, such taxes now amounting to $2008.47. Second party agrees to pay taxes for 1932 and subsequent years.

Under date of July 13, 1932, the Adrian State Savings Bank and Besser Manufacturing Company agreed upon condition of payment of taxes and reduction of principal to release the Besser Manufacturing Company from liability upon its mortgage on the Adrian property upon deeding by Besser Manufacturing Company of said property to Eugene F. Olsen. And upon the conditions of said agreement being carried out the first party will be thereby relieved of liability in connection with said mortgage.

6. First party agrees to pay second party all salary due him as appears from the books to date, such back salary to be paid at the rate of $400.00 per month commencing August 1, 1932, until same is fully paid. And thereafter to [fol. 3024] pay first party the sum of $100.00 per month on the first day of each month following settlement of salary account until the further sum of $600.00 is paid.

7. Second party agrees for himself, his representatives

and assigns, to not permit the property herein described to be used for the manufacturing of concrete products, machinery or Hot-Process Coal Block Machinery for ten years from this date and the real estate is hereby impressed with such a restriction.

8. This Agreement is declared binding upon the successors, assigns and legal representatives of the parties hereto.

In witness whereof the first party has caused these presents to be executed in duplicate by its President and Secretary by authority of its Board of Directors and second party has hereto set his hand and seal the day and year first above written.

Besser Manufacturing Company (L. S.), by J. H. Besser (L. S.), President, by Anna M. Besser (L. S.), Secretary, First Party, Eugene F. Olsen (L. S.), Second Party.

Signed, Sealed and Delivered in Presence of: Carl R. Henry.

[fols. 3025-3066] EXHIBIT 115

Taylor Concrete Products, Inc.
Watertown, New York

May 9, 1950.

Central Gocorp,
403 Grace St.
Adrian, Mich.

Attention: Mr. T. H. Merriam

Dear Ted,

Today, Mr. C. F. Rowell of the Stearns Manufacturing Co. called on us and when we told him how impressed we were with the operation of your senior machine, he told us some disturbing news. That the machine you had in Benton Harbor was thrown out very recently because of broken corner posts and trouble with hydraulic cylinders.

Also that Crandall had purchased two Stearns "15" to replace your Gocorp. Please let us know the facts in this

case as we intend to soon place an order for equipment which we hope will be trouble free and increase our production.

Mr. Rowell furthur stated that they could give delivery in 2 to 3 weeks which is very nice as we are completely out of blocks and have many orders on hand.

Awaiting your explanation of this Benton Harbor trouble, we are

Very truly yours, Taylor Concrete Products, Inc.,
Leland F. Taylor.

1343

EXHIBIT 121 Received Feb 29th 1948

E. F. STENEMAN Telephone Col Feb 27th 1948

Telephone 5 F 13

Contractor and Builder

ROBERTS, WISCONSIN

Dear Sir -

I am sorry I was not home when you called. I received your picture of various of the machines we use. Our prices, and I am interested in each machine. As though I was not sold on a Bissell for our machine as that is the capacity I want to keep one of my machines as short as I can. I would like a Rotary sweeper for I have one for my Tractor so I can keep on working a few hours after the tractor is through for the day. Could you please send a motor top and as it is I have no frames so all prices are cash. As high as possible. Also the machine pictured for Tractor, what time you let me have to decide on it. What kind of Brush do you recommend as I want to use it Power. Left hand.

Here is what I need

1 Wheel

1 Power lift Bar.

1 Air compressor

1 set of 8" Wide Face 2 inch 1 Diameter 1 Plow and wide Grip.

3 Cans 2½ of each 7⅝ x 7⅞ x 13⅝

4 Scrapers for tank load 41-42 lbs

1 Hitch

1 Hitch

1 Hitch

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E. F. STENEMAN
Contractor and Builder

Telephone 5-F-13

ROBERTS, WISCONSIN

[illegible]

3068

EXHIBIT 134

VIBRAPAC AGREEMENT

BESSER MANUFACTURING COMPANY, ALPENA, MICHIGAN, U.S.A.

Date July 11, 194[illegible]

User Goldcam[illegible] and [illegible]vel Company P.O. Box [illegible]

Street Third [illegible] Strain Streets County [illegible]wrence

City [illegible]ronton State [illegible]hio

Ship to this Address If Different from Above

How Ship [illegible] to pick up all equipment, [illegible] pallets. Delivering Carrier

Quantity	DESCRIPTION OF EQUIPMENT Sheet No. 5 For	Value In Case of Loss or Damage
	Electric Current Volts Ph. Cycles	
	Mixer Height	
1	Besser [illegible] plain [illegible] stripper, fully automatic, including [illegible] motors [illegible] to run [illegible] speed of 4-1/[illegible] cycles per minute, pallet size [illegible] x 1[illegible]-1/2 x [illegible]/1[illegible]	[illegible],000 00
1	Attachment for 7-5/8 x 7-[illegible]/8 x 15-[illegible]/8 [illegible] core [illegible] block, 1-1/[illegible] [illegible] shells, 1-[illegible] [illegible], [illegible] open end both ends two [illegible], [illegible] plain other end other compartment, and [illegible] grooves, [illegible] plain ends and steel [illegible] J[illegible] included. [illegible] time.	900 00
1	Set of parts for (5 type) [illegible] radius bullnose -- bullnose one end, open end other end.	150 00
1	[illegible] assembly for 7-5/8 x [illegible] x [illegible] [illegible] for open ends.	[illegible]8 00
[illegible]	Stripper shoes for back [illegible] bullnose parts [illegible] each.	1[illegible] 00
[illegible]	Attachment for [illegible]-[illegible]/8 x 7-5/8 x 15-[illegible]/8" Hollow Slabs, plain ends, made six at a time.	900 00
1	Set of parts for making solids in all compartments.	135 00
[illegible]	Attachment for 11-[illegible] x 7-[illegible]/8" x 1[illegible]-[illegible]/8" Hollow [illegible], plain ends, made two at a time.	900 00
[illegible]	Sets of Vibrator shaft assemblies for 15-[illegible]/8" length.	[illegible] 00

U.S. DIST. COURT, E.D. OF MAIN
Pltf. Ex. 13[illegible]
Deft. Ex.

Use single space for each item and double space between items.
Use 5 blanks for a set and new carbon.

Quantity	DESCRIPTION OF EQUIPMENT	Value in Case of Loss or Damage	
1	Power Offbearing Hoist, Horizontal Cylinder, Double Arm Boom, Automatic Pallet Pick-up and Pallet Release, will be mounted on Steel "I" Beam upright in place of on Machine.	2,000	00
	Westinghouse Electric Panel mounted on Machine with Starters and Switches, including complete approved wiring of Machine.	800	00
1	Automatic Density Control.	3,000	00
1500	Plain Steel Pallets — 26 x 18-1/2 x 5/16" Thick $2.50 each.	3,750	00
		33,483	00

Agreement to Furnish

1. BESSER MANUFACTURING COMPANY of Alpena, Michigan, hereafter called "Besser" agrees to furnish to "User" named on Page 1, the BESSER EQUIPMENT SERVICE consisting of the USE of Besser Equipment listed on Pages 1 and 2 and INSTRUCTION in its operation upon the conditions stated herein and USER agrees to take and use said Equipment upon said conditions. Title to said Equipment and additions thereto to be and remain in BESSER at all times.

Transferring

2. This Equipment shall not be transferred or delivered or sublet to any other person or corporation, and neither this agreement nor the use hereby granted can be assigned by the User by his own act or by operation of law. However Besser will transfer this Agreement to a new User on request of present User provided said new User has the ability and finances to carry on this Agreement properly.

Payment

3. User will make the following payments.

$ 1,[illegible] At Signing of this Agreement.

$ _____ At Time of Shipment.

$ 1,[illegible] Total Cash Deposit.

Additional [illegible] [illegible]
One Note for [illegible]
due Nov. 1, 194[illegible]
One Note for [illegible]
due May 1, 19[illegible]

4. Five Hundred Dollars ($500.00) Per Month Minimum Regular Monthly Payment.

Or One (1) Cent per 8 x 8 x 16 Block Equivalent when that is greater.
Above per block payment is reduced to three quarter (3/4) cent each on the excess over one and one-half million (1,500,000) block per year per machine.

5. $ None [redacted] Additional Monthly Payment.

[redacted] One (1) Cent per 8 x 8 x 16 Block Equivalent [redacted] until

6. $ [illegible] in additional equipment and additions thereto have been offset from this additional payment.

7. Additional Payment as above is to be full Use Payment and the only payment required on Additional Equipment for the Full Five Year period or optional Ten Year period of this agreement.

Return of Cash Deposit

8. One (1) Per Cent of Total Cash Deposit is to be deducted from each Monthly Payment until Cash Deposit has been reduced to One Thousand Dollars ($1,000.00). The Balance of Cash Deposit is to be returned to User at end of final Use Period when User has returned Equipment in good condition as provided herein with all payments made.

Yearly Minimum, Fiscal Year.

9. Whenever enough has been paid to equal the minimum regular Monthly Payments for a whole year, the payments for remainder of said year are on a per block basis only.

When Fifty Thousand Dollars ($50,000.00) has been paid in monthly payments, the monthly minimum is reduced to Three Hundred Dollars ($300.00) per month for remainder of the five or ten year period.

Time of Production Reports and Payments

10. User is to make the monthly Payments and also make accurate monthly Production Reports of the product of this equipment on blanks furnished by Besser, and send same to Besser by tenth of each month for preceding calendar month.

The additional conditions on back hereof are a part of this Agreement.

The Above is Agreed to:

Date July 11, 194[illegible]

[illegible] Gravel Company
User

By C. F. Goldcamp
[illegible] Title [illegible]

By Donald Goldcamp
Donald Goldcamp [illegible]

Henry Goldcamp
Henry Goldcamp [illegible]

BESSER MANUFACTURING COMPANY

By _____
Besser Representative

Approved at Alpena, Michigan

Date July 11 194[illegible]

BESSER MANUFACTURING COMPANY

By [illegible] Besser [illegible]
Authorized Signature

Specimen [illegible] Underlying the signature

3071

Location of Equipment

11. This Equipment is to be placed in Users plant at

Street Third & Main Streets County Lawrence

City Ironton State Ohio

and is not to be moved from this location except by written consent of an authorized Besser Officer.

Checking Production

12. Besser Representative shall have free access at reasonable times to Plant and Records of User to check production reports called for above and may place counters on said equipment. These counters will be arranged to give important information to both parties and both parties hereto will cooperate for the maintenance and proper operation of said counters.

Time of Agreement

13. Monthly payments and reports shall begin to accrue when operation of equipment begins in Users plant and in any case within two months from time of shipment to User. This agreement shall continue for five (5) years from its beginning. Besser also hereby gives User the option and right to renew this agreement for a second five (5) year period, said option to continue to within two months of expiration of first five (5) year period.

_____ is the time when monthly Reports and Payments begin to accrue.

Shipping Installing Starting

14. Besser will furnish this equipment FOB Alpena, Michigan or other point of manufacture and will furnish proposed plant layout and suggestions for installation. When User has installed the equipment and has it ready for operation, Besser will send its Expert who will instruct User in the use of the equipment and the manufacture of the Product.

Working Together for Good Results

15. Besser will maintain a staff of Engineers who will make periodic visits to Users plant to inspect the operation of said plant and equipment and make suggestions for securing good production and high grade results and a high grade product. Both parties hereto will actively work together for this purpose.

Guarantee and Care of Equipment

16. Besser guarantees this equipment to do good work when properly operated with good material and will replace without charge FOB Alpena, Michigan any parts which require replacement within one (1) year because of defective material or workmanship. User will take good care of this Equipment and will keep it in good working condition and will make necessary replacement of parts at expense of User, except as stated above, and will return said equipment at direction of Besser by freight prepaid at end of Use period in good condition except for natural wear.

Expiration of Agreement. Return of Equipment.

17. If this Agreement expires and the Equipment is not returned by User or retaken by Besser then User shall continue to make regular monthly reports and payments as called for herein. Upon expiration of this Agreement and failure to renew, or in case of non-payment or failure by User to carry out the conditions hereof, Besser shall have the right immediately after thirty (30) days written notice to enter the plant of User and take possession of and remove said equipment without process of law.

Insurance. Taxes.

18. Besser at its own expense shall carry the responsibility of Fire Insurance and of loss by fire. User shall be responsible and will make good for loss or damage in any other way except by fire and will also pay all taxes which are assessed on this Equipment after it is placed in Users' plant and until redelivery to Besser.

19. Machines and Attachments, in addition to the above or to replace any User may have in Use, will be furnished User in accordance with the conditions of this agreement at the rates prevailing at the time Users' order for same is received.

21. Supervision of installation of the above described equipment will be at the expense of the Besser Manufacturing Company, Alpena, Michigan, with the exception of the wiring for the Westinghouse Electric Panel for Mixer and for Skip Loader.

[fol. 3073] EXHIBIT 135

Besser Manufacturing Company

Plain Pallet Tampers and Vibrators

Complete Equipment for Concrete Products Plants
Alpena, Michigan

Phone: Alpena 291

March 25, 1949.

Goldcamp Sand & Gravel Company
Third and Lorain Streets
Ironton, Ohio

Attention: Mr. Donald Goldcamp

Dear Mr. Goldcamp:

When we learned that you had decided to install a competitive make of machine it gave us an overwhelming feeling of personal loss, and while we realize that so long as there is competition in industry, we will be faced with the same thing from time to time; however, in our business we have but one thing to lose and that is our customers, and when one of our customers like yourself, whose business we have valued very highly and whose plant we were just as proud of as we are of the man who is operating a half dozen Vibrapacs, decides he would like to try some other equipment, we immediately feel that we have in some way let him down.

If we were merely concrete block machinery manufacturers interested in making concrete block machinery and making a profit on it, we might be inclined to say that your case was an inevitable one; however, since we are vitally interested in the concrete block industry in the United States we have a personal stake in every concrete block plant that makes a concrete block. Therefore, deem it our privilege as well as our obligation to serve this industry in the best possible manner and with the highest possible type of service.

We can understand that you disagreed or did not clearly understand how our Vibrapac Use Agreement operates, and for this we can only blame ourselves here at Alpena for not having put forth a greater effort to explain this to you in a concise and logical manner. There are well over one hundred Besser Vibrapacs in operation under the use agreement at this time, and the service which we are rendering the industry under this agreement and the personal attention which our customers get under the use agreement merits nothing but the highest praise.

For example, a manufacturer in Phoeniz, Arizona using three Vibrapac machines, two of them old Vibrapacs which he had purchased outright and one of them installed under the Use Agreement, is now moving the two Vibrapacs which he originally purchased to another location and installing Vibrapacs under the Use Agreement in his plant, [fol. 3074] because he finds it more economical to operate the new Vibrapac which he got under the Use Agreement than it is to operate the old Vibrapac machines which he had already bought and paid for, but going on and telling you these things now is somewhat like holding a post-mortem and we know that you are not interested in that, but we do believe that you will be interested to know that we stand ready to be of any possible service to you at a moment's notice. All we ask is that you call on us.

We have not only the block machine required to make your plant an outstanding success, but we also have the trained service organization to back this up and insure your success with a Besser Super Vibrapac of modern design and with all of the latest features that can be incorporated in a concrete block making machine.

Please let us help you whenever you deem it possible.

Yours very truly, Besser Manufacturing Company,
By Ervin Hahn, Regional Sales Manager.

Ervin Hahn/klm
Enc: Super Cir.
cc: Mr. Niehaus

EXHIBIT 136

VIBRAPAC AGREEMENT

BESSER MANUFACTURING COMPANY, ALPENA, MICHIGAN, U.S.A.

Date January 20 194 9

User Goldsamp Sand & Gravel Company, P. O. Box 208

Street Third & Lorain Sts. County Lawrence

City Ironton State Ohio.

Ship to this Address If Different from Above.

How Ship Delivering Carrier

Quantity	DESCRIPTION OF EQUIPMENT	Sheet No.	For	Value In Case of Loss or Damage
	Electric Current 220 Volts 3 Ph. 60 Cycles.			
	Mixer Height To set in pit 40 inches deep.			
1	Besser Super Vibrapac Plain Pallet Stripper, fully automatic, including all Motors, [illegible], to run at a speed of 4-1/3 Cycles per minute, Pallet size 36 x 18-1/2 x 5/16"			40,000.00
1	Attachment for 7-5/8 x 7-5/8 x 15-5/8 - 3 Core Design Block, 1-1/4" Face Shells, 1-1/2" Center, 1" Ties, both ends open, and Motor Grooves, Halves, Plain Ends and Steel Sash Jambs included. Three at a time.			900.00
1	Attachment for 3-5/8 x 7-5/8 x 15-5/8" Hollow Slabs, Plain Ends, made six at a time.			900.00
2	Sets of Vibrator Shaft Assemblies for 1-5/8" Length.			600.00
1	Power Off Bearing Hoist, Horizontal Cylinder, Double Arm Boom, Automatic Pallet Pick Up and Pallet Release, will be mounted on steel "I" Beam upright in place of on machine.			2,000.00
1	Westinghouse Electric Panel mounted on machine with Starters and Switches, including complete approved Wiring of Machine.			800.00
				45,200.00

CANCELLED - Superseded by Lease #131 dated July 11, 1949.

Use Single space for each item and double space between items.
Use 5 Blanks for a set and new carbon.

3075

1352

Quantity	DESCRIPTION OF EQUIPMENT	Value In Case of Loss or Damage
	Sub Total ------	$45,200.00
1	Besser 50 Cu. Ft. Batch Mixer, Roller Bearing Equipped, with 30 H. P. 1200 R. P. M. 220.Volt, 3 Phase, 60 Cycle drive through V Belts, Clutch and Pulley, Including Drum Grid, Gear Housing and Extension Hopper.	4,480.00
1	Besser 50 Cu. Ft. Skip Loader with Foote Gear Reducer and 5 H. P. Motor with Electric Brake, Push Button control.	2,550.00 2,550.00
1	Westinghouse Electric Panel, not mounted, no wiring, for Mixer and Skip Loader.	275.00
1760	Plain Steel Pallets 26 x 18-1/2 x 5/16" Thick - $3.00	5,280.00
88	Model 72 Besser Super Strength Steel Racks for use with Fork Type Lift Truck, capacity 72 - 8" Blocks, @ $50.00 each.	4,400.00
	Total ----------	$62,185.00 2,185.00
		$62,185.00

1353

Agreement to Furnish

1. BESSER MANUFACTURING COMPANY of Alpena, Michigan, hereafter called "Besser" agrees to furnish to "User" named on Page 1, the BESSER EQUIPMENT SERVICE consisting of the USE of Besser Equipment listed on Pages 1 and 2 and INSTRUCTION in its operation upon the conditions stated herein and USER agrees to take and use said Equipment upon said conditions. Title to said Equipment and additions thereto to be and remain in BESSER at all times.

Transferring

2. This Equipment shall not be transferred or delivered or sublet to any other person or corporation, and neither this agreement nor the use hereby granted can be assigned by the User by his own act or by operation of law. However Besser will transfer this Agreement to a new User on request of present User provided said new User has the ability and finances to carry on this Agreement properly.

Payment

3. User will make the following payments.

$ 8,000.00 At Signing of this Agreement.

$ 13,550.00 At Time of Shipment.

$ 15,550.00 Total Cash Deposit.

4. Five Hundred Dollars ($500.00) Per Month Minimum Regular Monthly Payment.

Or One (1) Cent per 8 x 8 x 16 Block Equivalent when that is greater.
Above per block payment is reduced to three quarter (3/4) cent each on the excess over one and one-half million (1,500,000) block per year per machine.

5. $ 365.00 Per Month Minimum Additional Monthly Payment.

Or One (1) Cent per 8 x 8 x 16 Block Equivalent when that is greater until

6. $ 12,185.00 in additional equipment and additions thereto have been offset from this additional payment.

7. Additional Payment as above is to be full Use Payment and the only payment required on Additional Equipment for the Full Five Year period or optional Ten Year period of this agreement.

Return of Cash Deposit

8. One (1) Per Cent of Total Cash Deposit is to be deducted from each Monthly Payment until Cash Deposit has been reduced to One Thousand Dollars ($1,000.00). The Balance of Cash Deposit is to be returned to User at end of final Use Period when User has returned Equipment in good condition as provided herein with all payments made.

Yearly Minimum. Fiscal Year.

9. Whenever enough has been paid to equal the minimum regular Monthly Payments for a whole year, the payments for remainder of said year are on a per block basis only.
When Fifty Thousand Dollars ($50,000.00) has been paid in monthly payments, the monthly minimum is reduced to Three Hundred Dollars ($300.00) per month for remainder of the five or ten year period.

Time of Production Reports and Payments

10. User is to make the monthly Payments and also make accurate monthly Production Reports of the product of this equipment on blanks furnished by Besser, and send same to Besser by tenth of each month for preceding calendar month.

The additional conditions on back hereof are a part of this Agreement

The Above is Agreed to:

Date Jan 26 1949

User GOLDSAND SAND & GRAVEL COMPANY.

By C. F. Goldsand
Title

By Howard Goldsand Witness
Title

W. D. Johnson
Witness

BESSER MANUFACTURING COMPANY

By Raymond R. Nyhaus
Besser Representative

Approved at Alpena, Michigan

Date Jan 26 1949

BESSER MANUFACTURING COMPANY

By J. H. Besser Pres.
Authorized Signature

Typewrite the names underneath the signatures.

3077

1354

Location of Equipment

11. This Equipment is to be placed in Users plant at
Street THIRD & LOMAX STS. County LAWRENCE.
City IRONTON State OHIO.
and is not to be moved from this location except by written consent of an authorized Besser Officer.

Checking Production

12. Besser Representative shall have free access at reasonable times to Plant and Records of User to check production reports called for above and may place counters on said equipment. These counters will be arranged to give important information to both parties and both parties hereto will cooperate for the maintenance and proper operation of said counters.

Time of Agreement

13. Monthly payments and reports shall begin to accrue when operation of equipment begins in Users plant and in any case within two months from time of shipment to User. This agreement shall continue for five (5) years from its beginning. Besser also hereby gives User the option and right to renew this agreement for a second five (5) year period, said option to continue to within two months of expiration of first five (5) year period.

_____ is the time when monthly Reports and Payments begin to accrue.

Shipping Installing Starting

14. Besser will furnish this equipment FOB Alpena, Michigan or other point of manufacture and will furnish proposed plant layout and suggestions for installation. When User has installed the equipment and has it ready for operation, Besser will send its Expert who will instruct User in the use of the equipment and the manufacture of the Product.

Working Together for Good Results

15. Besser will maintain a staff of Engineers who will make periodic visits to Users plant to inspect the operation of said plant and equipment and make suggestions for securing good production and high grade results and a high grade product. Both parties hereto will actively work together for this purpose.

Guarantee and Care of Equipment

16. Besser guarantees this equipment to do good work when properly operated with good material and will replace without charge FOB Alpena, Michigan any parts which require replacement within one (1) year because of defective material or workmanship. User will take good care of this Equipment and will keep it in good working condition and will make necessary replacement of parts at expense of User, except as stated above, and will return said equipment at direction of Besser by freight prepaid at end of Use period in good condition except for natural wear.

Expiration of Agreement. Return of Equipment.

17. If this Agreement expires and the Equipment is not returned by User or retaken by Besser then User shall continue to make regular monthly reports and payments as called for herein. Upon expiration of this Agreement and failure to renew, or in case of non-payment or failure by User to carry out the conditions hereof, Besser shall have the right immediately after thirty (30) days written notice to enter the plant of User and take possession of and remove said equipment without process of law.

Insurance. Taxes.

18. Besser at its own expense shall carry the responsibility of Fire Insurance and of loss by fire. User shall be responsible and will make good for loss or damage in any other way except by fire and will also pay all taxes which are assessed on this Equipment after it is placed in Users' plant and until redelivery to Besser.

19. Machines and Attachments, in addition to the above or to replace any User may have in Use, will be furnished User in accordance with the conditions of this agreement at the rates prevailing at the time Users' order for same is received.

[fol. 3079] EXHIBIT 138

Lith-i-Bar Company

Holland, Michigan

November 1, 1948.

Miller Block Company
316 Goodsell St.

Evansville, Indiana

Attention: Mr. Lawrence Miller

Dear Mr. Miller:

I am curious to know something in relationship to our competitors, primarily Besser Manufacturing Company or Stearns Manufacturing Company.

We know that here and there some of their men made a practice of throwing a lot of threats around about what they were going to do to people who buy our machines. Usually that sort of thing is carried on before the man makes a purchase.

I am trying to track down some of that—if you have had such an experience I would appreciate you writing me about it. We have in the past found some instances, and I would like to have as complete a record of them as we can accumulate.

Thanking you for your cooperation, I remain

Your very truly, F. E. Milewski, Pres., Lith-I-Bar Company.

FEM:ep

Frank, I will give you a quick reply on this using your letter of inquiry. As you know when I came up and bought my machine I was definitely worried on this score and you related how you had talked to Mr. Besser and Gene Olson at one time about this and your attorney believed you had thing- worked out. Mr. Glenn Leemon who now is representing Besser around here had definitely told me that Jesse Besser would not let me operate a Lith-I-Bar machine in case I purchased one. He threatened me consider-

ably before we set up the machine but I have never seen him since although Besser men have been here in Evansville since that time. He pointed out how much Besser had in patent rights and that they would come back on me for damages rather than the manufacturer and break me up. As I told you before my trip to Holland this same Mr. [fol. 3080] Leemon told me that you were finishing up the few machine- you had on the assembly line and that they were insisting that you not manufacture any more.

So far as I can see now it was a drastic threat, but an idle one.

We are doing better all the time with our machine and think a lot of it. I will be happy to show our equipment to anyone who comes in and appreciate your help in solving our early difficulties.

Sincerely yours, Lawrence E. Miller, Miller Block Co.

[fol. 3081] EXHIBIT 139

Sometime ago in negotiating for new block manufacturing machinery the Besser Manufacturing Company's representative told us that if we installed a Lith-I-Block machine they would see to it that a competitive plant with their equipment was put in across the road and we would be driven out of business.

Wytheville Block Co., N. M. Lacy.

September 2, 1949.

[fol. 3082] EXHIBIT 142

Altavista Concrete Products
Altavista, Virginia

December 17th 1947.

Mr. Roy Darden,
Roy Darden Industries Inc.,
Bona Allen Building,

Atlanta 3, Ga.

Dear Roy:—

We are sending you by express today the 4" block attachments which you requested us over the phone to do. We hope you will get these back to us as soon as possible.

We wired you on yesterday that we will accept the 25c each for the 4" pallets, F.O.B. plant. We have these ready to ship as soon as we receive your instructions.

For your information we are quoting a paragraph from a letter we received today. This was the result of another company knowing we had bought one of your machines.

> "It is our understanding that this company will have to discontinue the manufacture of the Rockercrete machine in a very short time. They have been infringing on a patent but have had an agreement with the patentee to dispose of the machines they have on hand, then discontinue the manufacture of this machine. What will you do about repairs for this machine in future?"

What is the story on this?

With best wishes for the holidays,

Sincerely yours, Altavista Concrete Products, Mont Hubbard.

MH/N

[fol. 3083]

EXHIBIT 144

H. E. Shaw

936 Moreland Avenue, S. E.
Atlanta, Ga.

March 25, 1948.

Mr. Roy Darden
Roy Darden Industries
Bona Allen Building

Atlanta, Ga.

Dear Roy:

Over two years ago, the outlook for you seemed promising. This made me feel mighty good because of your particular makeup with plenty progressive energy and a profound desire for real achievements. I was particularly interested in the Warren-800 machine as I had watched it closely in Chattanooga and in Knoxville, and felt confident of its superior features involving high production and high quality masonry. When we met in Chicago at the NCMA meeting in 1946, I had a big let-down when I heard about the litigation involving patent rights in the Warren-800.

From a managerial standpoint of two Besser block plants, my latitude differs from the owners latitude; thus, my personal stationery. He is interested in the final figure on the monthly statement, whereas, I am interested in every phase from plant efficiency to periods beyond the sale. I have a lot of respect for the Besser machine itself, and I am sorry that I differ from the policies and management of the Besser Manufacturing Co. To cite a few instances, I wish to quote Mr. Thompson, who is Besser's representative in this district as saying that the court decision was handed down to you to cease production in the Warren-800 after making only six Warren-800 machines, as well as the maintenance parts for these six machines. Thompson asked me what the buyer of these particular machines would do for repair parts, etc., as if to say a buyer would be the goat. He also advised me that Besser had instituted a new machine distribution policy which would place machines under a contract royalty basis, and

that they have discontinued direct sale of block plant equipment to new plants. Also, I know from experience that while Besser advertises mold boxes for most every size block imaginable, he wants the plant operators to produce only the blocks which are 16 inches in length, and 8 inches in height. I was told by Miss Copeland in the Atlanta office that Mr. Besser did not want us to produce a 5" x 8" x 12" unit, and the only way I managed to get delivery on the mold box for this unit, was my threat to have it made locally. They finally came through with the box after many months of waiting. Being the largest producers of concrete masonry within the bounds of Georgia, we will produce the units demanded regardless of who might object as this comes under the head of Our business. In most cases, we can have patterns and castings made locally cheaper than buying direct from Besser. I know of [fol. 3084] other operators of Besser equipped block plants that have had bigger and better complaints with Besser.

Roy, I have a lot of confidence in you and have never known you to back away from any difficulties, and frankly, I hope you have not suffered too great a setback. What Besser needs is competition in his field, and the Warren-800 is the machine to do it. I know of one plant operator in Birmingham who will not permit a Besser representative in his Besser equipped plant. It is my understanding that he is through with Besser, and I believe you have sold him a Warren-800. Competition is the backbone of free enterprise, and it is my fervent hope that in some way, you can manage to produce the machine in quantity and quence some of these monopolistic attitudes.

Yours very truly, H. E. Shaw.

1360

EXHIBIT 148

STANDARD ORDER FORM

THE BESSER MANUFACTURING CO.

ALPENA, MICHIGAN, U.S.A.

DATE October 7, 1946

SHIP TO Building Units Inc.

POST OFFICE Primos, Del.Co.,Pa. R. F. D. NO.

COUNTY Delaware County STATE Penna.

SHIPPING POINT Primos, Pa. HOW SHIP Clifton Heights,Pa. Freight Station

NO.	DESCRIPTION	PRICE
	Besser equipment listed on reverse side of this contract	$26850.00
	"This quotation ~~is~~ is to be invoiced at the published prices in effect at time of shipment but said prices will not exceed any maximum prices prpperly established by O.P.A. or any successor agency, which are in effect at time of delivery." Shipment April 1947	

For which (I or we) agree to pay the Besser Manufacturing Company, at Alpena, Michigan the sum of Twenty six thousand, eight hundred and fifty---------- DOLLARS

as follows: $ 5,000.00 Cash at date of this order; $ 5,950.00 Sight Draft against Bill of Lading; and for value received, I (we) promise to pay to the order of the Besser Manufacturing Company, a Michigan corporation of Alpena, Mich. the sum of Seventeen thousand, nine hundred---------- DOLLARS

Payable at its offices in Alpena, Michigan, in installments, as follows, to-wit:

Balance 30 days from date of invoice

until all is paid in full, in cash, together with interest at the rate of six per cent per annum computed and payable

It is expressly understood that the title to the equipment, parts, and supplies ordered hereby (now placed or hereafter to be placed on the premises of the undersigned, in the County of Delaware, State of Penna.) shall remain in the Besser Manufacturing Co., the above named payee, until the full sum mentioned and all notes or renewals shall be paid in full, in cash. If the undersigned defaults in making any such payments or in observing any of the conditions and agreements by him to be observed, or if the undersigned shall be adjudicated bankrupt, or if a receiver shall be appointed for the undersigned's business, or, if the undersigned shall make an assignment for the benefit of the undersigned's creditors, then the Besser Manufacturing Co. either (1) may declare the entire sum remaining unpaid to be immediately due and payable, and elect to sue the undersigned for the amount due, thereby vesting the absolute title to said equipment, parts, and supplies in the undersigned; (2) the seller may enter the premises where said equipment, parts, and supplies are located and may take said equipment, parts, and supplies and thereafter hold the same absolutely free from all claim of the undersigned, and retain all payments made by the undersigned as and for liquidated damages, and not as a penalty, for the non-performance of this contract.

Neither notes nor renewals thereof shall be considered as payments until such notes or renewals are actually paid in money. Said equipment, parts, and supplies shall not become a fixture by being placed in any building or by being annexed in any manner to the realty, until all the conditions hereof have been fully paid and met.

The Besser Manufacturing Co. agrees to fulfill all claims and guarantees this machinery when properly operated and with proper materials and to furnish free F.O.B. cars at Alpena, Mich. for one year, any parts in the machines of their manufacture which break through fault of defective material or workmanship. All machines or parts to be delivered F.O.B. cars by Besser Manufacturing Co. at point of manufacture.

This order is subject to approval of the Besser Manufacturing Co. home office and not subject to countermand. The Besser Manufacturing Co. will endeavor to make prompt shipment but it is hereby agreed that said Besser Manufacturing Co. shall not be liable for delay or failure in delivery.

The undersigned, severally waive presentment for payment, protest, notice of non-payment and diligence.

I (we); the undersigned, do hereby accept the foregoing proposition, and do hereby agree to make all payments upon the terms and conditions herein specified.

BUILDING UNITS INC. (Seal)

by: [signature] (Seal) Signatures of Purchasers

Witness

Witness T. A. Doughty

Accepted F. C. Besser 1946

BESSER MANUFACTURING CO. Signatures of Sellers

Agent By F. C. Besser Pres. Treas.

3085

Besser Super Vibrapac, fully automatic to run at a speed of three and one third cycles per minute all motors furnished but no starters---------- $18,000.00

One air operated power off-bearing hoist--------- 600.00

One attachment to make 7 5/8"x 7 5/8"x 17 5/8" units including parts for making plain ends, halves, and steel sash jamb in one compartment of the mold-- 800.00

One attachment to make 11 5/8 x 7 5/8 x 17 5/8" units including parts for making plain ends, halves, and steel sash jamb in one compartment of the mold-- 800.00

One attachment to make 5 5/8"x 7 5/8"x 17 5/8" hollow units ---------- 800.00

One attachment to make 3 5/8" x 7 5/8"x17 5/8" hollow units ---------- 800.00

Three sets vibrating shafts for above attachments at ---------- 750.00

One electrical panel ---------- 600.00

Two thousand 5/16" x 18 1/2" x 26" plain steel pallets at $1.85 each ----------3700.00

$26,850.00

Current - 3 phase, 60 cycle, 220 volts.

3086

1362

EXHIBIT 149

STANDARD ORDER FORM

THE BESSER MANUFACTURING CO.

ALPENA, MICHIGAN, U.S.A.

DATE October 7, 1946

SHIP TO Building Units Inc. [illegible]

POST OFFICE Primos, Del.Co., Pa. R. F. D. NO.

COUNTY Delaware County STATE Penna.

SHIPPING POINT Primos, Pa. HOW SHIP Clifton Heights Pa. Freight Station

NO.	DESCRIPTION	PRICE
	One Pallet return for Super Vibrapac and one Change Over to operate Super Vibrapac at a speed of 4-1/5 cycles per minute	$ 12,000 00
	This order is to be priced at the published prices in effect at time of shipment but said prices will not exceed any maximum prices properly established by O.P.A. or any successor agency, which are in effect at time of delivery.	

For which (I or we) agree to pay the Besser Manufacturing Company, at Alpena, Michigan the sum of Twelve Thousand and no/100- DOLLARS as follows: $500.00- - - - - - - Cash at date of this order; $ ..... Sight Draft against Bill of Lading, and for value received, I (we) promise to pay to the order of the Besser Manufacturing Company, a Michigan corporation of Alpena, Mich. the sum of Eleven Thousand Five Hundred and no/100- DOLLARS Payable at its offices in Alpena, Michigan, in installments, as follows, to-wit:

This balance in a one year note. The purchaser agrees to send the Besser Manufacturing Company monthly reports and payments on the first of each month for the previous month at the rate of 1¢ per 8 x 8 x 16" block or the equivalent until said note is paid.

until all is paid in full, in cash, together with interest at the rate of ..... per cent per annum computed and payable .....

It is expressly understood that the title to the equipment, parts, and supplies ordered hereby (now placed or hereafter to be placed on the premises of the undersigned, in the County of Delaware, State of Penna.) shall remain in the Besser Manufacturing Co., the above named payee, until the full sum mentioned and all notes or renewals shall be paid in full, in cash. If the undersigned defaults in making any such payments or in observing any of the conditions and agreements by him to be observed, or if the undersigned shall be adjudicated bankrupt, or if a receiver shall be appointed for the undersigned's business, or if the undersigned shall make an assignment for the benefit of the undersigned's creditors, then the Besser Manufacturing Co. either (1) may declare the entire sum remaining unpaid to be immediately due and payable, and elect to sue the undersigned for the amount due, thereby vesting the absolute title to said equipment, parts, and supplies in the undersigned; (2) the seller may enter the premises where said equipment, parts, and supplies are located and may take said equipment, parts, and supplies and thereafter hold the same absolutely free from all claim of the undersigned, and retain all payments made by the undersigned as and as liquidated damages, and not as a penalty, for the non-performance of this contract.

Neither notes nor renewals thereof shall be considered as payments until such notes or renewals are actually paid in money. Said equipment, parts, and supplies shall not become a fixture by being placed in any building or by being annexed in any manner to the realty, until all the conditions hereof have been fully paid and met.

The Besser Manufacturing Co. agrees to fulfill all claims and guarantees this machinery when properly operated and with proper materials and to furnish free F.O.B. cars at Alpena, Mich. for one year, any parts in the machines of their manufacture which break through fault of defective material or workmanship. All machines or parts to be delivered F.O.B. cars by Besser Manufacturing Co. at point of manufacture.

This order is subject to approval of the Besser Manufacturing Co. home office and not subject to countermand. The Besser Manufacturing Co. will endeavor to make prompt shipment but it is hereby agreed that said Besser Manufacturing Co. shall not be liable for delay or failure in delivery.

The undersigned, severally waive presentment for payment, protest, notice of non-payment and diligence.

I (we) the undersigned, do hereby accept the foregoing proposition, and do hereby agree to make all payments upon the terms and conditions herein specified.

BUILDING UNITS INC. (Seal)
by: [signature] (Seal) } Signatures of Purchasers

Witness [signature]

Witness T. A. Dougherty

Agent [illegible]

Accepted October 7 1946

BESSER MANUFACTURING CO.

By F. C. Burnett } Signatures of Sellers
Asst. Secy. Vice-President

3087

1363

EXHIBIT 150

DATE	AMOUNT
10/7 on a/c	$3000.00
as per contract dated 10/7/46	

TOTAL OF INVOICES
LESS DISC
LESS
TOTAL DEDUCTIONS
AMOUNT OF CHECK

IF INCORRECT PLEASE RETURN
NO RECEIPT NECESSARY

BUILDING UNITS, INC.
PRIMOS, PA.

No. 1775

CLIFTON HEIGHTS, PA. Oct. 7, 1946

PAY TO THE ORDER OF Besser Manufacturing Company $3,000.00

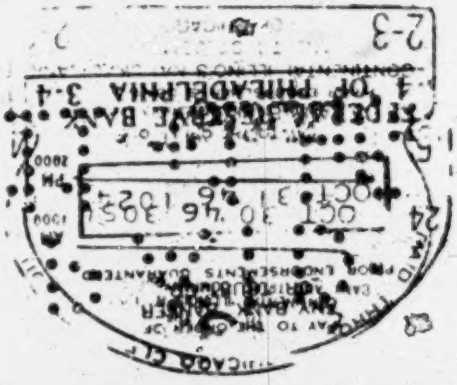
Three thousand and 00/100 DOLLARS

CLIFTON HEIGHTS
NATIONAL BANK
CLIFTON HEIGHTS, PA. 60-1784

PRESIDENT

TREASURER

Pay to the order of
PEOPLES STATE BANK
FOR DEPOSIT ONLY
BESSER MANUFACTURING CO.



3088

EXHIBIT 151

BUILDING UNITS, INC.
PRIMOS, PA.

No. 1776

CLIFTON HEIGHTS, PA. Oct. 7, 1946

DATE	AMOUNT
10/7 on a/c	$500.00
as per contract dated 10/7/46	

TOTAL OF INVOICES
LESS DISC
LESS
TOTAL DEDUCTIONS
AMOUNT OF CHECK

IF INCORRECT PLEASE RETURN
NO RECEIPT NECESSARY

PAY TO THE ORDER OF Besser Manufacturing Company $500.00

The sum of 50 cents DOLLARS

CLIFTON HEIGHTS
NATIONAL BANK
CLIFTON HEIGHTS, PA. 60-1754

PRESIDENT

TREASURER

Pay to the order of
PEOPLES STATE BANK
ALPENA MICH
FOR DEPOSIT ONLY
BESSER MANUFACTURING CO.

FEDERAL RESERVE BANK OF PHILADELPHIA 3-4

3089

1365

EXHIBIT 152

LEASE

BESSER MANUFACTURING COMPANY. ALPENA, MICHIGAN, U.S.A.

Date October 21, 1947

Lessee Building Units, Inc., Corp. of the State of N.J. P.O.Box

Street Oak Ave. & Pennsylvania R.R. County Delaware

City Primos State Pennsylvania

Ship to this Address If Different from Above Clifton Heights Freight Station

How Ship Freight - P. R.R.

Quantity	Description of Equipment Besser Original.
	Electric Current. 3 Ph. 60 Cycle 220 Volts Mixer Height
1	Super Vibrapac Plain Pallet Stripper, Fully Automatic, and including all Motors and with Front Pallet Feed and to run at a speed of 4-1/5 Cycles per minute. Pallet size 26 x 18-1/2 x 5/16
1	Standard Offbearing Hoist
1	Westinghouse electric panel mounted on left side frame of above Vibrapac with starters and switches, including complete approved wiring of machine.
1	Attachment to make 7-5/8 x 7-5/8 x 17-5/8" units with standard shell and ties, 3 at a time, including parts for making plain ends, halves, and steel sash jamb in one compartment of mold.
1	Attachment to make 7-5/8 x 7-5/8 x 15-5/8" units with standard shell and ties, 3 at a time, including parts for making plain ends, halves, and steel sash jamb in one compartment of mold.
1	Attachment to make 11-5/8 x 7-5/8 x 17-5/8" units with standard shell and ties, 2 at a time, including parts for making plain ends, halves, and steel sash jamb in one compartment of mold.
1	Attachment to make 5-5/8 x 7-5/8 x 17-5/8" units with standard shell and ties, 4 at a time.
1	Attachment to make 3-5/8 x 7-5/8 x 17-5/8" units with standard shell and ties, 6 at a time.
5	Sets of vibrating shafts complete for above attachments.
2200	Pallets 5/16" thick by 18-1/2 x 26"
1	5 h.p. compressor complete with A.S.M.E. coded tank.
1	set of parts to make 7-5/8 x 7-5/8 x 17-5/8 cornec blocks
1	" " " " " " " x 15-5/8 solid blocks
1	~~Attachment~~ 3-5/8 " x ~~17-5/8~~ 15-5/8 Hollow & Solid

3090

Quantity	Description of Equipment

Agreement to Lease

1. BESSER MANUFACTURING COMPANY of Alpena, Michigan, hereafter called "Besser" agrees to furnish and to Lease to Lessee named on Page 1 the equipment listed on Pages 1 and 2 upon the conditions stated herein and Lessee agrees to take and rent said equipment upon said conditions, title to said equipment and additions thereto to be and remain in Besser at all times.

Payments

2. Lessee will make following Rental Payments.

[redacted] Advance Rental. Payable as follows:

$_____ At Signing of Lease.

$_____ Balance at Time of Shipment.

3. Regular Monthly Rental as follows.

$500.00 Per Month Minimum Monthly Rental.

Or One (1) Cent per 8 x 8 x 16 Block Equivalent when that is greater.

4. Additional Monthly Rental as follows.

$ [redacted] Per Month -

Or One Half (1/2) Cent per 8 x 8 x 16 Block Equivalent when that is greater until

$ [redacted] in additional equipment has been offset from this additional rental.

5. Payment of Additional Rental as above is to be full Rental Payment and the only Rental required on Additional Equipment for the Full Five Year period or optional Ten Year period of this Lease.

Return of Advance Rental

6. One and One Quarter (1-1/4) Per Cent of Total Advance Rental is to be deducted from each Regular Monthly Payment. If this Lease is renewed after the first period, these deductions shall continue in the new period until all advance rental is returned to Lessee. If Lease is not renewed, any balance of Advance Rental will be returned to Lessee when Equipment is returned to Besser in good condition.

Time of Production Reports and Payments

7. Lessee is to make the monthly payments and also make accurate monthly Production Reports of the product of this equipment and send same to Besser by tenth of each month for preceding calendar month.

Location of Equipment

8. This Equipment is to be placed in Lessee's plant at

Street Oak Ave. P.R.R County Delaware

City Prince State Penn.

and is not to be moved from this location except by mutual agreement.

(The additional conditions on back hereof are made a part of this Lease Agreement)

The Above is agreed to:

Date Oct 21 1947

Building Units, Inc.

Lessee

By H. H. Hangeman

Pres.

Officers Title

Witness:

Roy Martin Boyd

P.M. Park

BESSER MANUFACTURING COMPANY

By J. J. Stelly

Besser Representative

Approved at Alpena, Michigan

Date October 23 1947

BESSER MANUFACTURING COMPANY

By J. H. Besser Pres.

Authorized Signature

Yearly Minimum

9. When with the help of Per Block Payments enough rent has been paid to equal the monthly minimums for the whole year, any further monthly minimums for said year can be omitted and payments made on per block basis only for balance of said year. The monthly minimums for remaining months of the year are to be the 1-1/4% of Advance Rental.

Checking Production

10. Besser representatives shall have free access at reasonable times to Plant and Records of Lessee to check production reports called for above and may place counters on said equipment. These counters will be arranged to give important information to both parties and both parties hereto will cooperate for the maintenance and proper operation of said counters.

Time of Lease

11. This Lease shall start and monthly payments and reports shall begin to accrue when the equipment begins operation in Lessee's plant and in any case within thirty days from time of shipment to Lessee. This Lease shall continue for five (5) years from its beginning. Besser also hereby gives Lessee an option and the right to renew this Lease for a second five (5) year period, said option to continue to within six months of expiration of first five (5) year period.

~~Oct. 31, 1947~~ Dec. 1, 1947 is the time of beginning of this lease.

Shipping Installing Starting

12. Besser will furnish this equipment FOB Alpena, Michigan or other point of manufacture and will furnish proposed plant layout and suggestions for installation. When Lessee has installed the equipment and has it ready for operation, Besser will send its Expert who will instruct Lessee in the use of the equipment and the manufacture of the Product.

Working Together for Good Results

13. Besser will maintain a staff of Engineers who will make periodic visits to Lessee's plant to inspect the operation of said Plant and Equipment and make suggestions for securing high grade results and a high grade product. Both parties hereto will actively work together for this purpose.

Guarantee and Care of Equipment

14. Besser guarantees this equipment to do good work when properly operated with good material and will replace without charge FOB Alpena, Michigan any parts which require replacement within one (1) year because of defective material or workmanship. Lessee will take good care of this Equipment and will keep it in good working condition and will make necessary replacement of parts at expense of Lessee, except as stated above, and will return said Equipment at direction of Besser by freight prepaid at end of Lease period in good condition except for natural wear.

Expiration of Lease. Return of Equipment

15. If this Lease expires and the Equipment is not returned by Lessee or retaken by Besser, then Lessee shall continue to make regular monthly reports and payments as called for herein. Upon expiration of this Lease and failure to renew or in case of non-payment of rent or failure by Lessee to carry out the conditions of this Lease, Besser shall have the right to enter the plants of Lessee and take possession of and remove said equipment without process of law.

Insurance Taxes

16. Besser at its own expense shall carry the responsibility of Fire Insurance and of loss by fire. Lessee shall be responsible and will make good for loss or damage in any other way except by fire and will also pay all taxes which are assessed on this equipment after it is placed in Lessee's plant and until redelivery to Besser.

[fol. 3094] EXHIBIT 153

Staley & Company

Established 1920

Concrete Products Plants

Construction and Industrial Equipment

236 North Rolling Road

Springfield, Del. County (Suburb of Phila.)
Penna.

October 21st. 1947.

Building Units Inc.,
Primos, Penna.

Attention Mr. H. Longenecker

Dear Mr. Longenecker:

Mr. Besser asked me to take care of you personally, Harry, and your Company in the most perfect manner so that you will have the most up to date and most economical plant in the Philadelphia area.

In addition to the equipment being furnished by the regular lease you will be signing, as soon as available he would like to furnish you and supervise your men in installing an apparatus for automatically taking the pallets from the rack to the machine and loading the racks with the blocks from the machine. Should new racks be required to do this, Besser proposes to furnish them and the cost of same could be added to item #4 of your lease. At the same time any improvements in machine design would be installed. Besser reserves the privilege of furnishing a new machine if he believes it more advisable.

Should the policy of Besser change and sales of these machines again take place in this area, Building Units will be given the privilege of buying the equipment furnished on the lease at prices effective at date of sale.

The reason for the above, is that Mr. Longenecker, was the first to agree to the lease aggre-ment arrangement and

committment was made before final policy was determined. In any event the above equipment when furnished remains the property of the Besser Mfg. Co. along with the other items in the lease.

Very truly yours, P. W. Park, Besser Mfg. Company.

JJ/S

P.S. We agree that if we make a lease for the same type equipment as you are leasing on terms more favorable to the lessee than those expressed in your lease, we will modify your lease to take care of the more favorable terms.

P. W. P.

[fol. 3095] EXHIBIT 154

Besser Manufacturing Company

Plain and Pallet Tampers and Vibrators

Complete Equipment for Concrete Products Plants

Alpena, Michigan

Phone: Alpena 291

October 29, 1947,

Mr. H. H. Longenecker
Building Units Inc.
Oak Ave. & Pennsylvania R. R.

Primos, Delaware Co., Pennsylvania

Dear Harry:

Thanks and congratulations on the Lease which you sent to us through Mr. Staley which I am sure will work out in a way which will please you very much.

Prompt shipment will be made of this equipment and we are looking forward to having you get into good production in the near future. This equipment will enable you to do very high grade work and a lot of it at lowest cost.

Your copy of the Lease is also enclosed and with best wishes, I remain

Yours very truly, Besser Manufacturing Company,
By J. H. Besser, President.

JHB:msk

Enc: Copy of Lease

[fol. 3096] EXHIBIT 155

Besser Manufacturing Company

Plain Pallet Tampers and Vibrators

Complete Equipment for Concrete Products Plants
Alpena, Michigan

Phone: Alpena 291

June 4, 1949.

Mr. Henry Long-necker.
Building Units, Inc.
Oak Ave. & Pennsylvania R. R.

Primos, Del. Co., Pennsylvania

Dear Harry:

Certainly enjoyed the time I spent with you recently. It was pleasing to see your plant running so smoothly and to note the many improvements you have made recently, such as changing over to oil fire on your boiler, your new bulk cement bin, and many other smaller, but necessary, corrections and additions. You have a smooth running operation.

Within the next thirty to sixty days we will ship you the Besser Automatic Height and Density Control and the Pallet brush and oiler.

I find on my return that you have the latest on the front pallet feed. However, we are going to have a factory service man check over your machine very promptly. He

will correct the delivery of block so that you will not have any breakage from the bumping of pallets.

With reference to the burned out motor on the air compressor, we are again contacting Kellog American, and we will have this matter straightened out very shortly.

Harry, I have discussed the other matter with Mr. Besser, and the status is the same as we talked about during my visit. In other words, we cannot sell you the machine outright. We know that you will continue your successful operation under the Vibrapac agreement and that it will be highly profitable to you.

Many thanks for all the courtesies extended on my recent visit. Kindest regards.

Yours very truly, Besser Manufacturing Company,
D. R. Fox, General Sales Manager.

DRF:rfd

[fol. 3097] EXHIBIT 156

140 Elliott Avenue
Yonkers 5, New York

April 5, 1950.

Stearns Manufacturing Company
Adrian, Michigan

Att'n Mr. Pierce Wright

Gentlemen:

I believe you will agree with my observations that since the middle of the 1948 season there has been a gradual reduction in the demand for concrete block machinery, and that the industry is rapidly setting back to normal pre-war production or below.

Accordingly, this state of affairs has affected my returns from the patents under which you are licensed and necessitates this request for an opportunity to receive additional funds, with your permission.

I have had several inquiries from various sources as to the possibility of manufacturing under the patents in-

volved in the license mentioned which would afford me an additional source of revenue. This may be accomplished if your organization will grant a waiver on that provision of the license agreement which gives you an exclusive under my inventions.

Therefore, gentlemen, may the writer have your considered judgment on such a request and a favorable action by your management.

Very truly yours, Louis Gelbman.

[fol. 3098] EXHIBIT 157

Stearns Manufacturing Company, Inc.

Concrete Block Making Equipment
Adrian, Michigan

Telephone 1300

Mr. Louis Gelbman,
Gelbman, Inc.,
140 Elliott Ave.,
Yonkers 5, New York,

Dear Mr. Gelbman:

Your recent request to broaden the licensing powers under your patents has been duly considered by this company. With some hesitation we are constrained to agree with your view points regarding the request for additional funds by releasing the exclusive feature of our license, enabling you to issue additional licenses.

In pursuance of the foregoing, and in accordance with authority vested in me by direction of the board of directors of the Stearns Mfg. Co., the Stearns Mfg. Co. hereby grants your request to change our exclusive license agreement under the Gelbman patents to a non-exclusive license.

Signed and Sealed, Stearns Manufacturing Co.,
Myron Hultmark, President.

D. C.
D. Callewaert.

Equipment of Proven Worth

[fol. 3099] EXHIBIT 159

Memorandum of Agreement

Ben Stone, of 20031 Shrewsbury, Detroit, Michigan, hereinafter called Stone, hereby offers to purchase from Besser Manufacturing Company, of Alpena, Michigan, hereinafter called Besser, forty-five thousand (45,000) shares of the capital stock of Stearns Manufacturing Company, of Adrian, Michigan, hereinafter called Stearns, for a total purchase price of Two Hundred Seventy Thousand ($270,000.00) Dollars, upon the following terms:

1. Stone will pay in cash Ten Thousand ($10,000.00) Dollars upon execution of this agreement; Twenty-five Thousand ($25,000.00) Dollars on or before March 1, 1951; Forty Thousand ($40,000.00) Dollars on or before March 1, 1952; Seventy-five Thousand ($75,000.00) Dollars on or before March 1, 1953; and the balance of One Hundred Twenty Thousand ($120,000.00) Dollars on or before March 1, 1954. Certificates evidencing said shares will be delivered on payment of the full purchase price of Two Hundred Seventy Thousand ($270,000.00) Dollars.

2. Stone will have during the life of this agreement the right to vote said shares and also, unless and until any such shares are sold by Besser, the right to vote all other shares of Stearns now or hereafter owned by or for the benefit of Besser. Besser from time to time will execute such proxies to Stone as may be required to effectuate this right.

3. Stone will have during the life of this agreement an option for ninety (90) days after written notice to meet the terms of any bona fide offer acceptable to Besser, for the purchase of any shares of Stearns over and above said forty-five thousand (45,000) shares.

4. Until March 1, 1952, any dividends paid on account of said forty-five thousand (45,000) shares shall belong to Besser. Thereafter any dividends paid on account of said [fol. 3100] forty-five thousand (45,000) shares shall be divided between Stone and Besser according to the ratio on the dividend payment date of Stone's payments on account of said shares to the total purchase price of Two Hundred Seventy Thousand ($270,000.00) Dollars. Nothing

contained in this paragraph shall obligate Stone as a stockholder, proxy, or director to cast his vote or use his influence in favor of any dividend declaration.

5. Stone may terminate this agreement at any time by written notice to Besser. Besser may terminate this agreement only for default by Stone in performance of this agreement. Upon termination Besser at its option either will refund to Stone his payments on account of the purchase price of said shares in cash less Ten Thousand ($10,000.00) Dollars, or will transfer to Stone a sufficient number of shares of Stearns at Six ($6.00) Dollars per share to equal his payments on account of the purchase price of said shares.

6. Stone will use his voting rights under this agreement to cause his election as soon as practicable as director, president and general manager of Stearns, and thereafter during the life of this agreement will serve diligently and faithfully in those capacities.

7. Stone will do everything within his power and opportunity to cause Stearns to request and to accept from Besser Manufacturing Company the licenses described in Paragraph 8 hereafter, it being recognized by the parties that there exists presently a serious question of infringement of patents by Stearns and that, by way of compromise of such question, the application for license, the acceptance of the license and the recognition of the validity of said patents is an important part of the contract between these parties. The failure of Stone to exert the effort and accomplish the result herein stated shall give to Besser, at its election, the right to declare void the agreement upon its part to sell the shares of stock hereinbefore identified.

[fol. 3101] 8. Besser will grant Stearns, in consideration of Stone's undertakings as aforesaid, but without limitation to the life of this agreement, non-exclusive licenses as follows: (1) to manufacture and sell Cored Pallet Concrete Block Machines, without limitation as to size of block produced or number of blocks produced simultaneously, so long as said machines are adaptable exclusively to the manufacture of blocks on cored pallets, and (2) to manufacture and sell Plain Pallet Concrete Block Machines, provided that such machines will produce not more than one

or two blocks simultaneously, either 8" x 8" x 16" or 8" x 8" x 18" or equivalent, or of size which can be made in a mold not larger than required for two 8" x 8" x 18" blocks, or can be made on a pallet not more than 18½" square. The license agreements to implement this undertaking by Besser will provide for full use by both Stearns and Besser of all inventions, improvements and developments now or hereafter owned, controlled, licensed or developed either by Besser or by Stearns, whether or not patented or patentable, and full disclosure by Besser or by Stearns, each to the other of all techniques, methods, processes and know-how which are or may be useful in the manufacture, operation, maintenance and repair of the machines covered by this Agreement. In consideration of these licenses Stearns will pay a royalty of One Hundred Twenty-five ($125.00) Dollars to Besser and Seventy-five ($75.00) Dollars to Louis Gelbman of New York, N. Y., on each machine with molds to make one at a time of 12" width by 18" length units and any other size or combination of units in this size mold; a royalty of Two Hundred Fifty ($250.00) Dollars to Besser and One Hundred Fifty ($150.00) Dollars to Gelbman on each machine with molds to make two at a time of 8" width by 18" length units and any other size or combination of units in this size mold; and on each cored pallet machine with molds to make more than two at a time of 8" [fol. 3102] width by 18" length, and any other size or combination of units in this size mold, an additional royalty of One Hundred Twenty-five ($125.00) Dollars to Besser and Seventy-five ($75.00) Dollars to Gelbman for each number over two at a time. As a condition of these licenses Stearns will recognize and accept the validity of any patents relating to the manufacture of concrete block machinery which are owned, controlled or licensed by Besser.

9. Besser will assign to Stearns, in consideration of Stone's undertakings as aforesaid, but without limitation to the life of this agreement, all production rights, all accounts receivable on Besser's books, and all rights of Besser to return of advances, all inventory and existing engineering drawings in connection with a cinderizing machine for the manufacture of Aglite, so-called, and all of Besser's interest in a certain contract between one Frank Leftwich and Besser. For such assignment Stearns will assume all

of Besser's obligations under said contract with Leftwich, and will pay to Besser all sums advanced by Besser to Leftwich, all sums receivable by Besser from Marietta Concrete Company on account of the purchase of Aglite equipment, and all sums receivable by Besser from Lightweight Aggregate Corporation and the cost of inventory on hand for Aglite equipment, less a credit against said sums of Thirty Thousand ($30,000.00) Dollars. Besser will make no charge for the engineering drawings. Besser unconditionally guarantees payment of all accounts receivable from Marietta Concrete Company and Lightweight Aggregate Corporation, which are hereby assigned to Stearns.

Witness my hand and seal the 30th day of March 1950.

Ben Stone (L. S.)

Acceptance

The foregoing offer has been reviewed and accepted by the Board of Directors of Besser Manufacturing Company, and the undersigned, in behalf of the Board of Direc-
[fol. 3103] tors, have been authorized to sign and seal this acceptance of said offer in the name of the company.

Besser Manufacturing Company, By J. H. Besser, President, and F. C. Burnett, Secretary.

[fol. 3104] Exhibit 160

Proxy

Know all men by these presents, That the undersigned Besser Manufacturing Company, does hereby appoint Ben Stone the true and lawful attorney of the undersigned and in the name and stead of the undersigned to vote as proxy of the undersigned at all annual or special meetings of stockholders of Stearns Manufacturing Company and for and at any and all adjournments thereof on any shares of the capital stock of said company which at the time may stand in the name of the undersigned or be owned by it, for the election of directors, the ratification of all acts of the Board of Directors and for all committees thereof and for the transaction of any and all business as may come before such meetings. This proxy shall continue in full force until revoked in writing by the undersigned.

In witness whereof, the undersigned has caused this proxy to be executed this 12th day of April, 1950 by authority of its Board of Directors.

Besser Manufacturing Company, By J. H. Besser, Pres.

In Presence of:

F. C. Burnett.
S. M. Johnson.

[fol. 3105] EXHIBIT 162

License Agreement

This agreement made this 1st day of April, 1950, by and between Hamlin F. Andrus, of ..... and Louis Gelbman, of 140 Elliott Avenue, Yonkers, New York, and Besser Manufacturing Company, a Michigan Corporation having a principal place of business at Alpena, Michigan, hereinafter jointly referred to as Licensors, and J. W. Appley and Son, a Florida Corporation, having its office and principal place of business at St. Petersburg, Florida, hereinafter referred to as Appley, witnesseth:

Whereas, Licensors are the owners of certain improvements and inventions in concrete block making machines of the vibrating type in which the mold box is vibrated under pressure during the operating cycle of the machine in order to compact the concrete mixture therein, which said improvements and inventions are the subject of the following Letters Patent of the United States owned by Licensors:

United States Patents

Patent No.	Inventor	Issue Date
2,003,632	Louis Gelbman	June 4, 1935
2,029,365	Louis Gelbman	Feb. 4, 1936
2,069,880	Louis and Nathan L. Gelbman	Feb. 9, 1937
2,251,447	Louis Gelbman, Eugene F. Olsen and Arthur B. Mays	Aug. 5, 1941
2,269,955	Eugene F. Olsen	Jan. 13, 1942
2,275,676	Louis Gelbman, Eugene F. Olsen and Arthur B. Mays	Mar. 10, 1942
2,366,780	Louis Gelbman, Eugene F. Olsen and Arthur B. Mays	Jan. 9, 1945
2,106,629	Ephriam J. Scott	Jan. 25, 1938
2,319,291	Jesse H. Besser	May 18, 1943

Whereas, Appley is desirous of acquiring a certain non-exclusive right and license to make, use and sell devices, apparatus and/or processes described in said patents,

Now, therefore, in consideration of the mutual promises of each other as hereinafter set forth, the parties agree as follows:

[fol. 3106] 1. Licensors hereby grant to Appley for the lives of the aforesaid patents and any reissues and extensions thereof, unless this agreement shall be sooner terminated as hereinafter provided, the following rights:

2. The non-exclusive license and privilege to make, use, sell or lease or have manufactured, cored pallet machines and devices embodying the improvements and inventions disclosed in the above listed patents, or any of them, in and throughout the United States, its territories and possessions, and throughout all foreign countries, provided, however, that such devices or machines employ not more - one or two cored pallet molds to make one or two at a time of twelve inch width by eighteen inch length units and any other size or combination of units in these size molds. The license granted herein shall extend to and include any and all improvements or inventions hereinafter made by Licensors, or either of them, during the term of this agreement, relating to concrete block making machines of the vibrating type in which the mold box is vibrated under pressure during the operating cycle of the machine in order to compact the concrete mixture therein, throughout the United States and all foreign countries.

3. Appley agrees to pay to Besser a royalty on each and every concrete block making machine, or devices for attachment thereto, of the vibrating type in which the mold box is vibrated under pressure during the operating cycle of the machine in order to compact the concrete mixture therein, which is sold, leased, or otherwise disposed of to a customer of Appley for use in the manufacture of molded units. Such royalty to be as follows:

> Two Hundred Dollars ($200.00) for attachment devices or machines with cored pallet molds to make one (1) at a time of twelve inch width by eighteen inch length units and any other size or combination of units in this size mold.

Four Hundred Dollars ($400.00) for attachment devices or machines with cored pallet molds to make two (2) at a time of eight inch width by eighteen inch length units and any other size or combination of units in this size mold.

[fol. 3107] Royalties shall accrue on all such machines or attachment devices when the articles are shipped to the customer. Appley shall apply a patent notice to products made of sold under this agreement.

4. Appley covenants and agrees that the Letters Patent covered by this agreement, are good and valid in respect to each of the claims, and agrees not to attack or question, directly or indirectly, the validity of the said claims during the life of the last to expire patent.

5. Any improvements developed by any of the parties hereto relating to the machinery, devices and apparatus licensed hereunder, whether patentable or not, are to fall within the scope of this agreement, and to be licensed to the other parties without further compensation.

6. Appley shall keep accurate records of all such machines or attachment devices therefor manufactured, sold, leased or otherwise disposed of by them, which said records shall be open to the inspection of Licensors, or their duly authorized representatives at any time during reasonable business hours. Appley shall render to Licensors a written report on the first day of each month commencing the 1st day of May, 1950, setting forth the number of machines or devices sold, leased or otherwise disposed of and shipped to the customer by them during the preceding calendar month, including the name of the customer and the serial number and type of such machine or device for attachment thereto. Appley shall pay to Besser, with a copy of said report to the other Licensors the total amount of royalties shown to be due thereby. Upon receipt of said royalties Besser shall immediately pay to the other Licensors their aliquot share.

7. The expense of prosecuting any alleged infringers of patents covered by this agreement shall be shared equally by each of the parties hereto; and the determination of what suits shall be brought must be by unanimous agreement of

[fol. 3108] the parties hereto; but any two parties hereto may prosecute alleged infringers at their own expense and the parties not participating in the expense of such suit shall not share in any damages awarded. The parties not participating in the expense of any such suit agree to give cooperation and execute the necessary papers.

8. If Appley fails to keep or perform any covenant or agreement herein contained, Licensors may give written notice of the default, and if the same has not been made good within thirty (30) days, Licensors may, at their option, forthwith cancel and terminate the license in default by written notice. If Appley shall become insolvent, or shall make an assignment for the benefit of creditors, or if proceedings in voluntary or involuntary bankruptcy shall be instituted in behalf of or against Appley, or if a trustee or receiver of the property of Appley shall be appointed, Licensors may, at their option, terminate the license forthwith, by written notice.

9. This agreement shall inure to the benefit of and be binding upon the Licensors, their heirs, executors, administrators, legal representatives and assigns, as the case may be. This agreement shall inure to the benefit of and be binding upon Appley and any successor to the entire business and good will of Appley in concrete block making machines, but shall not otherwise be assignable by Appley without permission of Licensors in writing.

This agreement may be opened for negotiation on comparable plain pallet machines one year from date hereof by mutual consent of the parties, but nothing herein shall affect the continuance of this agreement for the cored pallet devices covered hereby.

[fol. 3109] In witness whereof, the parties hereto have executed this agreement in quadruplicate, the day and year first above written,

Hamlin F. Andrus, Louis Gelbman, Besser Manufacturing Company, By J. H. Besser, President.

J. W. Appley & Son Inc., by James E. Appley, Secretary-Treasurer.

STATE OF NEW YORK,
County of ——, ss.

On this ..... day of ....., 1950, personally appeared before me ....., to me known and known by me to be the person mentioned in and who executed the attached agreement, and he acknowledges to me that he executed the same as his free act and deed for the purposes and uses therein mentioned.

—— ——. My commission expires ——.

STATE OF NEW YORK,
County of ——, ss.

On this ..... day of ....., 1950, personally appeared before me ....., to me known and known by me to be the person mentioned in and who executed the attached agreement, and he acknowledges to me that he executed the same as his free act and deed for the purposes and uses therein mentioned.

—— ——. My commission expires ——.

[fol. 3110] STATE OF MICHIGAN,
County of Alpena, ss.

On this ..... day of ....., 1950, personally appeared before me Jesse H. Besser, who being by me duly sworn did depose and say that he resides at Alpena, Michigan, and is President of Besser Manufacturing Company, the corporation described in the attached agreement; that he knows the corporate seal of said Besser Manufacturing Co.; that the seal affixed to said agreement is said corporate seal; that the same was affixed to said agreement by authority of the Board of Directors; and that he signed his name thereto by like authority.

—— ——. My commission expires —— ——.

STATE OF FLORIDA,
County of Pinellas, ss.

On this 1st day of April, 1950, personally appeared before me J. E. Appley, who being by me duly sworn did depose and say that he resides at 831 Ninth Street North, St.

Petersburg, Florida, and is Secretary-Treasurer of J. W. Appley & Son Inc., the corporation described in the attached agreement; that he knows the corporate seal of said J. W. Appley & Son Inc.; that the seal affixed to said agreement is said corporate seal; that the same was affixed to said agreement by authority of the Board of Directors; and that he signed his name thereto by like authority.

John E. Baas, Notary Public, State of Florida at Large. My commission Expires Jan. 12, 1954. (Seal.)

[fol. 3111] EXHIBIT 176

Waxstein & Gelbman
Counsellors at Law

20 South Broadway, Yonkers 2, N. Y.

Yonkers 5-5377

Bernard Waxstein
Morris Gelbman

March 24, 1950.

Stearns Manufacturing Co., Inc.
Adrian, Michigan

Gentlemen:

Enclosed herewith you will please find a Modification Agreement which I would like to have executed by both Stearns Manufacturing Co., Inc. and the Besser Manufacturing Company.

As soon as these have been properly executed, will you be kind enough to forward the same to the Besser Manufacturing Company for signature.

Thanking you in advance for your cooperation, I remain

Very truly yours, Waxstein & Gelbman, By: Morris Gelbman.

MG:ba
Directed by:

[fol. 3112] EXHIBIT 177

Modification of a License Agreement between Hamlin F. Andrus and Louis Gelbman, Licensors and Stearns Manufacturing Co., Inc., Licensee and Besser Manufacturing Company, Licensee, made this ____ day of March, 1950;

Now, in consideration of the sum of One and 00/100 ($1.00) Dollars in hand paid by the Licensors to the Licensees, and mutual promises made herein, and other good and valuable consideration, it is agreed:

1) That the first sentence of paragraph "4" of the aforesaid License Agreement, made December 7th, 1942, by and between the parties hereto, be amended and modified so as to read:

> "4. Licensors may grant any other right or license to manufacture, use or sell machines embodying said improvements or inventions, or any of them, or under said patents, or any of them, during the term of this agreement without permission of Stearns and Besser."

2) That in all other respects the aforesaid License Agreement, and any and all other terms and conditions contained therein, shall remain binding upon all parties hereto.

In witness whereof, we have hereunto set our hands and [fol. 3113] seals the day and year first above written.

—— ——, Licensor, ——, Licensor, Stearns Manufacturing Co., Inc., By: —— ——.
Besser Manufacturing Company, By: —— ——.

STATE OF NEW YORK,
County of Westchester, ss:

On the ____ day of ____, nineteen hundred and fifty before me came Hamlin F. Andrus, to me known to be the individual described in, and who executed the foregoing instrument, and acknowledged that he executed the same.

—— ——, Notary Public, Westchester County.

STATE OF NEW YORK,
County of Westchester, ss.:

On the ..... day of ....., nineteen hundred and fifty before me came Louis Gelbman, to me known to be the individual described in, and who executed the foregoing instrument, and acknowledged to me that he executed the same.

—— ——, Comm. of Deeds, City of Yonkers.

[fol. 3114] STATE OF MICHIGAN,
County of ——

On the ..... day of ....., nineteen hundred and fifty, before me came .....
to me known, who, being by me duly sworn, did depose and say that he resides in .....
that he is the ..... of Stearns Manufacturing Co., Inc., the corporation described in, and which executed, the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; and that he signed his name thereto by like order.

—— ——, Notary Public.

STATE OF MICHIGAN,
County of ——

On the ..... day of ....., nineteen hundred and fifty before me came .....
to me known, who, being by me duly sworn, did depose and say that he resides in .....
that he is the ..... of Besser Manufacturing Company, the corporation described in, and which executed, the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; and that he signed his name thereto by like order.

—— ——, Notary Public.

[fol. 3115] EXHIBIT 178

140 Elliott Avenue
Yonkers 5, New York
April 5, 1950.

Besser Manufacturing Company
Alpena, Michigan

Attention Mr. Jesse Besser

Gentlemen:

I believe that you will agree with my observations that since the middle of the 1948 season there has been a gradual reduction in the demand for concrete block machinery, and that the Industry is rapidly setting back to normal per-war production or below.

Accordingly, this state of affairs has affected my returns from the patents under which you are licensed and necessitates this request for an opportunity to receive additional funds, with your permission.

I have had several inquiries from various sources as to the possibility of manufacturing under the patents involved in the license mentioned which would afford me an additional source of revenue. This may be accomplished if your organization will grant a waiver on that provision of the license agreement which gives you an exclusive under my inventions.

Therefore, gentlemen, may the writer have your considered judgment on such a request and a favorable action by your management.

Very truly yours, Louis Gelbman.

[fol. 3116] EXHIBIT 179

Stearns Manufacturing Company, Inc.

Concrete Block Making Equipment

Adrian, Michigan

Telephone 1300

April 21, 1950.

Mr. Louis Gelbman,
Gelbman, Inc.,
140 Elliott Ave.,
Yonkers 5, New York.

Dear Mr. Gelbman:

Your letter of April 5th to the Stearns Manufacturing Company was presented and read at the Board of Directors Meeting yesterday.

The Board by resolution authorized Mr. Myron Hultmark to communicate with you to discuss this matter. I am sure that Mr. Hultmark will find it convenient to visit you very shortly.

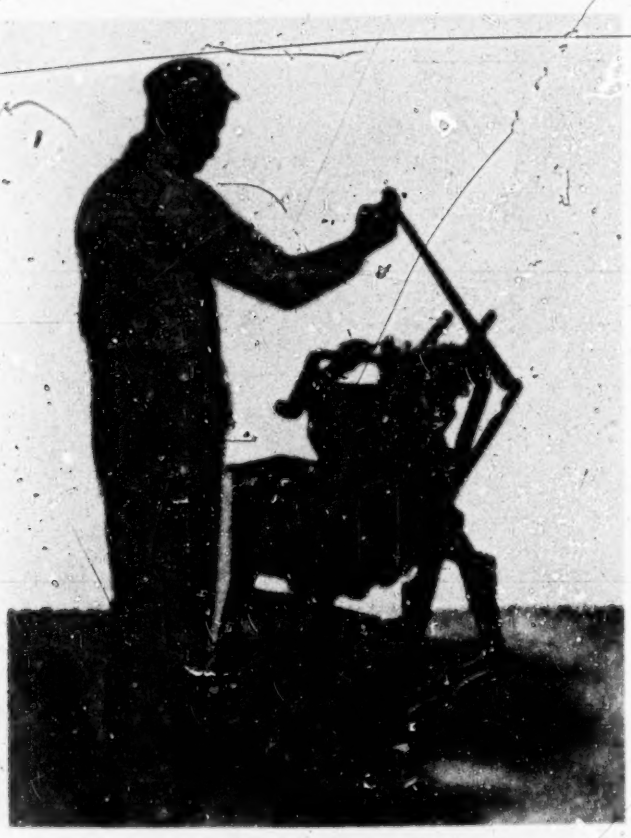
Very truly yours, Pierce E. Wright.

PEW:DC

EXHIBIT 180

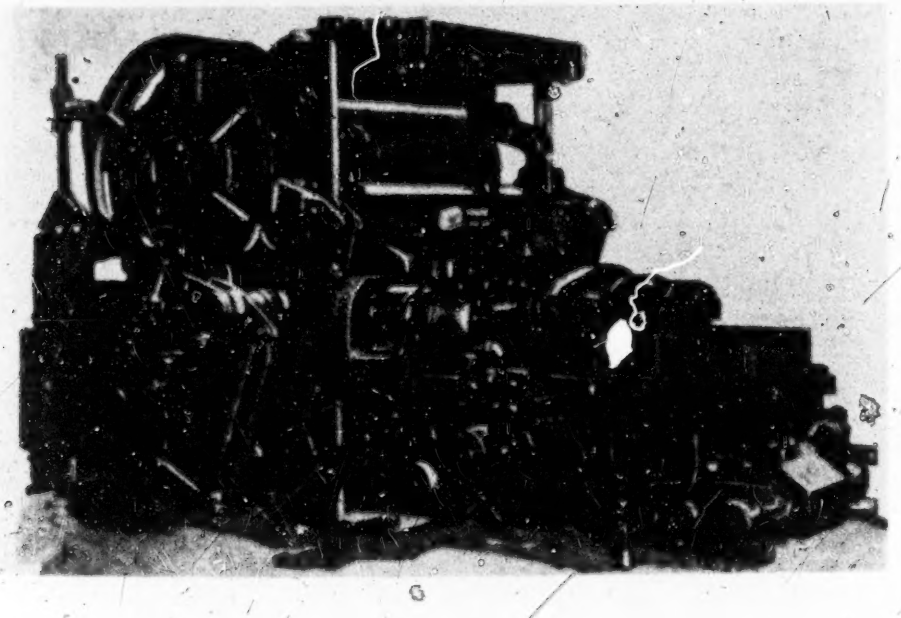
45 Years of Making Block Machines

Alpena, Mich. Firm Has Played an Important Role in Raising the Industry's Productivity



Left: One of the first hand-operated machines which Besser started manufacturing in 1904. Concrete was shoveled into the mold and compacted by hand. Two men, working steadily, could make about 200 blocks per day on this machine.

Below: The modern Besser Super Vibrapac, with front pallet feed, produces 5000 units per day with a two-man crew — a 2500 percent increase over the early machine shown above. The product has improved correspondingly in uniformity, appearance and performance.

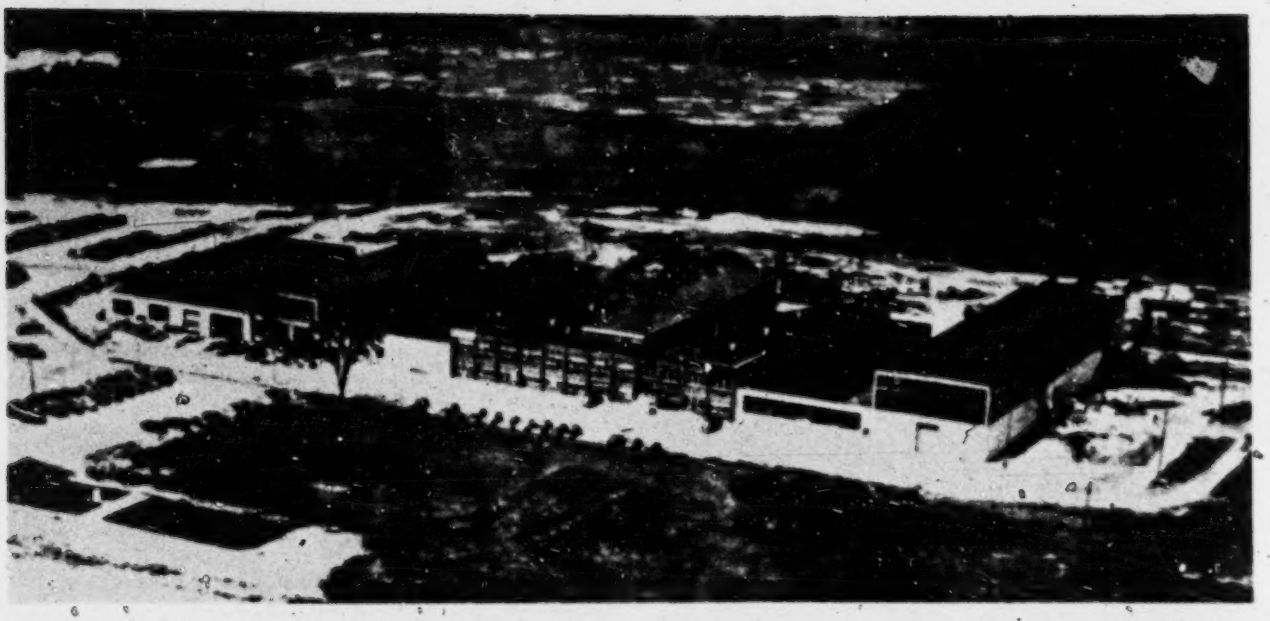


EVERY hour of the work day, in plants distributed throughout the civilized world, well over half a million 8-in equivalent concrete masonry units are produced on machines which were designed and built by the Besser Manufacturing Company of Alpena, Mich. Based on the ultra-conservative figure of 2,000 operating hours per average machine per year, it is evident that the total annual output of Besser block machines must be considerably in excess of a billion units, or enough to build some 200,000 concrete masonry homes of average size.

The greater proportion of concrete masonry units are used for larger structures, any of which would utilize several times the quantity needed for an average home. Churches, schools, theatres and other public buildings use lightweight units for sound-proofing and acoustical qualities, as well as for fire safety. In the several extensive apartment housing projects recently finished in New York City, all interior walls and partitions were cinder concrete units made on Besser Vibrapacs. One private residence in San Diego, Calif., costing $125,000, has all exterior and interior walls of pumice concrete units also made on a Besser Vibrapac. In the small residence and farm building fields Besser Vibrapac units find an extensive market due to economical production of the units.

The company which is indirectly responsible for this tremendous output of masonry units is almost as old as the industry it serves. The late Herman Besser, founder of the Besser Manufacturing Co., became interested in block making machinery as a result of his connection with the Alpena Portland Cement Co., which he helped organize at Alpena in 1899. The Besser company started making concrete block machines in 1904, and in the same year, following extensive development work in their own block plant at Alpena, their first machine for making concrete masonry units was manufactured.

This was an entirely hand-operated, cored-pallet machine, consisting of a mold with collapsible sides and cores which were withdrawn through the bottom of the mold. The mold box was charged by means of a shovel, and the tamping was



Aerial view of Besser Mfg. Co.'s home office and main plant at Alpena, Mich. Present factory comprises 120,000 sq. ft. of floor space.

done by hand. Two men, working at top speed, could produce almost 200 units per day on this machine, or 100 units per man-day.

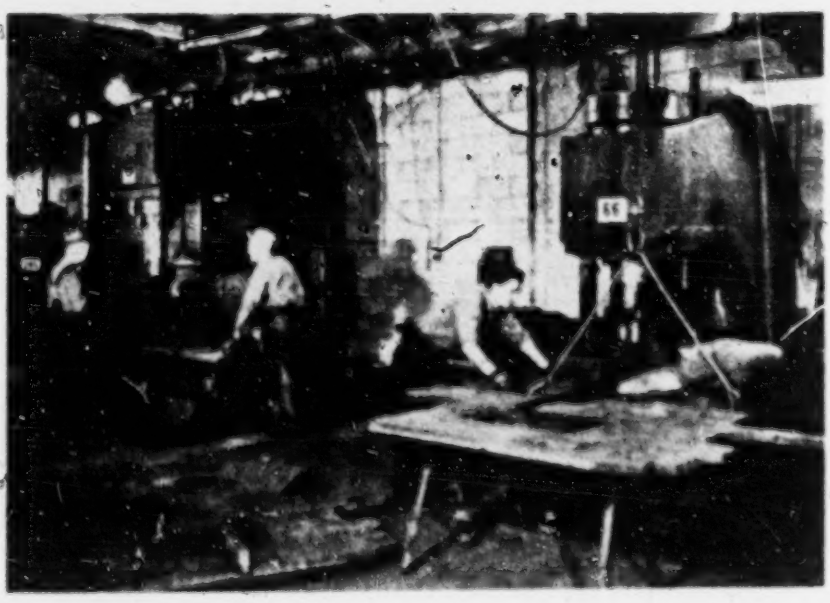
From the very start, the founder's son, Jesse H. Besser, now president of the company, devoted the major share of his time to the development of improved designs. By 1909, largely as a result of his efforts, the company was able to offer block makers a power tamper for working over the hand machine. In addition to eliminating hand tamping, this design further reduced labor by adding a hopper to the machine and locating the mixer overhead. Production was stepped up to about 750 units per day with a 3-man crew, or 250 units per man-day.

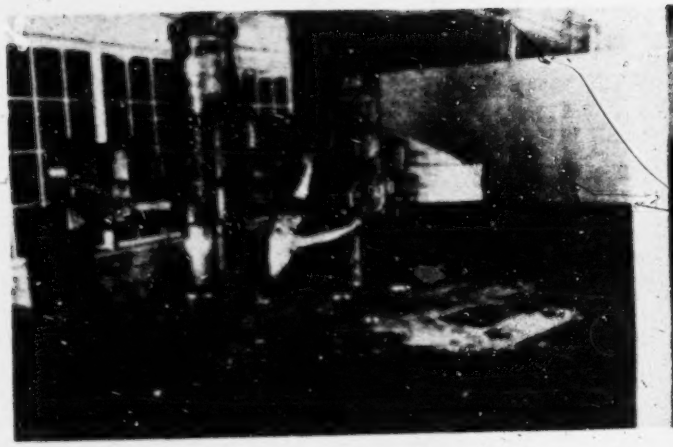
Additional automatic features were offered in the Single Automatic Face Down machine which was brought out in 1914. The feeding and the starting and stopping of the tampers on this machine were automatic, and the cores were pulled by power. Pallet feeding and the opening and closing of the mold were still done by hand. Operating at three cycles per minute, the Single Automatic Face Down machine produced about 1,500 units with a 4-man crew, or approximately 400 blocks per man-day.

By 1919 a machine of similar design was perfected on which two units could be produced in each cycle of operation. The Double Automatic Face Down machine produced 3,000 units per day with a 6-man crew, or about 500 units per man-day.

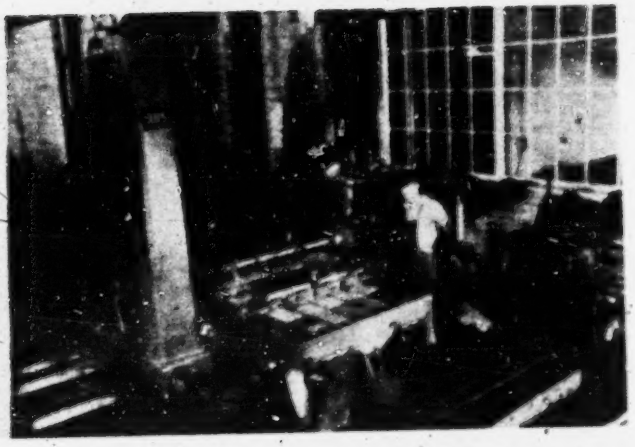
Right: Jesse H. Besser, president of the Besser Company since his father's retirement in 1925, has been the dominant factor in the firm's steady growth and in its outstanding contributions to the art of making concrete masonry units. On the wall at right is a photograph of the late Herman Besser, founder of the company.

Below: View in the straightening department where side plates, shafts and other parts are trued up.





The thick steel plates which form the sides of the Vibrapac are jig bored on this 6-ft. Carlton drill.



Mold bars for Vibrapac molds are here being machined on a 5-in. horizontal Universal boring mill.

In 1924, as a direct result of the engineering development work of Jesse Besser, the company brought out one of its most important contributions to the block industry . . . the first successful stripper machine using plain pallets. The Senior-Automatic Plain Pallet Stripper, as it was called, marked a revolutionary advancement in the art of producing concrete masonry units. By making it possible to produce any size or type of unit on the same steel or wood pallet, it greatly reduced the producer's initial investment and operating cost, and opened wide new opportunities for the industry.

With the exception of pallet feeding and the removal of finished blocks, the machine introduced in 1924 was fully automatic. For the first time cores were supported from above, and the blocks were stripped by the upward movement of the mold against a stationary stripper head. This machine operated at 6 cycles per minute, producing 3,300 blocks per day with a 4-man crew, or about 800 units per man-day.

In 1929 a new model known as the Standard Automatic Plain Pallet Stripper was introduced. It was similar in design to the Senior Automatic, but incorporated several mechanical improvements which greatly reduced the number of parts. The speed was increased to 6½ cycles per minute to achieve a production of 3,600 blocks per day, or 900 units per man-day.

The Super Stripper, introduced in 1934, operated at 7 cycles per minute. It was similar to the Standard Stripper in operation, but differed considerably in construction. One-piece steel sides were used for the first time to replace the structural shapes used in earlier models. With a 4-man crew this machine produced 4,000 units per day, or 1,000 per man-day.

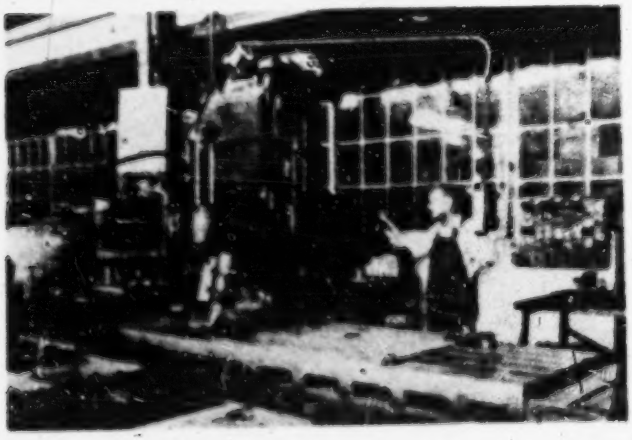
The next major change in design took place in 1939, when the Super Plain Pallet Vibrapac made its first appearance. All of the previous machines had compacted the block by the tamping method, but the Vibrapac, as its name suggests, utilized the then new vibration method. It makes three units in each cycle of operation, and operates at 3½ cycles (or 10 blocks) per minute. Its output of 5,000 units per day, with a three-man crew jumped man-day production to 1,600 units—16 times greater than was possible with the first Besser machine made in 1904.

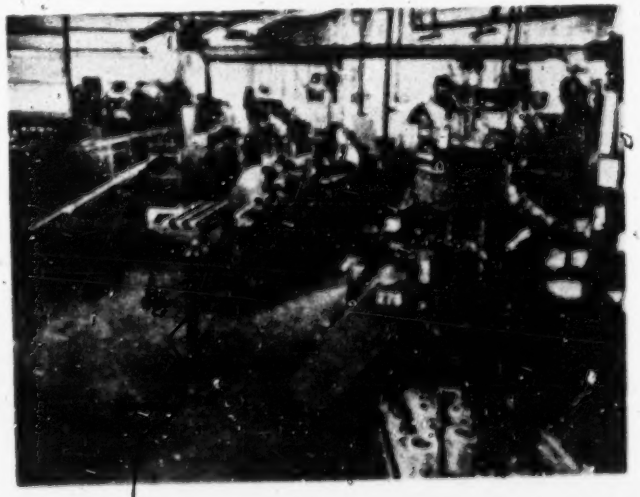
New operational developments have been made by which productivity per man has continued upward. The recently developed front pallet feed now makes it possible for two men to operate the mixer, make and offbear block with the Vibrapac, increasing output per man to 2,500 units per day. Other advancements are side pallet return, quality and density control and 100 percent pressed top.

Improvements in the quality and uniformity of concrete masonry units produced on Besser equipment have through the years kept pace with the needs of the industry and the increased production of the machines. A vast number of design

View of some of the turret lathes in the plant. They handle shafting from ¼ to 6 in. in diameter.

Side plates and other flat members are planed on this 12-ft. hydraulic planer.





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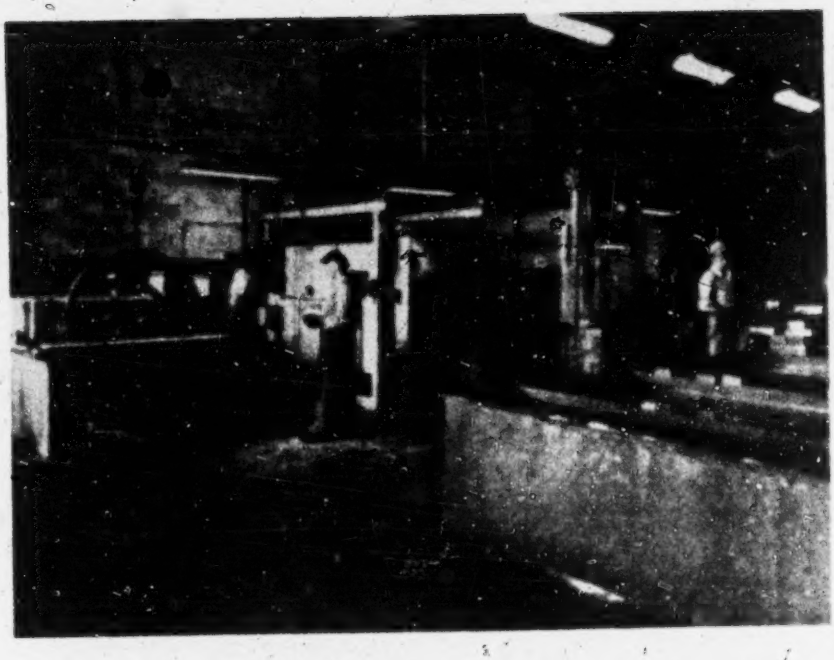
changes affecting quality of the product have been made, as field experience, coupled with the company's own extensive development work have indicated a need for them. These improvements, after careful testing, are made available for machines currently in use as well as for those under production at Alpena.

In addition to the famous Vibrapac machines, the Besser company manufactures and sells a complete line of accessory equipment for concrete block plants, including batch mixers, skip loaders, offbearers, block cubers and similar items. A fairly recent development is equipment for the production of lightweight aggregate by the Aglite process. In this process finely crushed clay, shale or other suitable raw material is mixed with a small amount of crushed solid fuel and fed to the Aglite sintering machine. The resulting sinter cake, after crushing and screening, makes a lightweight, strong and durable aggregate.

With the steady rise in the productive capacity of Besser block machines, the company recognized the importance of consumer advertising to stimulate demand for the output of the machines. This need was met by developing an all-inclusive cooperative advertising service for Vibrapac operators. The service includes a large selection of tested newspaper advertisements, radio scripts and cartoon mats designed to give the block producer a complete advertising program without cost for these materials.

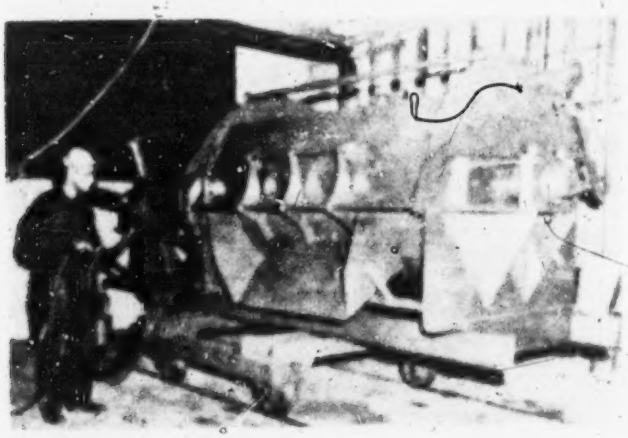
There is also a consumer booklet called *Modern Building* intended for use in combination with the newspaper ads or as an envelope stuffer. Plastic blocks, cooperative book matches, plan books, blotters and similar items are made available at cost or less to Vibrapac plants for use in sales promotion. The complete services of Besser's advertising department are always available to all Vibrapac operators in planning any sort of advertising or promotional program.



Electric cyanide pot, furnaces and quenching tanks in the heat treating department.

Although the Besser company does not by any means dominate the block machinery field, its factory at Alpena is undoubtedly the largest in the world serving the concrete masonry unit industry. An expansion program carried out after World War II increased the floor space of the plant from 40,000 to approximately 120,000 square feet.

Here the finest and most modern machine tools available are so arranged as to achieve as close approximation of line production as is possible with a product involving definite variations in auxiliary equipment. The plant is self contained to a remarkable degree, and the company does not have to rely on any outside facilities to manufacture as many as 20 Vibrapac machines per month. All dies, jigs, fixtures and cutting tools used in the plant are made in the company's own shops. Automatic and semi-automatic production methods are employed in making many of the parts for Besser machines.



Spray painting one of the big 50-cu. ft. batch mixers.

During World War II Besser produced equipment for the war effort, including anti-aircraft guns; gun parts; aircraft parts; and gasoline, steam and electric winches. For this outstanding performance the company received the coveted Army-Navy "E" Award.

In addition to the large factory at Alpena, the company operates two branch plants located at Atlanta, Ga., and Los Angeles, Calif. District sales offices are maintained in New York City, Philadelphia, Pittsburgh, Washington, D. C., Atlanta, Cincinnati, Detroit, Chicago, Phoenix, Los Angeles and Spokane. In addition to district sales offices in this country, Besser maintains sales offices in nineteen foreign countries.

Despite the increased scope and complexity of the company's operations, Jesse Besser's primary concern today, just as it was some 40 years ago, is the development of better machinery for the production of better concrete masonry units at reduced cost. His company's major contributions to the block-making art have been spaced at 5-year intervals since the first machine was produced in 1904. If that pattern is maintained, there will be a new Besser block machine on the market before the close of this year. There are reports, in fact, that such a machine has been under development at Alpena for many months, and that it will achieve a new high in the productivity of Besser machines. In doing this it can scarcely fail to establish another landmark in the history of the concrete masonry unit industry.

[fols. 3122-3124] EXHIBIT 182

1947 Census of Manufactures Reports

For sale by the Superintendent of Documents, U. S. Government Printing Office, Washington 25, D. C. Price 15 cents.

[fol. 3125] Concrete, Gypsum, Mineral Wool, and Stone Products; Lime

This report shows 1947 Census of Manufactures statistics for establishments engaged primarily in the production of concrete, gypsum, and mineral-wool products; lime; and monumental and building-stone products not made at plants operated in conjunction with quarries. These establishments have been classified in five industries, described separately below.

The 1939 industry classifications were somewhat different from those used in 1947. Comparable figures for the two years were obtained by retabulating the 1939 data. For earlier years comparable figures are not available, except as indicated for the Mineral Wool Industry.

Concrete Products (Standard Industrial Classification No. 3271).—This industry comprises establishments primarily engaged in manufacturing concrete building blocks and shapes, pipe and conduit, and similar products such as poles, piling, septic tanks, garbage boxes, garden furniture, incinerators, and vaults made from a combination of stone or gravel, sand, and cement. Contractors engaged in concrete construction work are classified in the construction industries, and building-materials dealers engaged in mixing and delivering ready-mixed concrete in the trade industries.

[fol. 3126]

Table 5.—Value of Products Shipped, by Broad Classes of Products, for the United States: 1947

[The first column shows the total value of shipments of the specified industry, divided among: (A) products classified in (primary to) the industry, (B) products classified in other industries (secondary to the specified industry), and (C) miscellaneous receipts. The second column shows the value of shipments of the primary products of the specified industry reported by establishments in other industries. The third column shows the total value of shipments of the primary products of the specified industry by all reporting manufacturers.]

[Money figures in thousands of dollars]

Concrete products industry	Shipped by—		
	Concrete products industry	Other industries	All industries
Total shipments by the industry	$329,734	.....	.....
A. Primary products of the industry	325,984	$1,282	$327,266
Concrete block and brick	177,305	511	177,816

Table 6-A.—Quantity and Value of Products, Totals for the United States: 1947 and 1939

[Money figures in thousands of dollars]

Product	Unit of measure	1947			1939	
		Shipments and interplant transfers		Production	Production	
		Quantity	Value f.o.b. plant	Quantity	Quantity	Value f.o.b. plant
Concrete products, total		.....	$327,266	.....	.....	$76,963
Concrete block and brick, total		.....	177,816	.....	.....	26,382
Block:	M block					
Light-weight aggregate (cinder, expanded slag, etc.)	(8"x8"x16" equiv.)	460,782	77,296	471,438	406,555	25,515
Heavy-weight aggregate	do	563,350	94,228	570,585		
Brick	M brick	291,052	6,292	296,602	[1] 146,651	867

EXHIBIT 183

Composite Statement Compiled from Deposition and Oral Testimony
Re Concrete Block Making Machines - Tamper Type

Name & Address	1946 Quantity of Machines Produced	1946 Production Capacity in Blocks per hr	1946 Prod Capacity per yr based on 300 8 hr days	1947 Quantity of Machines Produced	1947 Production Capacity in Blocks per hr	1947 Prod Capacity per yr based on 300 8 hr days	1948 Quantity of Machines Produced	1948 Production Capacity in Blocks per hr	1948 Prod Capacity per yr based on 300 8 hr days	Total: Total annual Block Production Capacity of Machines Manufactured in the 3 year Period	Block size used in charters 8x8x16
Concrete Equipment Co Holland Mich	75	100	18000000				0	0	0	18000000	
W. E. Dunn Mfg Co Holland Mich	89	100	21360000	53	100	12720000	19	100	4080000	38160000	
J. B. Foote Foundry Co. Fredericktown Ohio	9	32	691200	381	32	29260800	92	32	7065600	37017600	
Ford Cement Block Mach Co Cedar Falls Iowa	44	300	31680000	45 2	300 120	32400000 576000	6	300	4320000	68976000	
E. B. Kelly Co Farmingdale N J	37	300	26640000	8	300	5760000	7	300	5040000	37440000	
The Kent Machine Co Cuyahoga Falls Ohio	180	200	86400000	60	200	28800000	20	200	14400000	129600000	
Miles Mfg Co Jackson Mich	241	200	115680000	226	200	108480000	97	200	46560000	270720000	
Leslie Miller Supply Co Bedford Ohio	0	0	0	50	112½	13500000	25	112½	6750000	20250000	
Multiplex Machinery Co Elmore Ohio	16 12	200 300	[illegible]680000 3640000	12 15	200 300	5760000 10800000	14 5	200 300	6720000 3600000	43200000	
Praschak Machine Co Marshfield Wisc	2	240	1152000	6	240	3456000	0	0	0	4608000	
Universal Concrete Mach Co Columbus Ohio	5	250	3000000	5	250	3000000	0	0	0	6000000	
Universal Tampers Inc Peoria Ill	9	220	4752000	12	220	6336000	7	220	3696000	14784000	
Weber Machine & Welding Wks Amory Miss	75	87½	15750000	50	87½	20500000	0	0	0	36250000	
C. M. Wooten Co Knoxville Tenn	6	60	864000	2	60	288000	5	60	720000	1872000	
Totals - -			342,289,200			271,636,800			102,951,600	716,877,600	

3127

EXHIBIT 184

Composite statement compiled from Depositions and Oral Testimony
Concrete Block Machine Machines Vibrator Type

Name & address of Manufacturer	1946 Quantity of Machines Produced	1946 Production Capacity in Blocks per hr	1946 Prod Capacity per yr based 300 8 hr days	1947 Quantity of Machines Produced	1947 Production Capacity in Blocks per hr	1947 Prod Capacity per yr based 300 8 hr days	1948 Quantity of Machines Produced	1948 Production Capacity in Blocks per hr	1948 Prod Capacity per yr based 300 8 hr days	Total: Total Annual Block Production Capacity of Machines Manufactured in the three yr period	Block size used in chart in 8x8x16
J. W. Appley & Son Inc St Petersburg Fla	950	110	250300000	500	110	132000000	300	110	79200000	462100000	
Allied Welding & Mfg Co Orlando Fla	36	175	15120000	15	175	6300000	7	175	2940000	24360000	
Columbia Machine Wks Vancouver Washington	5	300	2400000	7	300	3360000	3	250	1800000		
				3	400	2880000	13	400	12480000	22920000	
Concrete Industries Van Nuys Calif	0	0	0	2	75	360000	1	75	180000		
							2	180	864000	1404000	
Crawford Industries Pomona Calif	0	0	0	4	600	5760000	0	0	0	5760000	
W. E. Dunn Mfg Co Holland Mich	72	200	34560000	58	200	27840000	14	200	6720000	69120000	
Edgar Block Machine Wks Ormond Fla	150	88	31680000	50	88	10560000	12	88	2534400	44774400	
Stephen Flam Van Nuys Calif	279	100	66960000								
	8	150	2880000								
	514	200	246720000	0	0	0	0	0	0	384960000	
	80	300	57600000								
	6	750	10800000								
Fleming Mfg Co St Louis Mo	241	100	57840000	150	100	36000000	48	100	11520000		
				26	180	11284000	81	180	34992000	151584000	

3128

Composite Statement compiled from Depositions & Oral Testimony
Re: Concrete Block Making Machines - Vibrator Type

Name & Address	1946 Quantity of Machines Produced	1946 Production Capacity in Blocks per hr	1946 Prod Capacity per yr based on 300-8 hr days	1947 Quantity of Machines Produced	1947 Production Capacity in Blocks per hr	1947 Prod Capacity per yr based on 300-8 hr days	1948 Quantity of Machines Produced	1948 Production Capacity in Blocks per hr	1948 Prod Capacity per yr based on 300-8 hr days	Totals: Total annual Block Production Capacity of Machines manufactured in the 3 year period	Block size used in chart in 8x8x16
Roy W. Darden, Atlanta Ga.	9	200	1440000	2	800	3840000	1	800	1920000	9600000	
				3	200	1440000	2	400	960000		
Fifth Avenue Fabricating Co, No Birmingham Ala	38	110	7980000	0	0	0	0	0	0	7980000	
F C George Machine Co, Orlando Fla	218	300	156960000	55	300	39600000	16	300	11540000		
				27	375	24300000	43	375	38700000	271080000	
General Engines Co, Philadelphia Pa	0	0	0	0	0	0	205	100	49200000	49200000	
Bob Graveley Industries, Orlando Fla	250	250	150000000	25	450	15000000	14	250	7400000		
				4	480	2304000	1	480	1154000		
				4	100	960000	4	100	480000	186896000	
				4	125	1200000	3	125	900000		
				6	300	4320000					
				4	400	1920000	4	300	1440000		
Hollastone Co Inc, No Hollywood Calif	6	125	1800000	10	125	3000000	5	125	1500000	6300000	
Sawler Machine Foundry Co, Birmingham Ala	21	112	5670000	0	0	0	0	0	0	5670000	
Seth-I-Bar Co, Holland Mich	2	480	2304000	27	480	31104000	45	480	51840000	85248000	
No Birmingham Casting Co, Birmingham Ala	14	500	1680000	0	0	0	0	0	0	1680000	

3129

1398

Composite statement compiled from Depositions and Oral Testimony
Re: Concrete Block Making Machines - Vibrator Type

Name & Address	1946 Quantity of Machines Produced	1946 Production Capacity in Blocks per hr	1946 Prod Capacity per yr based on 300-8 hr days	1947 Quantity of Machines Produced	1947 Production Capacity in Blocks per hr	1947 Prod Capacity per yr based on 300-8 hr days	1948 Quantity of Machines Produced	1948 Production Capacity in Blocks per hr	1948 Prod Capacity per yr based on 300-8 hr days	Total: Total annual Block Production Capacity of Machines Manufactured in the 3 year period	Block size used in chart in 8X8X16
O.K. Manufacturing Co Minneapolis Minn	6	190	2736000	1	190	456000	0	0	0	3192000	
Praschak Machine Co Marshfield Wisc	6	240	3456000	3	240	1728000	8	240	4608000	9792000	
R S Reed Corp Three Rivers Mich	0	0	0	4	200	1920000	0	0	0	1920000	
Scripps Pearson Mach Wks Inc Edmonds Wash	0	0	0	15	250	9000000	10 2	500 600	12000000 2880000	23880000	
Turkey Creek Mfg Co Birmingham Ala	10 1	112½ 125	2700000 300000	0	0	0	0	0	0	3000000	
R K Tyra Corp Forest Lake Minn.	13	50	1560000	9	50	1080000	2	50	240000	2880000	
Van Orman Co Fairmount NJ	0	0	0	0	0	0	5	400	4800000	4800000	
Vibra Lamp Mach Co Greensboro NC	5	250	3000000	10	250	6000000	8	500	9600000	18600000	
Universal Lampers Inc Peoria Ill	1	220	528000	0	0	0	0	0	0	528000	
C M Wooten Co Knoxville Tenn	2 2	60 200	288000 960000	3 1	60 200	432000 480000	0	0	0	2160000	
			1,128,222,000			386,876,000			354,190,000	1,861,262,000	

3130

EXHIBIT 185

Stearns Manufacturing Co.
Adrian Mich.
Production data for 1946, 47 & 48

	1946			1947			1948			TOTALS
	Quantity of machines manufactured & sold	Production Capacity in Blocks per hr.	Prod Capacity per yr based on 300-8 hr days	Quantity of Machines manufactured & sold	Production Capacity in Blocks per hour	Prod Capacity per yr based on 300-8 hr day	Quantity of Machines manufactured & sold	Production capacity in Blocks per hr	Prod Capacity per yr based on 300-8 hr day	
Tampers										
Model										
A Clipper	269	200	129,120,000	156	200	74880000	37	200	17760000	
C Clipper	17	150	4320000	4	150	1440000	0			
E Clipper	29	100	6960000	12	100	2880000	3	100	720000	
			140400000			79200000			18480000	238,080,000
Vibrators										
Model										
#7 Jolteretz	33	360	28512000	18	360	15552000	13	360	11232000	
#9 " "	77	400	7392000	48	400	46080000	18	400	17280000	
#15 " "	0	720	0	32	720	55296000	18	720	31104000	
			102432000			116928000			59616000	278,976,000

3131

EXHIBIT 186

Besser ~~Manufacturing~~ Company
Alpena, Mich

Production capacity of concrete block machines manufactured and sold or leased in the years 1946, 1947 and 1948

	1946 Quantity of machines	1946 Production capacity per year, based on 300 8 hr. days	1947 Quantity of machines	1947 Production capacity per year, based on 300 8 hr. days	1948 Quantity of machines	1948 Production capacity per year, based on 300 8 hr. days	Total production capacity of machines sold or leased in the three year period
Vibrators.							
Victory Vibrapac, production capacity 250 8×8×16 blocks per hour							
Super Vibrapac, production capacity 600 8×8×16 blocks per hour							
Super Vibrapac V3R, production capacity 750 8×8×16 blocks per hour							
Victory Vibrapac	16	9,600,000	24	14,400,000	14	8,400,000	32,400,000
Super Vibrapac	170	244,800,000	186	267,840,000	19	27,360,000	540,000,000
Super Vibrapac V3R			5	9,000,000	56	100,800,000	109,800,000
Total	186	254,400,000	215	291,240,000	89	136,560,000	682,200,000

Fastener & Nichols Foreign 10-2- 4V S 3V 11 S 2V

94,920,000
587,280,000

[fol. 3133] EXHIBIT No. 187

Industry Statistics Compiled From Depositions and Oral Testimony and Company Records
Re: Concrete Block Making Machinery Industry

Annual Production Capacity of Machines Manufactured and Sold in 1946, 1947, 1948

	1946	1947	1948	Totals
Tampers:				
Other Manufacturers	342,289,200	271,636,800	102,951,600	716,877,600
Stearns	140,400,000	79,200,000	18,480,000	238,080,000
Totals	482,689,200	350,836,800	121,431,600	954,957,600
Vibrators:				
Other Manufacturers	1,120,722,000	386,376,000	354,170,400	1,861,268,400
Besser	254,400,000	291,240,000	136,560,000	682,200,000
Stearns	102,432,000	116,928,000	59,616,000	278,976,000
Totals	1,477,554,000	794,544,000	550,346,400	2,822,444,400
Total of Tampers and Vibrators:				
Other Manufacturers	1,463,011,200	658,012,800	457,122,000	2,578,146,000
Besser	254,400,000	291,240,000	136,560,000	682,200,000
Stearns	242,832,000	196,128,000	78,096,000	517,056,000
Totals	1,960,243,200	1,145,380,800	671,778,000	3,777,402,000
Percentage of Vibrators to totals of Tampers and Vibrators	75%	69%	82%	75%
Percentage of Vibrators Capacity:				
Other Manufacturers	76%	48%	64%	66%
Besser	17%	37%	25%	24%
Stearns	7%	15%	11%	10%
Percentage of Totals of Tampers and Vibrators Capacity:				
Other Manufacturers	75%	58%	68%	68%
Besser	13%	25%	20%	18%
Stearns	12%	17%	12%	14%

U.S. vs Besser Manufacturing Co.

EXHIBIT 188

Summary Schedule Reflecting Machines Manufactured, Production ... & ...
Dollar Value of Vibrating & Tamping Machines for Years 1946, 1947 & 1948

	Vibrating					Tamp					Total				
	No. Machines Manufactured	Production by Year Minimum	Production by Year Maximum	Dollar Value	Percent of Total	No. Machines Manufactured	Production by Year Minimum	Production by Year Maximum	Dollar Value	Percent of Total	No. Machines Manufactured	Production by Year Minimum	Production by Year Maximum	Dollar Value	Percent of Total
Year 1946															
Miscellaneous Companies	2436	1[illegible]632000	1[illegible]993200	2925[illegible]468		500	33[illegible]200	[illegible]200	1[illegible]118		[illegible]	1[illegible]197200	1[illegible]994[illegible]200	3[illegible]4368	
Percent of Total	91.2%	75.4%	77.7%	46.3%		12.1%	9.4%	7.4%	6.8%		86.2%	74.2%	76.7%	50.9%	
Stearns Manufacturing Co.	110	1024320[illegible]	1024320[illegible]	698337[illegible]		310	Not [illegible]	[illegible]	[illegible]		420	[illegible]322000	[illegible]348[illegible]000	1253043[illegible]	
Percent of Total	3.4%	7.4%	6.7%	11.1%		7.5%	2.6%	2.6%	2.2%		7.7%	13.0%	12.0%	15.8%	
* Besser Manufacturing Co.	174	2880000	2880000	2692500000		None					174	2880000	2880000	2692500000	
Percent of Total	5.4%	17.2%	15.6%	42.6%							5.4%	12.9%	11.8%	33.9%	
Totals	3220	13986[illegible]000	13211[illegible]000	6316232[illegible]3	79.6%	[illegible]10	[illegible]1496[illegible]500	[illegible]4[illegible]4116	[illegible]620[illegible]26	20.4%	[illegible]230	[illegible]48[illegible]500	[illegible]2[illegible]2[illegible]000	7936[illegible]8669	100.0%
Year 1947															
Miscellaneous Companies	1621	15[illegible]060000	[illegible]041200[illegible]	15[illegible]2[illegible]382		927	366[illegible]900	256[illegible]200	5[illegible]4[illegible]8		1748	[illegible]47560[illegible]	68718[illegible]2[illegible]	2306001[illegible]	
Percent of Total	79.2%	50.4%	54.3%	25.5%		34.1%	17.1%	17.8%	6.8%		31.6%	57.2%	61.8%	32.8%	
Stearns Manufacturing Co.	98	1[illegible]928000	[illegible]928000	10[illegible]264[illegible]4		172	79[illegible]000	[illegible]22[illegible]	3[illegible]4[illegible]85		270	[illegible]96128000	17[illegible]128000	1363[illegible]602	
Percent of Total	7.6%	14.8%	15.5%	17.3%		15.4%	22.7%	22.0%	30.2%		11.3%	18.8%	17.6%	19.4%	
* Besser Manufacturing Co.	170	2896000	2896000	3366[illegible]000		None					170	2896[illegible]00	2[illegible]960000	3366500[illegible]	
Percent of Total	13.2%	33.8%	30.2%	57.2%							7.1%	22.0%	20.6%	47.8%	
Totals	1289	8694[illegible]000	[illegible]630000	5885[illegible]696	83.6%	[illegible]17	345[illegible]500	355[illegible]200	[illegible]1[illegible]4[illegible]63	16.4%	2388	[illegible]6[illegible]648[illegible]00	[illegible]1[illegible]22[illegible]800	7035[illegible]759	100.0%
Year 1948															
Miscellaneous Companies	847	3[illegible]118[illegible]00	3[illegible]937[illegible]00	143[illegible]684[illegible]6		5[illegible]1	[illegible]01[illegible]25[illegible]	[illegible]48[illegible]7[illegible]600	2[illegible]9[illegible]116[illegible]		1[illegible]58	[illegible]32144000	[illegible]4[illegible]2[illegible]2[illegible]00	1760[illegible]4[illegible]0	
Percent of Total	87.1%	64.9%	67.5%	31.0%		59.[illegible]%	[illegible]4.[illegible]%	85.0%	17.4%		87.[illegible]%	68.6%	70.6%	35.0%	
Stearns Manufacturing Co.	49	5961[illegible]000	5961[illegible]000	566[illegible]9[illegible]7		1[illegible]0	184[illegible]00	184[illegible]000	82[illegible]4[illegible]75		5[illegible]	[illegible]5[illegible]76[illegible]00	[illegible]5[illegible]7[illegible]1[illegible]00	66[illegible]7[illegible]7922	
Percent of Total	5.1%	11.7%	10.9%	12.3%		11.4%	12.6%	12.[illegible]%	2.6%		6.[illegible]%	12.4%	11.6%	12.9%	
* Besser Manufacturing Co.	76	1[illegible]520000	1[illegible]520000	2623[illegible]000		None					76	[illegible]7[illegible]520[illegible]	[illegible]7[illegible]520[illegible]	2623[illegible]000	
Percent of Total	7.8%	23.4%	21.8%	56.7%							4.2%	17.0%	17.8%	52.1%	
Totals	972	4025[illegible]000	[illegible]5[illegible]0[illegible]00	[illegible]162[illegible]97[illegible]33	91.8%	3[illegible]	11[illegible]2[illegible]	1[illegible]2[illegible]2[illegible]0	[illegible]1[illegible]4[illegible]379	8.2%	1[illegible]7	[illegible]3[illegible]1[illegible]00[illegible]	[illegible]7[illegible]5[illegible]8[illegible]00	[illegible]5[illegible]3[illegible]7[illegible]2	100.0%

* Totals for Besser Manufacturing Co. exclude "Foreign" Sales.
The Dollar Value for the "Leased" Machines has been Computed ... [illegible] each for the Stearns Leased Machines and Machines at $1502. The Value of the Vibrator Machines at $1500. each for the years.

Ⓐ The data for the Miscellaneous Companies do not include data of Concrete Industries, Inc. or Rex Chainbelt Inc. per Mr. Wm. Speer, Antitrust Attorney for ... with the data of these companies for the years 1946 to 1948.

EXHIBIT 189

U.S. vs Besser Manufacturing Co.
Detailed Schedule of Machines Manufactured [illegible]
for Years 1946, 1947, 1948 Excluding the Tamping Principle

Page 1	1946 No. Machines Manufactured	1946 Production Blocks/Hr	1946 Production/Year 300-8 hour Minimum	1946 Production/Year 300-8 hour Maximum	1946 Dollar Value	1947 No. Machines Manufactured	1947 Production Blocks/Hr	1947 Production/Year 300-8 hour Minimum	1947 Production/Year 300-8 hour Maximum	1947 Dollar Value	1948 No. Machines Manufactured	1948 Production Blocks/Hr	1948 Production per Year 300-8 hour Minimum	1948 Production per Year 300-8 hour Maximum	1948 Dollar Value
Air-Conditioning Building Units, Los Angeles, Calif.		None					[illegible]					None			
Air-Tamp Corporation, Lancaster, Ohio		(Experiment) Not [illegible]					[illegible]								
Allied Steel Products, Inc., Brooklyn Village, Ohio		None					None					None			
Appley, J.E., St Petersburg, Florida		None					[illegible]					None			
Bay City Cast Stone Block Co, Bay City, Mich.		None					None					None			
Blockcrafters Research, Inc., Syracuse, N.Y.		None					None					None			
Christopher, Geo. C. & Son Iron Works, Wichita, Kansas		None					None					None			
Concrete Equipment Co., Holland, Mich.	75	100	18000000	18000000	[illegible]		None					None			
Concrete Industries, Inc., Van Nuys, Calif.		None					None					None			
Concrete Machinery Co., Hickory, N.C.		None					[illegible]					None			
Crawford Industries, Pomona, Calif.		None					None					None			
Crawford-Dooley Ind. & Sales Co., Pomona, Calif.		None					[illegible]					[illegible]			
Des Plaines Concrete Products Machine Co., Des Plaines, Ill.		None					[illegible]								
Dunn, W. E., Mfg. Co.	89	100	21360000	2136[illegible]			[illegible]					[illegible]	[illegible]	[illegible]	18615-
[illegible] Block Machine Works, Ormond, Florida		None					0					[illegible]			

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Tamping Principle

Page 2	No. Machines Manufactured	Production Blocks/Hr.	1946 Production/Year 300-8 Hour Days Minimum	Maximum	Dollar Value	1947 No. Machines Manufactured	Production Blocks/Hr.	Production per Year 300-8 Hour Days Minimum	Maximum	Dollar Value	1948 No. Machines Manufactured	Production Blocks/Hr.	Production per Year 300-8 Hour Days Minimum	Maximum	Dollar Value
Fifth Avenue Fabricating Co. Birmingham, Ala.		None					None					None			
Flam, Stephen Van Nuys, Calif.		None					None					None			
Fleming Manufacturing Co.		None					None					None			
Foote, T.B., Foundry Co. Fredericktown, Ohio	9	32	691200	691200	48041	381	32	29260800	29260800	2032852	92	32	7065600	7065600	491451
Ford Cement Block Machine Co. Cedar Falls, Iowa	44	300	31680000	31680000	68568	45 2	300 120	32400000 576000	32400000 576000	85322	6	300	4320000	4320000	10200
General Engines Company Gloucester, N.J.		None					None					None			
Graveley, Bob, Industries, Inc. Orlando, Florida		None					None					None			
Hollostone Co., Inc. N. Hollywood, Calif.		None					None					None			
Jackson & Church Company Saginaw, Mich.		None					None					None			
Kent Machine Co. Cuyahoga Falls, Ohio	180	200	86400000	86400000	250000	[illegible]	200	28800000	28800000	96000	30	200	14400000	14400000	45000
Kramer Machine Foundry Co. Birmingham, Ala.		None					None					None			

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Page 3		No. Machines Manufactured	Production Blocks/Hour	1946 Production per Year 300-8 Hour Days Minimum	Maximum	Dollar Value	1947 No. Machines Manufactured	Production Blocks/Hour	Production per Year Minimum	Maximum	Dollar Value	No. Machines Manufactured	Production Blocks/Hour	1948 Production per Year 300-8 Hour Days Minimum	Maximum	Dollar Value
Miles Manufacturing Co.	Jackson, Mich.		None					None					None			
Miller, Leslie C., Supply Co.	Bedford, Ohio		None					None					None			
Mishco Corporation	Miami, Florida		None					None					None			
North Birmingham Casting Co.	Birmingham, Ala.	14	50	1680000	1680000	4900-		None					None			
O.K. Manufacturing Co.	Minneapolis, Minn.	6	190	2736000	2736000	15000-	1	170	[illegible]	[illegible]	3000-		None			
Reed, R.S. Corp.	Three Rivers, Mich.		None				4	[illegible]	[illegible]	[illegible]	[illegible]		None			
Scripps Pearson Machine Works, Inc.	Edmonds, Wash.		None				15	250	[illegible]	[illegible]	[illegible]	10 2	500 600	12000000 2880000	12000000 2880000	40350-
Southern States Material Co.	Birmingham, Ala.		None					None					None			
Superior Lidgerwood Mundy Corp.	Superior, Wisc.		None					None					None			
Sutter, H.P. Co.	Ebenezer, N.Y.		None					None					None			
Turkey Creek Mfg. Co.	Birmingham, Ala.	1 12	125 112½	300000 2700000	300000 2700000	121145		None					None			
Twinplex Hydraulics Inc.	Syracuse, N.Y.		None					None					None			
Tyra, Nik. Corp.	Forest Lake, Minn.	13	40-60	1248000	1872000	105[illegible]	7	40-60	[illegible]		[illegible]	2	45-60	[illegible]	288000	2000-
Universal Concrete Machinery Co.	Columbus, Ohio		None					None					None			
Universal Tampers, Inc.	Peoria, Ill.	1	200-240	480000	5760	[illegible]										

Page y		No. Machines Manufactured	Production Blades/Year	1946 Production per Year Minimum	Maximum	Last Year Value	No. Machines	1947 Production Blades/Year	Minimum	Maximum	Value	No Machines Manufactured Planned	Production Blades/Year	1948 Production per Year Minimum	Maximum	Dollar Value	
	Van Dorn Co. Philadelphia, Pa.		None				None					None				
	Vibro-Tamp Machinery Company		None				None					None				
	Willard Concrete Machinery Co. Inglewood, Calif.		None				None					None				
	Whitman Machinery Co. Farmingdale, N.J.		None				None					None				
	Kelly, R.B. Company Farmingdale, N.J.	37	250 - 350	12200000	13080000	10248 -	8	250 - 350	4800000	6720000	27510 -	6 or 7	250 - 350	4200000 (a)	5880000 (a)	7462 -	
	Machine & Welding Works Jerseyville, Miss.	25	75 - 100	13500000	18000000	7875 -	50	75 - 100	7500000	12000000	5250	None					
	Welding & Mfg. Co. Inc. Orlando, Florida		None				None					None					
	Machine Works Vancouver, Wash.		None				None					None					
	Co. Machine Co Orlando, Florida		None				None					None					
	Machinery Corp. Fremont, Ohio	16 12	200 300	7680000 8640000	7680000 8640000	34200 -	12 15	200 300	5760000 6480000	7680000 8640000	50000	4 5	200 300	6220000 3600000	6220000 3600000	57000 -	
	Co. Inc. Evansville, Texas	1	60	864000	864000	2670 -	2	60	720000	2850	1425	5	60	720000	720000	1965 -	
	Machine Co. Alma, Mich.		None				None					None					
	Sub-Totals	798		332,5200	348492co	10,7113	211	200	23,1162		1,7	305		10125600	12600	329/1604	

(a) Production based on 7 Months

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Name		1946 No. Machines Manufactured	1946 Production Blocks/Hour	1946 Production Minimum 300 Days	1946 Production Maximum 300 Days	1946 Dollar Value	1947 No. Machines Manufactured	1947 Production Blocks/Hour	1947 Production Minimum 300 Days	1947 Production Maximum 300 Days	1947 Dollar Value	1948 No. Machines Manufactured	1948 Production Blocks/Hour	1948 Production Minimum 300 Days	1948 Production Maximum 300 Days	1948 Dollar Value
Besley Machine Co.	Marshfield, Wisc.	2	240	1152000	1152000	40,875	4	240	345600	345600	14331.67	None				
Day Bros.	Atlanta, Ga.		None				None					None				
	Totals	800		345,67200	360011200	10654886	927		266500800	276772800	8034687.35	805		10102560	10487760	3291164
															Total Average Yearly Production = 10487760	
Smith Mfg. Excluding the following Companies per Jos. Green, Antitrust Office																
Diecraft Industries Inc.			None				None					None				
Day Bros.			None				None					None				
	Adjusted Totals	800		345,67200	360011200	10654886	927		266500800	276772880	8034687.35	805		10102560	10487760	3291164
Stearns Manufacturing Co.		248	200	49,120000	49,120000	554026.96	156	200	24880000	24880000	3467.41.88	37	200	1776000	1776000	85487.95
		12	450	4320000	4320000		4	100	1440000	1440000		3	100	720000	720000	
		29	100	696000	696000		12	100	2880000	2880000						
	Stearns Totals	310		54,136000	54,136000	554026.96	172		28560000	28560000	3467.41.88	40		1848000	1848000	85487.95
Lester Manufacturing Co.	Alpena, Mich.		None				None					None				

EXHIBIT 190

U.S. vs Besser Manufacturing Co.
Detailed Schedule of Machines Manufactured, Production & Dollar Value 60-317
Year 1946, 1947 & 1948 envolving the Vibrating Principle

Vibrating Principle

	1946 No. Machines Manufactured	1946 Production Blocks/Hr.	1946 Production/Year 300 - 8 Hour Days Minimum	1946 Production/Year 300 - 8 Hour Days Maximum	1946 Dollar Value	1947 No. Machines Manufactured	1947 Production Blocks/Hour	1947 Production/Year 300 - 8 Hour Days Minimum	1947 Production/Year 300 - 8 Hour Days Maximum	1947 Dollar Value	1948 No. Machines Manufactured	1948 Production Blocks/Hour	1948 Production per Year 300 - 8 Hour Days Minimum	1948 Production per Year 300 - 8 Hour Days Maximum	1948 Dollar Value
Conditioning Building Unit, Los Angeles, Calif.		None					None					None			
Tamp Corporation, Lancaster, Ohio		None					None					None			
Steel Products, Inc., Brooklyn Village, Ohio		None					None					None			
Ashley, J.E., St. Petersburg, Florida	950	100 - 120	22000000	23600000	950000 -	600	100 - 120	20000000	14400000	500000 -	300	100 - 120	22000000	24400000	300000 -
Bay City Cast Stone Block Co., Bay City, Mich.		None					None					None			
Blackwalters Research, Inc., Syracuse, N.Y.		None					None					None			
Christopher, Geo. C. & Son Iron Works, Wichita, Kansas		None					None					None			
Concrete Equipment Co., Holland, Mich.		None					None					None			
Concrete Industries, Inc., Van Nuys, Calif.		None				2	75	360000	360000	3000 -	1 2	75 180	180000 864000	180000 864000	1200 -
Concrete Machinery Co., Hickory, N.C.		None					None					None			
Crawford Industries, Pomona, Calif.		None					None					None			
Crawford-Dooley Ind. & Sales Co., Pomona, Calif.		None				4	600	5760000	5760000	42000 -		None			
Des Plaines Concrete Products Mch. Co., Des Plaines, Ill.		None					None					None			
Dunn, W.E., Mfg. Co.	[illegible]	200	34560000	34560000	119880 -	58	200	27840000	27840000	111070 -	14	200	6720000	6720000	28112 -
Edgar's Block Machine Works, Ormond, Florida	150	88	31680000	31680000	105000	[illegible]	88	10560000	10560000	[illegible]	12	88	2534400	2534400	8400 -

Vibrating Principle

Page 2	No. Machines Manufactured	Production Blocks/Hr.	1946 Production per Year 300-8 Hour Days Minimum	1946 Production per Year 300-8 Hour Days Maximum	Dollar Value	No. Machines Manufactured	Production Blocks/Hr.	1947 Production per Year 300-8 Hour Days Minimum	1947 Production per Year 300-8 Hour Days Maximum	Dollar Value	No. Machines Manufactured	Production Blocks/Hr.	1948 Production per Year 300-8 Hour Days Minimum	1948 Production per Year 300-8 Hour Days Maximum	Dollar Value
Fifth Avenue Fabricating Co. Birmingham, Ala.	38	75-100	6840000	9120000	13300-		None					None			
Elam, Stephen Van Nuys, Calif.	279	100	66960000	66960000	728300-		No Data					No Data			
	8	150	2880000	2880000											
	514	200	246720000	246720000											
	80	300	57600000	57600000											
	6	250	10800000	10800000											
Elemina Manufacturing Co.	241	100	57840000	57840000	200512-	150	100	36000000	36000000	124800-	48	100	11520000	11520000	38663-
						26	180	11232000	11232000	50013-	81	180	34992000	34992000	170459-
Fonta, J.B., Foundry Co. Fredericktown, Ohio		None					None					None			
Fred, Cement Block Machine Co. Cedar Falls, Iowa		None					None					None			
General Engines Company Gloucester, N.J.		None					None				205	100	49200000	49200000	41610-
[illegible], Bob, Industries, Inc. Orlando, Florida	250	250	150000000	150000000	300000-	25	250	15000000	15000000	69500-	12	250	7200000	7200000	29800-
						2	480	2304000	2304000		1	480	1152000	1152000	
						4	100	960000	960000		2	100	480000	480000	
						4	125	1200000	1200000		3	125	900000	900000	
						6	300	4320000	4320000		2	300	1440000	1440000	
						2	400	1920000	1920000						
[illegible] Co., Inc. N. Hollywood, Calif.	6	125	1800000	1800000	12000-	10	125	3000000	3000000	30000-	5	125	1500000	1500000	10000-
[illegible] Church Co. Saginaw, Mich.		None					None					None			
[illegible] Machine Company Tuscaloosa Falls, Ohio		None					None					None			
[illegible] Co. [illegible]ingham, Ala.	21	100-125	6040000	6300000	21000-		None					None			

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Tumbling Principle

Page 3		No. Machines Manufactured	Production Blocks/Hr.	1946 Production per Year (Sec. 8 Hour Days) Minimum	Maximum	Dollar Value	No. Machines Manufactured	Production Blocks/Hr.	1947 Production per Year (Sec. 8 Hour Days) Minimum	Maximum	Dollar Value	No. Machines Manufactured	Production Blocks/Hr.	1948 Production per Year (Sec. 8 Hour Days) Minimum	Maximum	Dollar Value
Miles	Manufacturing Co. Jackson, Mich	241	200	35680000	35680000	336152-	226	200	10480000	10480000	341398-	97	200	4656000	4656000	147388-
Miller	Leslie C., Supply Co. Bedford, Ohio		None				50	100-125	12000000	15000000	26250-	25	100-125	6000000	7500000	14076-
Nishco	Corporation Miami, Florida		None					None					None			
North	Birmingham Casting Co. Birmingham, Ala		None					None					None			
O.K.	Manufacturing Co. Minneapolis, Minn.		None					None					None			
Reed	R.S., Corp. Three Rivers, Mich.		None					None					None			
Scripps	Pearson Machine Works Inc. Edmonds, Wash		None					None					None			
[illegible]	States Material Co. Birmingham, Ala		None					None					None			
[illegible]	Lidgewood-Moody Corp. Superior, Wisc		None					None					None			
[illegible]	K.E. Co. [illegible], N.Y.		None					None					None			
[illegible]	Mfg. Co. Birmingham, Ala.		None					None					None			
[illegible]	Hydraulics, Inc. Syracuse, N.Y.		None					None					None			
[illegible]	Corp. Saint Lake, Minn		None					None					None			
[illegible]	Concrete Machinery Co. Columbus, Ohio	5	200-300	2400000	3600000	5650	5	200-300	[illegible]	3600000	1400750		None			
[illegible]	Jumpers, Inc. [illegible], Ill.	9	200-240	4320000	5184000	2433594	12	200-240	[illegible]	[illegible]	[illegible]	7	200-240	3360000	4032000	2246563

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Vibrating Pressure

	No. Machines Manufactured	Production Blocks/Hr	1946 Production Min.	1946 Production Max.	Dollar Value	No. Machines Manufactured	Production Blocks/Hr	1947 Production Min.	1947 Production Max.	Dollar Value	No. Machines Manufactured	Production Blocks/Hr	1948 Production Min.	1948 Production Max.	Dollar Value
Van Dorn Co Philadelphia, Pa.		None					None				5	400	1800000	1800000	[illegible]
Vibra-Tamp Machinery Company	5	250	3000000	3000000	8000-	10	250			20000-	8	500	9600000	9600000	58455-
Willetta Concrete Machinery Co Lynwood, Calif		None					None					None			
Witherow Machinery Co. Framingdale, N.J.		None					None					None			
Kelly, E B Company Framingdale Co.		None					None					None			
Weber Machine & Welding Works Amory, Miss		None					None					None			
Allied Welding & Mfg. Co Inc. Orlando, Florida	84	100-250	8640000	21600000	40798-	15	100-250	3600000	9000000	20451-	7	100-250	1680000	4200000	[illegible]
Columbia Machine Works Vancouver, Wash	5	200	2400000	2400000	17246-	7	200	3360000	3360000	36800-	3	250	1800000	1800000	[illegible]
						3	400	2880000	2880000		13	400	12480000	12480000	134000-
George, F C Machine Co Orlando, Florida	218	225-325	77220000	116200000	330676-	55	225-325	29700000	49500000	8788187	16	225-325	8640000	14400000	2382250
						27	300-450	19440000	29160000	9056360	43	300-450	30960000	42480000	12[illegible]
Multiplex Machinery Corp Fremont, Ohio		None					None					None			
Wooten C. M. Co Knoxville, Tenn.	2	60	288000	288000	4400-	3	60	432000	432000	250		None			
	2	200	960000	960000		1	200	480000	480000						
Luth I Bin Co Holland, Mich. (Testimony)	2	480	2304000	2304000	13520-	27	480	3110400	3110400	237000-	45	480	5184000	5184000	396000-
Sub-Totals	2831		104[illegible]000	185036000	2907[illegible]845	1621		361[illegible]000	410604000	14183[illegible]49	842		327554400	358[illegible]000	141[illegible]06

* Deposition classifies data under tamping however comments that machines used "compression & pressure"

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	No. Machines Manufactured	Production Rate Blocks/Hr.	1946 Production Number 8" Eq. Blocks	1946 Year Dollar Value	1947 No. Machines	1947 Production Rate Blocks/Hr.	1947 Production Number 8" Eq. Blocks	1947 Year Dollar Value	1948 No. Machines	1948 Production Rate Blocks/Hr.	1948 Production Number 8" Eq. Blocks	1948 Year Dollar Value
Prescrok Machine Co. Marshfield, Wisc.	6	240	3456000	3456000	3	240	1728000	1728000	8	240	4608000	4608000
Roy H. Darden Atlanta, Ga.	3	200	1440000	1440000	3	200	1440000	1440000	2	200	960000	960000
					2	800	3840000	3840000	1	800	1920000	1920000
Totals	2834		1650022000	1813722000	1028		461000000	460500000	853		334424000	333984000
Results After Excluding the Following Companies per W.D. Speer, Antitrust Office												
Concrete Industries, Inc.	14		None		2	75	360000	360000	2	180	648000	648000
Roy H. Darden	3	200	1440000	1440000	3	200	1440000	1440000	2	200	960000	960000
					2	800	3840000	3840000	1	800	1920000	1920000
Adjusted Totals	2834		1648632000	1809932000	1021		456060000	455700000	847		331184000	330744000
Stearns Manufacturing Co.	33	360	2851200	2851200	18	360	1555200	1555200	13	360	1123200	1123200
	77	400	7392000	7392000	48	400	4608000	4608000	18	400	1728000	1728000
					22	400	2112000	2112000	18	320	3110400	3110400
Stearns - Totals	110		10243200	10243200	88		8275200	8275200	49		5961600	5961600
Besser Manufacturing Co. Domestic	160	600	28040000	28040000	100	600	17360000	17360000	5	600	1152000	1152000
Alpena, Mich.	14	250	840000	840000	20	250	1200000	1200000	11	600	1584000	1584000
Foreign	10	600	1440000	1440000	6	600	864000	864000	2	250	120000	120000
	2	250	120000	120000	1	250	60000	60000	56	250	10080000	10080000
									12	250	1200000	1200000
Besser Totals	186		30440000	30440000	127		19484000	19484000	86		15136000	15136000
Excluding Foreign	174		28880000	28880000								

Value of Permits

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AUG 9 1951
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 230

BESSER MANUFACTURING COMPANY AND JESSE H. BESSER,

Appellants,

vs.

THE UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

STATEMENT AS TO JURISDICTION

CARL R. HENRY,
JOHN W. BABCOCK,
Counsel for Appellants.

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UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

Civil Action No. 8144

UNITED STATES OF AMERICA,

Plaintiff,

against

BESSER MANUFACTURING COMPANY, STEARNS MANUFACTURING COMPANY, INC., JESSE H. BESSER, LOUIS GELBMAN AND HAMLIN F. ANDRUS,

Defendants

JURISDICTIONAL STATEMENT

Pursuant to Rule 12 of the Rules of the Supreme Court of the United States, petitioners Besser Manufacturing Company and Jesse H. Besser, two of the defendants in the above entitled action, respectfully present the following statement disclosing the basis upon which the Supreme Court of the United States has jurisdiction upon appeal to review the final judgment herein, dated April 12, 1951.

Jurisdiction

This is an appeal from a final judgment of the District Court of the United States for the Eastern District of Michigan, Southern Division, in an action in which the United States as complainant, under Section 4 of the

Sherman Act, sought and obtained relief against Besser Manufacturing Company, Jesse H. Besser and others in respect of acts and agreements found to constitute a violation of sections 1 and 2 of the said Act (Act of July 2, 1890, c. 647, sections 1, 2, and 4, 26 Stat. 209; 15 U. S. A. C. §§ 1, 2, 4). Jurisdiction to review by direct appeal the final judgment entered in this action is conferred by section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 58 Stat. 272; 62 Stat. 989; 15 U.S.C. § 29), and section 2101(b) of the Judicial Code [62 Stat. 962; 28 U.S.C. § 2101(b)].

The following decisions, among others, sustain the jurisdiction of the Supreme Court to review the final judgment in this action on direct appeal: *United States* v. *National Lead Co.*, 332 U. S. 319 (1947); *Hartford-Empire Co., et al.* v. *United States*, 323 U. S. 386 (1945); *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707 (1944).

Dates of Judgment and Application for Appeal

The final judgment sought to be reviewed was entered on April 12, 1951.

The petition for appeal is presented to the District Court herewith on June 6, 1951.

Statute Involved

The statutory provisions involved are Sections 1, 2, and 4 of the Sherman Anti-Trust Act, as amended (26 Stat. 209; 50 Stat. 693; 15 U. S. C. §§ 1, 2, 4). The pertinent provisions thereof are as follows:

> "§ 1. *Trusts, etc., in restraint of trade illegal; exception of resale price agreements penalty*
>
> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: . . ."

"§ 2. *Monopolizing trade a misdemeanor; penalty*

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

"§ 4. *Jurisdiction of courts; duty of district attorneys; procedure*

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 of this title; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

Nature of the Case and Rulings Below

The complaint, filed April 28, 1949, charged defendants Besser Manufacturing Company, Jesse H. Besser, Stearns Manufacturing Company, Inc., Louis Gelbman, and Hamlin F. Andrus (hereafter respectively called Besser Co., Besser, Stearns, Gelbman, and Andrus) with violations of sections 1 and 2 of the Sherman Act (26 Stat. 209; 15 U. S. C. §§ 1 and 2). The general charges were that Besser Co. and

Besser had attempted to monopolize, and had monopolized, interstate trade and commerce in concrete block making machinery; and that since 1942 the five defendants had been engaged in a combination and conspiracy to restrain such commerce.

Concrete block making machines are sold or leased by their manufacturers to local businesses, which employ them in the production of concrete blocks used for various building purposes. Certain overall figures are undisputed, though there is controversy as to the inferences to be drawn from them. In 1948 concrete block machines were produced and sold or leased by not less than 42 manufacturers. The machines sold or leased by these manufacturers had a total annual production capacity of 628,000,000 standard concrete blocks. Of this aggregate, the production capacity of the machines sold or leased by Besser Co. was 119,000,000 blocks, or 19%; of Stearns, 77,000,000 blocks, or 12.3% and of other manufacturers, 432,000,000 blocks, or 68.7%.

The dollar value of machines sold or leased by a manufacturer, however, is not necessarily proportional to the productive capacity of such machines. Thus, in 1948, the dollar value of machines sold or leased by Besser Co. was 52.1% of the aggregate dollar value of the industry; by Stearns 12.9%; and by other manufacturers, 35%.

Besser Co., a Michigan corporation, was founded in 1897 by Mr. Herman Besser, father of defendant Jesse H. Besser, as a wood stave and shingle mill. In 1904 it entered the manufacture of concrete block making machinery, and by 1905 its former stave and shingle operations had been discontinued. Mr. Herman Besser continued active in the company until 1925; Mr. Jesse Besser began working with the company as a boy after school, and has devoted to the company his entire business career of nearly

fifty years. He and his wife today own all the stock of the company.

Pioneers in the industry, the Bessers, father and son, through their business and inventive efforts, have been largely instrumental in the technological development of the concrete block making process. The first Besser machine, produced over 45 years ago. was an entirely hand operated, "cored" pallet [1] machine consisting of a mold with collapsible sides and cores which were withdrawn through the bottom of the mold. The mold box was hand charged by shovel, the mixture was tamped down into the mold by hand, and the block within the core was removed by hand. This manual operation produced some 150 to 200 blocks per 8-hour day. In 1909 the Bessers developed a power tamper to work above the hand machine, the first marked improvement in the process, which trebled the output capacity. In 1914 the Bessers developed a machine in which the tamping and the core removal were power operated, though the feeding and the opening and closing of the mold were still by hand. This improved machine produced some 1800 blocks per day. In 1919 they perfected a machine of similar design which produced two blocks at a time, thus stepping up productive capacity with a six man crew to some 3000 blocks per day.

In 1924 Jesse H. Besser invented the so-called "plain" pallet stripper process which in essence eliminated the metal core and permitted the delivery of the block directly from the mold without involving the extra step of utilizing a core. Employing this development, on which a patent was issued to Mr. Besser in 1929, machines were manu-

[1] The term "cored" pallet is descriptive of a concrete block making machine in which a metal core is placed inside the mold, and the block is cast within this core. The core, while the mixture is still wet, is removed from the mold. Subsequently, after the block has set, the core is removed from the block.

factured which, with a four man crew, could produce 3000 to 3600 blocks daily. All of the foregoing machines used tamping to compact the mixture in the mold. In 1939 Besser Co. began the production of Vibrapac machines, which used vibration of the mold, instead of tamping, to compact the mixture. Today, in areas of sufficient population concentration to absorb volume production, fully automatic machines making three blocks at a time can produce 6000 blocks per eight-hour shift with a two man crew.

Other patents related to concrete block making machinery have been issued to various inventors, of which several are mentioned in the record in this case. During the 1930s, Gelbman and Andrus evolved, and in 1939 patented, certain developments providing for a movable feed box which poured the mixture into a vibrating mold, where pressure was applied during vibration. In 1938, one Scott secured a patent providing for the packing of the mixture in the mold by vibration of the mold separate from the machine, and, thereafter, one Wellnitz patented a device for controlling the height and density of the concrete block. Besser Co. owns the Scott and the Wellnitz patents, the latter having been purchased shortly before the trial in 1950. There is no allegation, and no evidence, that there was any impropriety in the acquisition of these patents by Besser Co.

About 1934, Stearns, headed by one Eugene F. Olsen, started to produce concrete block making machines, and in 1936, Stearns obtained an exclusive license under certain Gelbman-Andrus patents and began the manufacture thereunder of high production vibrating machines. In 1940, Gelbman, Andrus, and Stearns sued a user of a Besser machine for infringement. Besser Co. defended this action and the trial court found for the defendant. While an appeal was pending, Gelbman, Andrus, Stearns and Besser Co. entered into a license agreement dated December 7, 1942, which presents one of the important issues in this case. In

part this license agreement was in settlement of the patent litigation; and in part it was intended to secure the wider exploitation of certain Gelbman-Andrus patents not involved therein and not previously licensed to Stearns. By such agreement, Gelbman and Andrus granted to Besser Co. and to Stearns licenses on their patents and on any relevant improvements and subsequent inventions. Each license was exclusive (except for the license to the other company), and the parties agreed that additional licenses would be granted only with the consent of all parties to the agreement.

Between 1942 and the institution of the present action, defendants have insisted that the Gelbman-Andrus patents be respected. When necessary, infringement actions have been instituted, the most recently adjudicated action being *Andrus* v. *Whitman*, 93 F. Supp. 383, decided by Judge Picard (who also presided at the trial of this action), in an opinion which sustained the validity and found infringement of the Gelbman apparatus patent, and which sustained the validity but found no infringement of the Scott patent and the Gelbman method patent. In settlement of various of the infringements or claimed infringements, defendants have, from time to time, granted limited licenses to the parties charged with infringement to permit them to carry out planned programs of manufacture without financial loss.

In 1946 Besser Co. purchased the assets and good will of Stephen Flam, Inc., a California corporation engaged in the manufacture of block making machinery. At the same time, Stephen Flam individually executed exclusive licenses to Besser Co. under certain patents and patent applications owned by him, agreed to assign such patents on full payment of an $80,000 consideration, took employment with Besser Co. on a part-time consultant basis for five years at $6,000 per annum, agreed to grant Besser Co.

an exclusive license under inventions made by him during the period of his employment, and also agreed not to engage in the manufacture of concrete block making machines for eight years except in connection with Besser Co. These agreements superseded an earlier contract of 1938 whereby Flam had granted Besser Co. an exclusive, non-assignable license under certain enumerated patents owned by Flam excepting from the license nine western and southwestern States. Flam had further agreed to render consultant services to Besser Co. on a part-time basis. There is nothing in the record with respect to the circumstances of the making or performance of the Flam agreements except the contracts themselves.

Between 1946 and 1948 Besser Co. bought 87,000 shares of the 198,833.5 outstanding shares of Stearns stock, at a cost of nearly $1,000,000. Although three new directors were thereafter elected at the next stockholders' meeting, the undisputed evidence, coming in part from the government's own witness, is that Besser had not participated in or made any comments concerning the management of Stearns between such election and the date of the trial. Prior to the trial, Besser Co. entered into a still unexecuted agreement to sell this stock.

In October 1947, Besser Co. established the policy of distributing certain of its most advanced machines under lease contracts rather than by outright sale. The lessee makes an initial deposit which is credited against the subsequent payments due under the lease, which payments are based on the number of blocks produced, with a specified minimum monthly rental.

The government's complaint included charges resting on a 1931 purchase of stock of the Consolidated Concrete Machinery Company and a 1935 purchase of certain assets of Industrial Brownhoist Co. The trial court found for

defendants on these transactions, and they require no further comment.

The government contended:

> (a) that defendants have combined and conspired to restrain and to monopolize interstate trade and commerce in concrete block making machines, and that Besser Co. and Besser have attempted to monopolize and have monopolized such trade and commerce, and that the district court should so find and enjoin them therefrom;
>
> (b) that defendants' license agreement of December 7, 1942 is unlawful, and that their use of patents subsequent thereto has likewise been unlawful;
>
> (c) that Besser Co. and Besser should be required to divest themselves of any financial interest in or control over Stearns, and be perpetually enjoined from acquiring any interest in any other concern manufacturing concrete block machines; and
>
> (d) that the district court should order Besser Co., at the option of its lessees and on such terms and conditions as the court might propose, to terminate the leases for its machines and sell them outright.

This action went to trial in the district court before the Honorable Frank A. Picard on May 16, 1950. On January 31, 1951, the district court rendered its opinion herein which found for defendants in some respects and against defendants in other respects, concluding that violations of the Sherman Act had been established. A copy of this opinion is attached hereto as Appendix A.

On April 12, 1951, the district court entered its final judgment herein, which adopted the previously filed opinion as its findings of fact and conclusions of law. A copy

of this judgment is attached hereto as Appendix B. This judgment, in respects pertinent to this appeal:

Par. I

(a) determined that defendants had conspired to restraining and monopolize commerce in concrete block making machines, and that Besser Co. and Besser had attempted to monopolize and had monopolized such commerce;

Par. III

(b) applied the provisions of the judgment applicable to any defendant to "such defendant, its subsidiaries, successors, assigns, and each of its officers, directors, agents, employees and any other person acting under, through, or for such defendant."

Par. IV(A)

(c) directed that within sixty (60) days, Besser Co. and Besser present to the district court their plan for divesting themselves of all stock holdings or other interests, direct or indirect, in defendant Stearns, such plan to provide for such divestiture by July 1, 1951;

Par. IV(B)

(d) directed Besser Co. and Besser to cancel any and all contracts, agreements or understandings, in effect prior to the judgment, providing for the divestiture of such stock, and enjoined them from adhering to or enforcing any rights under said contracts, agreements or understandings;

Par. V(A)

(e) perpetually enjoined Besser Co. and Besser from acquiring without prior notice to the Attorney General and approval by the court, the business, physical assets, or good will, or any part thereof, or any capital stock or security of any person engaged in the manufacture of concrete block making machines;

Par. V(B)

(f) perpetually enjoined Besser Co. and Besser from causing, authorizing, or knowingly permitting any of their officers, directors, agents, or employees to serve as such for any other such person or firm;

Par. VI(A)

(g) nullified the entire license agreement of December 7, 1942, between Besser Co., Stearns, Gelbman and Andrus which had granted Besser Co. and Stearns exclusive licenses to exploit certain patents of Andrus and Gelbman;

Par. VI(B)

(h) perpetually enjoined defendants from conveying or receiving any patent rights under any license, contract or agreement which gives the licensee or licensees control over the number of licenses issued or to be issued, "or which has the same unlawful purpose and effect as the . . . license agreement of December 7, 1942";

Par. VI(C)

(i) enjoined all defendants, except Stearns, from instituting, threatening, maintaining, or continuing any suits, with the exception of three actions already decided at the date of the judgment [see *Andrus* v. *Whitman*, 93 F. Supp. 383 (E.D. Mich., 1950)] for infringement of any patents referred to in the next succeeding paragraph, which infringement had occurred prior to the date of the judgment;

Par. VII(A)

(j) directed all defendants, except Stearns, to grant to any applicant therefor a non-exclusive license to make concrete block making machinery under any or all of their patents, which pertaining to concrete block making machines, are now existent, or which are issued or applied for within ten (10) years; and en-

joined them from transferring any of such patents other than subject to this provision;

Par VII(B)

(k) enjoined all defendants, except Stearns, from including any restriction or condition whatsoever in any license or sublicense granted pursuant to the above provision, or any license of such patent presently owned or acquired within the next ten years, and "in order to arrive at a fair royalty price for the use of" such patents, ordered Gelbman and Andus to appoint two representatives to act with two other persons appointed by the Government on an extra-judicial "committee" to determine such "fair" royalty prices and the form and contents of such royalty contracts; provided that, if such "committee" could not agree on the terms of the contracts, or on a choice for a fifth member of the "committee," the court might elect to make himself a member or appoint a fifth member; and directed that "the same method and manner" should be used to determine such royalty rates and contract covering such patents, "present and future," owned or controlled by Besser Co. and Besser;

Par. VII(C)

(l) ordered the filing of the royalty prices and contract forms so set with the district court, to become a part of the judgment "as though it were now included herein";

Par. VII(D)

(m) provided that nothing therein should prevent any applicant from attacking "in the aforesaid proceedings" the validity or scope of any of the patents, nor should the judgment be construed as imputing any validity or value to any of the patents;

Par VIII(A)

(n) directed Besser Co., within thirty (30) days of the judgment, *i.e.*, by May 12, 1951, to notify each lessee

of its machines of an option, open until October 1, 1952, to (1) continue its lease, (2) terminate its lease, or (3) "enter into an agreement to purchase the machine or machines leased, and the accessory equipment used, as mutually satisfactory to the parties concerned";

Par. VIII(B)

(o) directed Besser Co. to sell repair parts at reasonable, non-discriminatory terms to any such lessee or purchaser;

Par. IX

(p) enjoined defendants from entering into, adhering to, or claiming any rights under any contract, agreement, or understanding with any person engaged in the development or manufacture of concrete block making machinery designed to prevent such person from competing with them; and

Par X

(q) enjoined defendants from coercing any person to refrain from manufacturing concrete block making machinery or from furnishing supplies to such manufacturers.

On May 8, 1951, petitioners applied to the district court for a stay of certain provisions of the judgment herein pending the perfection of an appeal to the Supreme Court of the United States. The court refused to grant such stay until petitioners had appointed their two representatives on the extra-judicial "committee" to set royalty and contract terms established in paragraph VII (B) of the judgment, and until such "committee" had met and performed its assigned duties. Accordingly, under protest and pursuant to a specific ruling made by the trial court on May 8th, that such action would be without prejudice to their appeal rights, petitioners, on May 9, 1951, designated two representatives to this "committee."

Meantime, the government had already designated as its "committee" representatives Eugene F. Olsen and Roy Darden, both of whom had been government witnesses at the trial. Olsen, formerly president of Stearns, is president and principal stockholder of the Gene Olsen Corporation, one of Besser Co.'s foremost competitors. At the trial, Olsen had testified that "there is not a large number who are manufacturing [concrete block making] machines and who are not infringing the Gelbman and/or the Scott patents," and, when asked by the court if he claimed that his own machine did not so infringe, had replied "No, I have not claimed that." Darden, the other government representative, also is a manufacturer of concrete block making machinery. A patent infringement suit instituted in 1946 by Gelbman and Andrus involving Darden's machine was settled, at Darden's instance, by granting him a limited license to manufacture a specific number of machines. This license was still outstanding at the time of the trial.

On May 11, 1951, Mr. Justice Reed of the Supreme Court of the United States stayed for thirty (30) days the provisions of paragraphs IV(A), VI, VII, VIII, and IX of the final judgment herein, with the exception of the provisions of paragraph VII dealing with the royalty "committee," and the provisions enjoining the institution of suits and the making of certain contracts enumerated in paragraphs VI (C) and IX respectively.

Thereafter, on May 21 and 22, 1951, the "committee" met, ostensibly to attempt to agree upon "a fair royalty price" for the use of the patents involved. At these sessions, to which Olsen and Darden brought private counsel, no agreement was possible because such counsel insisted upon setting only "nominal" royalties. Upon an informal report of this inability to agree, the trial judge, on May 23rd, designated himself as the fifth member of this extra-judicial "committee." Prior to this designation, counsel

for petitioners had requested, without prejudice to their appeal, that the full "committee" thereafter follow formal procedures so that the evidence relevant to the proper amount of such "fair royalty price" might be presented to the "committee" and the parties heard thereon. At the meeting at which the trial court designated himself as the fifth "committee" member, one of petitioners' representatives on the "committee" orally made the same request. The trial judge refused, and, without permitting petitioners to produce any evidence as to a "fair royalty price," forthwith accepted the royalty figures proposed by the government's representatives on the "committee," which figures their counsel had, to the court's knowledge, previously described as "nominal." On May 29, 1951, the Trial Judge, acting in an individual capacity as a fifth member of the "committee" delivered to Government Counsel a "Proposed Form of License Agreement" incorporating these figures as the final royalty prices, which report was filed on May 29, 1951 by the Government with the Clerk of the District Court purportedly to become thereby a part of the Final Judgment.

The Questions Are Substantial

This appeal presents substantial questions, which for convenience, may be subdivided into three categories.

a. *The Findings and Conclusions That Petitioners Violated the Sherman Act*

Three points will illustrate, without exhausting, the substantial nature of the questions raised under this category:

1. The district court erroneously condemned, as a violation of the Sherman Act, the 1942 contract whereby Gelbman and Andrus granted exclusive patent licenses to Stearns and Besser Co. Such a license agreement, entered

into partly to settle *bona fide* patent litigation, is valid, even when exclusively granted to two licensees (see *Standard Oil Company* v. *United States*, 283 U. S. 163, 171-172 (1931); *United States* v. *General Electric Co.*, 272 U. S. 476, 489 (1926); *Virtue* v. *Creamery Package Company*, 227 U. S. 8, 32-33 (1913); *Bement* v. *National Harrow Co.*, 186 U. S. 70, 94 (1902); *Flexner Co.* v. *Faussner Co.*, 145 F. (2d) 528, 539 (C. C. A. 7th, 1944).)

Such a valid, non-assignable, exclusive license necessarily implies that no other licenses shall be granted unless, by mutual agreement of all parties thereto, the license agreement is modified. The 1942 Gelbman-Andrus-Besser Co.-Stearns agreement provided explicitly that further licenses should be granted only on consent of all parties to the license agreement. To the extent that this provision was relied on by the trial court to invalidate the agreement, the court erroneously held that an explicit statement of terms necessarily implicit in such a license contract is fatal to the license.

The court erred further in holding that the contract was made illegal under the Sherman Act because it included an agreement subsequently to license improvements or future patents in the same field [*cf. Transwrap Corp.* v. *Stokes Co.*, 329 U. S. 637 (1947); *Aspinwall Manufacturing Company* v. *Gill*, 32 Fed. 697 (C. C. N. J. 1887), app. dis. 140 U. S. 699 (1891)].

The district court's erroneous conclusion as to the legality of the 1942 agreement was the principal, if not the sole, support of its determination that there was a conspiracy or combination in restraint of trade among defendants, and was also a main support of the finding that petitioners had an illegal monopoly. Since this erroneous conclusion was the basis for an important part of the specific provisions of

the judgment below, the legality of the 1942 agreement presents a substantial question for review.

2. The district court erroneously condemned as violations of the Sherman Act the 1946 contracts, summarized above, between Besser Co. and Stephen Flam, Inc. and Stephen Flam individually. Except for the written contracts themselves, introduced as exhibits, nothing appears in the record concerning these agreements, their purpose or the circumstances surrounding their negotiation. That there was nothing illegal *per se* in any of the agreements is obvious from the summary of their provisions. The broad inferences drawn by the district court from the contracts themselves are unwarranted, and were erroneously used by the trial court as a basis for its conclusion that petitioners had attempted to obtain a monopoly. Such basic error presents another substantial question for review.

3. The district court erroneously found a violation of the Sherman Act in the insistence of defendants that other manufacturers not infringe their patents. The evidence showed that Besser Co. was the owner of patents known respectively as the Scott patent and the Wellnitz patent, the latter having been acquired only shortly before the trial. There was no contention, no evidence, and no finding that the acquisition of either of these patents was tainted by any illegality. The undisputed evidence of the government's own witness, Olsen, was that there were few manufacturers of concrete block making machines who did not infringe the Gelbman or the Scott patents. Olsen admitted that if the Gelbman and the Scott patents were valid, he would not claim that his own machines did not infringe, but rather thought he might be infringing. That the Gelbman and the Scott patents are valid was adjudicated in *Andrus* v. *Whitman*, 93 F. Supp. 383 (E. D. Mich., 1950),

which case was decided prior to the opinion or judgment here under review.

In this context, the trial court erroneously concluded that these defendants violated the Sherman Act by pointing out to other manufacturers claimed infringements of their valid patents. The correctness of the court's determination that a warning of infringement, unless followed by litigation or negotiation, is an abuse of the patent right which violates the Sherman Act presents a further substantial question for review.

b. *The Punitive Nature of the Judgment Entered*

Even assuming *arguendo* that these defendants may have violated the Sherman Act, the punitive provisions of the final judgment present substantial questions for review. Four points will illustrate, again without exhausting, the substantial nature of the questions raised under this category:

1. By requiring the compulsory licensing of "any, some or all patents and patent applications pertaining to concrete block making machinery now owned or controlled by the defendants," the judgment, in effect, confiscates the patent rights of petitioner Besser Co. in the Scott and the Wellnitz patents, although no evidence suggested any impropriety in their acquisition and they were not involved in the 1942 agreement. The Scott patent has only recently been adjudicated valid [see *Andrus* v. *Whitman*, 93 F. Supp. 383 (E. D. Mich. 1950)]. No claim of invalidity is made as to the Wellnitz patent, acquired at considerable expense by Besser Co. early in 1950. Nothing in the opinion, which constitutes the findings of fact and conclusions of law, or in the evidence, suggests any basis for depriving Besser Co. of its legal rights as assignee under the Scott and the Wellnitz patents [see *Hartford-Empire Co.* v.

United States, 323 U. S. 386, 417, (1945); *Crown Co.* v. *Nye Tool Works*, 261 U. S. 24, 34-35 (1923)]. The propriety of this provision of this judgment also presents a substantial question for review.

2. The judgment further requires petitioners to open to compulsory unlimited and unrestricted licensing "any, some or all patents and patent applications pertaining to concrete block making machinery . . . which are issued or applied for within ten years from the entry of this final judgment [Par. VII (A)]." Under this provision, if Besser Co. or Besser, eight years hence, should patent a new development in the industry, discovered through their own research and inventive genius, such patent must forthwith be offered to the entire industry at rates fixed by the royalty "committee" set up in the judgment. In *Hartford-Empire Co.* v. *United States* (*supra*), 417-418 (1945), the Supreme Court condemned a similar provision. Its inclusion in this judgment, in the face of such condemnation, presents a substantial question for review.

3. Since 1947, Besser Co. has leased rather than sold certain of its most advanced machines. By directing Besser Co. to notify every lessee that it may terminate such lease at any time prior to January 1, 1953, or continue the lease, or "enter into an agreement to purchase the machine or machines leased [Par. VIII(A)]," the judgment, in effect, invalidates the existing lease contracts. In *Hartford-Empire Co.* v. *United States* (*supra*), 412-413, 419, 420, 422, the Supreme Court condemned an analogous provision. Its inclusion here presents another substantial question for review.

4. The judgment incorporates other provisions specifically disapproved by the Supreme Court: *e. g.*, it is not limited to the United States [*Hartford-Empire Co.* v. *United States*, *supra*, 410]; the restrictions on Besser Co.

and Besser or their privies, holding office or financial interest in other concerns manufacturing concrete block making machines [Par. V(A)(B)] are too extensive (*ibid.*, 410, 424-426); the provision that nothing therein should prevent any licensee from attacking the validity or scope of the licensed patents [Par. VII (D)] is improper [*United States* v. *United States Gypsum Co.*, 340 U. S. 76, 94 (1950)]. These and other punitive provisions present substantial questions for review.

c. *The Improper Delegation of Judicial Functions to a Lay Royalty "Committee"*

Further substantial questions arise from the provisions of the judgment establishing an extra-judicial "committee" to set royalties and contract terms, the actions of such "committee" and the participation of the district judge therein.

The requirement that the royalty and license terms, under the compulsory licensing erroneously ordered by the district court, should be determined by an extra-judicial lay "committee" [Par. VII (B)], on which the district court finally elected to sit, constitutes an unprecedented method by which to determine facts which shall become part of the final judicial judgment herein. According to the judgment, this "committee" must set the royalties and the contract terms for any future patents acquired by petitioners in the next ten years, such royalties and terms also to become part of this judgment. No authority exists for any such procedure, and its inclusion in this judgment presents a substantial question for review.

Petitioners were further denied fundamental rights by the informal act of the trial judge in appointing himself as the fifth member of such extra-judicial "committee," and by his subsequent action in summarily, by what was in effect a

3-2 "committee" vote, fixing royalties at rates previously described by counsel for the government representatives as nominal. The judge, acting in a non-judicial capacity as a "committee" member, refused to grant petitioners an opportunity to present evidence relevant to a "fair royalty price." The error of this proceeding was compounded by the fact that no provision was made in the judgment for any judicial review of the "committee" action. Moreover, any attempt to secure judicial review would be abortive if brought on before the same judge who had already departed from his judicial function to constitute himself a voting member of the lay "committee."

The foregoing raises, among others, the questions whether such a delegation of the judicial function to a "committee" of laymen is appropriate under the federal system of the administration of justice; whether important property rights, presently existing or coming into existence within ten years, may thus be confiscated by an *ad hoc* "committee" acting without evidence or hearing; and whether a district judge may properly abandon his judicial duties to vote a 3-2 "committee" report which shall become "a part of the judgment." The entire provision and its attempted execution obviously present substantial questions for review.

Respectfully submitted,

CARL R. HENRY,
Attorney for Petitioner,
Jesse H. Besser,
Alpena, Michigan.

JOHN W. BABCOCK,
Attorney for Petitioner,
Besser Manufacturing Company,
2276 Penobscot Building,
Detroit 26, Michigan.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

Civil No. 8144

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

BESSER MANUFACTURING COMPANY, STEARNS MANUFACTURING COMPANY, INC., JESSE H. BESSER, LOUIS GELBMAN, AND HAMLIN F. ANDRUS, *Defendants*

OPINION OF THE COURT

The government brings this action under Section 4 of the Sherman Anti-Trust Act, Ch. 647, Sec. 4, 26 Statute 209; 15 U.S.C. Sec. 4, charging that defendants conspired to, and did, create a monopoly in the manufacture of concrete block making machines in violation of Sections 1 and 2 of the Act. Defendants are Besser Manufacturing Company and Stearns Manufacturing Company, Inc., producers of concrete block making machines, Jesse H. Besser, who owns 99 per cent of the Besser Manufacturing Company (his wife 1 per cent) and Louis Gelbman and Hamlin F. Andrus, who own important patent rights used in the machines produced.

It is first necessary, therefore, to determine whether the facts prove that a monopoly has been created.

Besser Manufacturing Company (hereinafter called "Besser") is not only a pioneer but today admittedly holds a dominant position in manufacturing concrete block making machines. The company was founded by the father of Jesse H. Besser at Alpena, Michigan in 1897 as a stave and shingle mill and in 1904 expanded into the concrete block making machine business. At that time each step in the making of concrete blocks was entirely by hand beginning with the proper mix being shoveled into forms, tamped and then taken out. One machine could produce 150 blocks per day.

Since then the industry has gone through various stages from "hand" to the "power tamper" (developed by Besser in 1909—capacity 450 blocks per day); the automatic feeder in 1914 (capacity 1800 blocks per day) until 1924 when the Besser plain pallet stripper tamper was invented and one machine was capable of producing 3600 blocks one at-a-time in an 8 hour day. This patent, issued in 1929—and this fact becomes important—expired in 1946. Besser also later purchased the Scott patent rights applied for in 1927 and granted in 1938. Scott as decided by this court (Andrus v. Whitman, 93 Fed. Supp. 383) was a patent covering vibration of the mix in the form.

In 1939 came the Gelbman-Andrus patents with their coordinated vibration and tamping machines that received the mix into the vibrating form followed by automatic pressure. With the present Besser Super Vibrapac it is possible for one machine to make over 6000 standard size 8" x 8" x 16" blocks in one 8 hour day. But there are still concrete block making machines of the hand tamping type being manufactured, utilized and a few sold. Still others are semi-automatic.

So if we are to consider the production possibilities of all concrete block making machines that were being manufactured by the 50 odd concerns for the years 1946-7-8 the figures are as follows: (xx)

	All Other Manufacturers Tampers — Vibrators			Besser and Stearns Tampers — Vibrators	
1946	334	1048		140	356
Total	1382		Total	496	
1947	266	351		79	407
Total	617		Total	486	
1948	101	331		18	195
Total	432		Total	213	

(xx) in million blocks per year.

Defendants insist that this "production capacity" should be the yardstick to determine whether the Besser-Stearns

combined companies have a monopoly and not the "dollar value" of those machines as contended by the government.

On the other hand, the government insists that the use of dollar value is the normal, reasonable and correct method of measuring industry position particularly where the high production automatic machines of the vibrator type assume such a controlling position in that industry.

It points to sales figures demonstrating the importance of the vibrator type machine, which show that in 1946 vibrator machine sales represented 79.6% of total dollar industry sales; in 1947, 83.6%; and in 1948, 91.8%. Of this latter total, Besser and Stearns controlled 69%. To the government these figures become even more revealing when it is considered that a substantial part of the industry to which defendants refer, is not in competition with companies manufacturing the high production machines, for it claims that these low production machines afford no more competition than do hand shovels to large powerful excavating equipment. It reasons that "dollar value" of the machines manufactured should be the yardstick and if we consider this formula as a basis to determine whether the Stearns-Besser combination has a monopoly in the concrete block making machine industry we learn the following:

IN DOLLAR SALES OF ENTIRE INDUSTRY

	Besser and Stearns	The 53 Other Manufacturers
1946	49.7%	50.3%
1947	67.2%	32.8%
1948	65%	35%

Note: In 1946 Besser secretly purchased 13,000 shares of Stearns stock, its chief competitor, and in 1948 succeeded in buying 74,000 shares more. Besser then held 87,000 of the 198,833.5 shares of Stearns stock outstanding and forthwith elected three out of the five men on the Stearns board.

The evidence further shows that among the 50 odd companies which divided the 35 per cent of dollar sales in 1948—

LITH-I BAR had	7.8 per cent of the whole and
J. W. APPLEY	5.9 per cent of the whole

leaving the other 50 odd companies to divide the remaining 21.3 per cent.

The question is whether the court should consider "dollar value" or "production capacity" and here defendants insist that the bill of complaint eliminates any possibility of dollar value because it uses the word "production" which defendants interpret as meaning the "number" of blocks that can be made by those machines.

The court does not decide whether defendants' control of 33 per cent of the output possibilities from all machines produced constitutes a monopoly but incidentally it was held in United States v. Reading Co., 253 U. S. 26 that 33⅓ per cent of the total output of anthracite coal carried by defendant was sufficient to be a monopoly and in United States v. Lehigh Valley R. R. Co., 254 U. S. 255 the figure of 18.84 per cent. In any event we hold to no such narrow interpretation of the word "production." Nor has the plaintiff so limited itself, for in paragraph 14 of the complaint it charges defendants with restraints and monopoly in interstate commerce of concrete block machinery. "Commerce" is the business of buying and selling of commodities for money, W. W. Montague & Co. v. Lowry, 115 F. 27, Aff. 193 U. S. 38; U. S. v. Swift & Co., 122 F. 529; and here the commodity to which the government has reference is the concrete block machine, not its end product. But to this court "production" may mean either "production capacity" or "dollar value" dependent upon the commodity and here we determine that dollar value may be the measuring gauge. In this deduction we are fortified by decisions of our courts where dollar value has frequently been used, U. S. v. U. S. Gypsum Co., 333 U. S. 364, but more particularly in U. S. v. American Can Company, 87 F. Supp. 18, where the court considered that defendant had a monopoly on tin plate because it manufactured more than 200 million dollars worth of cans out of a total tin plate worth upwards of 500 million dollars. In fact "dollar value" is used throughout that opinion.

We also note with interest page 115, monograph No. 21, "Investigation of Concentration of Economic Power," Temporary National Economic Committee (76th Congress, 3rd Session); and Department of Commerce Report (Census of Manufacturers) to House of Representatives Subcommittee on Study of Monopoly power (Celler committee) dated

December 1, 1949, where "dollar value" was used in inquiring into the existence of monopoly power and control.

When two closely related corporations have 65 per cent of the dollar value of any industry and the balance is divided between over 50 other manufacturers with the nearest competitor having less than 8 per cent of the whole, we believe that such a combination has to all intents and purposes a monopoly within the meaning of the law. Add to this the fact that it's the big automatics that are important, not the hand tampers on the semi-automatics, and we find the position of Besser-Stearns in the industry is overwhelming. It has the power in its field to control the prices—meeting the test of the rule laid down in American Tobacco Co. v. U. S. 328, U. S. 781 as well as that found in U. S. v. American Naval Stores Co., 172 Fed. 455—

> "The popular meaning of 'monopoly' at the present day seems to be the sole power (*or a power largely in excess of that possessed by others*) of dealing in some particular commodity, or at some particular market or place, or of carrying on some particular business." (Emphasis ours)

We do not conceive that the Sherman Act anticipates that no deterring steps can be taken until a 100 per cent monopoly has become a "fait accompli."

> "It is not essential that the result of the combination be a complete monopoly, it is sufficient if it merely tends to that end and to deprive the public of the advantages which flow from free competition." U. S. v. E. C. Knight Co., 156 U. S. 16.

The Clayton Act (Section 7) 15 U. S. C. 18 aims to strike down a monopoly at its inception, when the first step is taken—Arrow-Hart & Hegeman Electric Co. v. Federal Trade Commission, 65 F. 2d 336, 340; the Sherman Act after it has become more virile.

A committee of the Judiciary of the Senate in its report accompanying the Clayton Act, dated July 22, 1914, said:

> "Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and

> make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the act of July 2, 1890 (the Sherman Act) or other existing anti trust acts and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation." (1949 Cong. Rec. 11730).

We hold that Besser controls Stearns and that the Besser-Stearns alignment created a monopoly.

Legality

We come then to the issue of whether this particular monopoly is illegal and we start with the oft repeated holding that the Sherman Act must be given a reasonable construction to accomplish its purpose. U. S. v. Union Pacific R. R. Co. 226 U. S. 61. "Bigness" as such, is not prohibited, U. S. v. U. S. Steel Corporation, 251 U. S. 417; U. S. v. Paramount Pictures, 334 U S. 172, although the courts have said that monopolistic power of itself constitutes an evil and is to be condemned whether the acts creating it have been lawful or unlawful. U. S. v. Griffith, 334 U. S. 100; Schine Theatres v. United States, 334 U. S. 110; U. S. v. Paramount Pictures, supra.

The rule, however, is that there must be the existence of power

> "to exclude competition when it is desired to do so" if "coupled with the purpose or intent to exercise that power."
>
> American Tobacco Co. v. U. S., supra;
> U. S. v. Griffith, supra 107;
> U. S. v. Patten, 226 U. S. 325-543; and
> U. S. v. Aluminum Company of America, 148 F. 416 at 432

or the intent to bring about the forbidden act, to-wit, the monopoly. U. S. v. Aluminum Company of America, supra.

Power and intent

As for intent—since this is only a state of mind rarely expressed or written down for the scrutiny of others—the courts generally say that all persons

> "must be held to have intended the necessary and direct consequences of their acts and cannot be heard to say the contrary."

U. S. v. Masonite Corp., 316 U. S. 275 and cases cited;

U. S. v. Patten, supra 543; U. S. v. Griffith, supra.

History of Besser

Let us then follow development of Besser up to the time this suit was started. We mention this because defendants at one point in their briefs argue strenuously that what has happened since that day cannot be taken into consideration by this court, while later therein they cite their own acts, after suit filed, aimed at purging themselves of any possible taint of monopoly. But at this point this court is interested only in the status of the alleged Besser combination as of the day of suit.

Consolidated Concrete Machinery Corporation

In 1929 the chief competitor of Besser was Consolidated Concrete Machinery Corporation world's largest producer of concrete block machinery units and running Besser a hard race for number one position in dollar sales. One E. F. Olsen was its president and the evidence is conclusive that Consolidated Concrete Machinery Corporation was in distress having taken many steps to preserve its life by manufacturing other products.

It had lost $ 33,040.50 for the year ending May 31, 1928,
It had lost 37,000.00 for the year ending May 31, 1929,
It had lost 180,000.00 for the year ending May 31, 1930,

and in 1931 Besser bought a controlling interest in Consolidated

> "at the request (Besser's testimony) of one of Consolidated's stockholders who had loaned it some money."

Besser then revamped Consolidated's board of directors by naming four of its seven members and in 1932 the company was dissolved; what was left of the plant moved to Alpena and its real estate sold.

The government contends that here was the first step in the design of Besser to accomplish its monopoly.

We cannot agree with this conclusion.

Our memory reverts to the years 1929, 1930 and 1931 and Consolidated only went the way of many other companies that might have survived if there had been no depression. If Besser, closely held, efficiently managed, and with its payroll limited in the high brackets, was able to continue business and buy out a competitor at that time we can see no objection.

BROWNHOIST

This court takes the same position regarding purchase by Besser of the Brownhoist block making equipment, inventory and other assets in 1935. Only an infinitesimal part of the Brownhoist business was devoted to concrete block machine manufacture and Brownhoist was moving back to Bay City from Cleveland where the operation of such a business could be a thorn in Besser's side right in its own backyard. Bay City is the first large city in the vicinity of Alpena. Of course we do not contend that one may, with impunity, remove all such thorns but there can easily develop unfair competition by a company operating a "sideline" that cripples a legitimate business wherein the "sideline" is the main object of its existence. To hold its elimination of such possible menace by purchase, rather than pushing the infringement suit it had threatened, was wrong, might encourage a philosophy that could destroy rather than help free enterprise and the ultimate development of our economic life. In our opinion it cannot be successfully reasoned that these two acquisitions—Consolidated and

Brownhoist—were attempts by Besser to promote its position to a monopoly of this industry.

We therefore see nothing illegal about the Brownhoist transaction.

But must the charges fall completely because plaintiff's allegation of 1931 as the beginning date of the conspiracy or monopoly, has been refuted?

We know of no rule that limits the government to proof of the exact date the attempt or realization of the monopoly began. The government, must, of course, be held within the ambit of its charge and we believe that 1942 specifically included in the bill of complaint, was within that ambit. Here we find what this court believes to be the most important development of the Besser empire for in 1942 was when Besser and Stearns agreed to control the Gelbman-Andrus patents which contract we will discuss later.

But continuing we learn that by 1946 there was a building boom in the United States which is still unsatisfied. Shortage of steel and other construction materials made concrete blocks more desirable and hence more salable. In addition they had been improved in style, attractiveness, efficiency and stability. The hand of fate and the business acumen of Besser had disposed of its chief competitor, Consolidated, back in 1931, but as there is always at least one automobile on the road ahead, no matter how many you overtake, there is likewise always a chief competitor to give you concern. In the instant case there were two main road blocks against Besser realizing its exclusive place in the sun—Stephen Flam, Inc. of California and Stearns Manufacturing Company of Adrian, Michigan.

The Flam Sale

Back in 1938, Besser had made a contract with Stephen Flam, Inc. of California, whereby Besser was given exclusive rights not only under Flam's existing patents but also under

> "any apparatus, machinery and devices which may be equipped with any type of vibrating or jolting devices other than as disclosed and claimed in said patents"

such rights to be exercised throughout the United States except that Flam retained the right to manufacture in nine western states.

Then in 1946 Besser bought out Flam completely, for $385,000.00 and in that year the conspiracy and monopoly undeniably began to show substance. The reasonable deduction is that Flam was giving Besser too much competition in nine states reserved to it. Flam was then fourth in dollar sales in the United States so Besser decided to remove this fly in the ointment. It purchased Flam's exclusive licenses, had Flam agree to stay out of the concrete block machine making business for 8 years and to make sure that it did, it gave Flam a job for 5 years. Then it went further—it got exclusive rights to any future patents Flam might get during the 5 years he was working for Besser.

The Besser-Stearns-Andrus-Gelbman Contract

This deal was the climax.

Besser's customer, Bell, had been sued in 1941 by co-defendants Gelbman and Andrus for alleged infringement of the Gelbman-Andrus patents then licensed only to Stearns. As a result of the Bell suit an agreement was entered into December 7, 1942, between the inventors and the two separate concerns, Besser and Stearns, whereby Besser, Stearns and the inventors were to live in peace and harmony. Stearns and Besser were each given the right to use the Gelbman and Andrus patents—but exclusively to them—and it was agreed that they were to have the benefit of, and right to use, any and all future improvements and patents covering concrete block making machines that might come from the fertile minds of either Andrus or Gelbman or both.

But this contract also contained a provision that not only prohibited the patentees giving anyone else a license, it also prevented either Besser or Stearns from joining Gelbman and Andrus in giving other prospective licensees the right to use any of the patents covered without the other's consent.

The above and Flam agreements are bitterly attacked

by the Government as illegal and the main overt acts in the monopolistic achievement.

Let us concentrate on the above Besser-Stearns-Gelbman-Andrus 1942 contract.

Unquestionably its purpose was to make certain that these two giants of the industry didn't battle each other over patents any more. But is there anything in the agreement itself frowned upon in the light of recent decisions of our Supreme Court? Does control of a patent give the patentee or licensee the rights contended for by defendants either solely or together?

Granting that an exclusive license may be valid, Crown Co. v. Nye Tool Works, 261 U. S. 24-37; U. S. v. Gen. Elec. Co., 272 U. S. 476-489, the Supreme Court has recognized certain limitations, and where such a license has for its purpose the suppressing of competition, it has been held invalid.

> "The Sherman law is a limitation of rights, rights which may be pushed to evil consequences and therefore restrained." Standard Sanitary Mfg. Co. v. U. S., 226 U. S. 2049.

We believe that the contract under question goes further than is necessary to protect the patent monopoly of Gelbman and Andrus. It may well be that an exclusive license to one party would be valid, but here the patentees have joined hands with the two largest competitors in the industry, and by terms of their agreement have virtually made it impossible for others to obtain rights under those patents. The contract even gives Stearns and Besser the power to restrict competition—present and future—by requiring their joint consent before licensing others. It is this combination requiring collective action that primarily invalidates the agreement. We believe it clear that the parties intended this contract to be a means whereby control of the industry could be acquired and competition eliminated. For what other reason would Besser or Stearns want the consent of the other before approving a licensee suggested by the patentees? And where it is apparent, as it is here, that the contract is to eliminate competition, it must be

held illegal. As the court stated in U. S. v. Parker-Rust-Proof Co., 61 F. Supp. 805, 813:

> "The primary purpose for entering into this contract was to eliminate present competition and prevent future competition. The Anti-Trust Acts condemn a contract entered into for the purpose of eliminating competition that exists as well as a contract preventing the development of future competition."

Still these contracts go further. The intent to restrain trade and the illegality is further augmented and evidenced by the provision in both the four-way agreement of 1942 and the Flam purchase contract granting exclusive rights to Besser and Stearns of all improvements to the existing patents and to inventions still unborn. Such conditions while not illegal per se cannot be justified as necessary to the enjoyment of or ancillary to the patent rights conveyed. U. S. v. National Lead Co., 63 Fed. Supp. 513, 524; U. S. v. General Electric Co., 80 F. Supp 989, 1005; Transparent Wrap Machine Corp. v. Stokes & Smith Co., 329 U. S. 637, and read in conjunction with the rest of the contract provisions and other acts herein enumerated, makes the conclusion inescapable that the Besser-Stearns group had and achieved an obvious objective that cannot be reconciled with the restrictions of the Sherman Anti-Trust Act.

These agreements are in our opinion fatal to defendants and as of the day of the trial were the wrongful acts of not only Besser in the Flam contract but in the December, 1942 agreement of all other defendants including Gelbman and Andrus. The latter took advantage of that contract and were active participants in threatening with suits those who supposedly violated their patents by infringement. Gelbman and Andrus were anxious not to protect their patent rights but to protect their contract with Besser and Stearns. And it all stems back to 1942 when Gelbman and Andrus entered into this agreement with Besser and Stearns. Then was the real beginning of the fruition of the monopoly, resulting from a conspiracy of the parties to that agreement to accomplish an illegal objective.

We pass now to 1946. Up to this point Besser apparently hadn't done anything about the Stearns Manufactur-

ing Company, probably because Besser owned the plain pallet patents expiring that very year, and partly because Stearns was devoting itself to the Jolt-Crete type of machines. But when it was learned that the Stearns Company was planning on manufacturing a plain pallet concrete block making machine that's when Besser became interested. That's when Besser through its agent secretly purchased a good share of the Stearns stock and finally in 1948 secured sufficient of that stock so that out of 198,833.5 shares Besser owned 87,000.00. Besser then put its own men on the board and we find it hard to believe that Besser didn't use any influence on its three directors. Perhaps it wasn't necessary. Perhaps satisfactory results were being obtained without pressure and if the figment of separate entities could be maintained so much the better. In any event, in 1948 Besser's hold on its second chief competitor became, to all intents and purposes, complete.

Then followed real activity by Besser and members of its organization, some of it before Besser had gobbled up Stearns. The little fellows were in the way and what appears to have been a deliberate campaign to wipe out all remaining competition started.

Besser tried to buy out Co-Corp founded by Olsen after he left Stearns, and continued this activity right up to the time of the hearings in this case.

There was testimony undenied, that Park, vice-president of Besser, tried to buy Lith-I-Bar and that Besser

> "considered it imperative that the Lith-I-Bar Company be out of business."

Besser offered jobs to Milewski of Lith-I-Bar, to Olsen and his son, as it had done previously to Stephen Flam.

Then one Millard Warren (1947) built two or three block machines that Besser claimed infringed on its patents. Warren yielded to pressure, threats, and being offered "pay" without leaving his own business.

Others, Darden, Ralph Samuelson, Hanneman, John B. Lagrade, Bernard Flam, son of Stephen, all felt the persuasion of the Besser arguments. Besser brought influence on a material supply source of Darden that curtailed the

Warren output since Darden was building the Warren machine. Practically all these men got out of their own business, generally impelled by threats of lawsuits, being given a job, pressure on customers, or all three, and usually Besser picked up their then patents with a mortgage on the fruits of their genius for years to come.

It attempted to limit Appley to "cored pallet" machines that can make 2 blocks at a time and Appley signed the contract prepared by Besser. A cored pallet (2 at a time) machine incidentally has a maximum output of 4800 blocks per day but costs the producer about 5 times as much to operate as the plain pallet machine.

The proof further showed that Besser personally indicated his attitude towards competitors by his letter to Gelbman, December 21, 1946, saying:

> "About the worst thing that could happen to this industry would be to have it wide open so that anybody and everybody could make machines and thus have no control on quality and no opportunity for anyone to do anything very important."

There were other letters that denote Besser's objective to accomplish the elimination of almost every competitor through

(1) recklessly made threats of suit, illegal under Maytag Co. v. Meadows Mfg. Co., 35 Fed. 2d 403; Dittgen v. Racine Paper Goods Co., 164 Fed. 89; U. S. v. Patterson, 205 F. 292;

(2) purchase of assets, illegal under—U. S. v. Union Pacific R. R. Co., supra; U. S. v. Reading Co., 253 U. S. 26; U. S. v. Lehigh Valley, R. R. Co., 254 U. S. 255 and

(3) covenants not to compete, illegal under Schine Theatres v. U. S., supra; Shawnee Compress Co. v. Anderson, 209 U. S. 423, 434; U. S. v. American Tobacco Co., 221 U. S. 106.

It further appears that there were two or three instances where suit was threatened involving machines that agents of defendants had never even seen. The threat of a lawsuit for infringement should be bona fide and one asserting

the exclusive right granted by the United States should not indiscriminately abuse that right. At least an examination should be made of the charged machine and then a lawsuit if necessary or at least negotiations started.

Emack v. Kane, 34 F. 46;
Adriance, Platt & Co. v. National Harrow Co., 121 Fed. 827;
U. S. v. Patterson, supra;
Dittgen v. Racine Paper Goods Co., supra.

Such a statement as made by Olsen, then president of Stearns, to Darden in the presence of Gelbman and Besser that

> "there is only about $700,000.00 gross business normally in this business; we are able to take care of that, the Besser Manufacturing Company and the Stearns Manufacturing Company; there isn't any room for your company" or

the Stearns letter to Gelbman (copy to Mr. Besser) referring to Darden's audacity in daring to compete in the concrete block machine industry—

> "Stories are persistent to the effect that Darden is doing quite a lot of business and is rather rapidly expanding his organization. It might be easier to knock his ears down now than later,"

have no place in the economic struggle of business, large or small, in this country nor have many of the other acts testified to against defendant Besser.

The one further fact. Defendant Besser had during the years in question developed a leasing system, which of itself is not to be condemned, but which nevertheless adds to the realization of a complete monopoly. As improvements have been made in these units they have become larger, heavier and more expensive. They run as high as $50,000.00 each and of course there will be no stampede to buy machines at this price. It is far beyond the reach of the small manufacturer. So Besser began the leasing system paid for at the capacity of the machine at 1 cent a block.

This is possibly as economical as these blocks can be made by hand or by other automatics and the ultimate effect on the existence of small companies can easily be visualized. A great deal of this springs from the grip that the Besser-Stearns combination got on the industry during the crucial period—1946-1948—when Besser started getting its control over Stearns, just when the plain pallet patent of Besser was about to expire and Stearns had indicated that it was going to make plain pallet machines. Stearns, standing alone, could have then become even a greater competitor of Besser because it still had the right to use the Gelbman and Andrus patents; but Stearns—controlled—presented opportunities that Besser could not resist.

So all this was stopped by Besser. Regardless of whether it actually exercised control over Stearns, it was in a position to do so and could have been interested in Stearns for no other reason.

While it must be admitted that not all of these acts are prohibited, nevertheless, we must view them in the broad panorama and of other acts and their association with each other to note, not only the effect—but to pierce the veil for evidence of intent.

U. S. v. Patten, supra;
Swift & Company v. U. S., 196 U. S. 375, 396;
U. S. v. Paramount Pictures, supra;
American Tobacco Co. v U. S., supra 809;
Montague & Co. v. Lowry, 193 U. S. 38;
Fashion Guild v. Trade Commission, 312 U. S. 457; and
Associated Press v. U. S., 326 U. S. 1.

It is clear then that the intent of Besser—with its Stearns control—to dominate this industry by monopoly is obvious and that the result of the Gelbman-Andrus-Besser-Stearns conspiracy was to restrict competitors which latter is illegal under the Sherman Act. (above citations)

And here is another instance that we believe speaks volumes.

The Stone Contract

When the hearings started in this case this court was surprised to find that there had been a falling out between

certain stockholders of the Stearns Company and Besser. We soon learned, however, that just a month or so previous Besser had made a contract by which one, Stone, was to purchase part and eventually all Besser shares in the Stearns Company thus purging Besser of all taint of the monopoly that it claimed did not exist. But the contract provides so many possibilities of this interest reverting back to Besser that we have some hesitancy in accepting at face value Besser's protestations, that Stone came into the picture just because he, Stone, "likes to turn an honest dollar" and had suddenly become enamored by the concrete block making and Aglite businesses.

Nor are we overly impressed with the sudden conversion of certain stockholders of Stearns who now favor the government's action. It is apparent that they are not interested in adopting the government's viewpoint from any altruism, but, having failed to purchase the Stearns' stock from Besser, are now determined that Stone won't become dominant in their company. They are aware also that if Stone's agreement with Besser prevails, Stearns will lose some of its patent rights; it will be obliged to recognize the validity of other Besser patents; it will also admit that it had no right to use certain patents Stearns has been using for years; it will be limited to the manufacture of two at-a-time pallet machines; it may have troubles on its own patents with Besser and, finally, Stearns will be saddled with the Aglite business that is promoted by Besser to increase the sources where concrete block men may get their material, now limited.

Which impels us to inquire

> "Why, if defendant Besser considers itself free from violation of either the Clayton or Sherman Anti-trust laws—is it so anxious at this time to apparently divest itself of its Stearns connection?"

To this court it is a practical admission that Besser not only has a monopoly, but knows that it has one and is seeking to superficially cleanse itself of all taint of monopoly while retaining all its benefits.

A Good Monopoly

May we not further examine what effect Besser's combination has had on the price of blocks—not on block making machines—but on the blocks themselves? Here the court was again surprised to learn that blocks cost practically the same now as they did 15 years ago—about 16 or 17 cents each. At first blush therefore it appears that this is a "good monopoly."

Admittedly Besser personally has profited and Besser personally has done much for this industry, but the price of blocks today compared to 15 years ago is due—for one reason—to the tough fiber of the competition, although limited, that refused to give up and second because the present Besser machines can make over 6000 blocks per day as against 3600, 15 years ago. But then there is no assurance that this will continue to be a so-called good monopoly. Besser management may possibly change. Even under Besser the pressure on competitors has risen considerably in the last three years. If this continues for the next three years in the same ratio it can hardly be expected to be hailed as a good monopoly under any reasoning. Furthermore, it might lower its lease agreement terms tomorrow and those who use Besser machines can sell blocks at less. Then what happens to the little competitors is what happens in every price war—they finally "fold their tents" like the Arabs.

But it is now generally recognized that no trust or monopoly obtained by illegal means should be permitted to exist whether it is good or bad. See

U. S. v. Crescent Amusement Co., 323 U. S. 173, 187, 188;
U. S. v. Griffith, supra, 107; and
American Tobacco Co. v. U. S., supra, 811.

The statute does not differentiate. As stated in U. S. v. Aluminum Co. of America, supra, 527:

> "Be that as it may, that was not the way that Congress chose; it did not condone 'good trusts' and condemn 'bad' ones; it forbade all."

Conclusion

We conclude that the defendants, Besser, Stearns, Andrus and Gelbman have combined and conspired to restrain and to monopolize interstate trade and commerce in concrete block machines in violation of Sections 1 and 2 of the Sherman Act, and that Besser Manufacturing Co. and Jesse H. Besser have attempted to monopolize and have monopolized said trade and commerce in violation of Section 2 of the Act.

We hold, therefore, that this court must bring Besser's activities within the restrictions of the Sherman Act by the following steps:

First, that the Besser interest must dispose of its holdings in the Stearns Manufacturing Company, Inc.;

Second, that the Gelbman-Andrus patents listed in the December 7, 1942 agreement, plus all improvements and inventions made subsequently and which come within the terms of said agreement, be made available to everyone in the industry on the same terms;

Third, that all lessees of Besser machines may at their option withdraw as a party to such leases providing said option is exercised by July 1, 1951, Besser to notify each lessee of his right of withdrawal; and

Fourth, that each of the parties to that December 7, 1942 contract be and is hereby enjoined from entering into a like agreement with each other or any other person, corporation or combination.

Since defendants now claim that they want to dispose of their Stearns interest and since Besser, according to defendants' brief page 28, is willing to remove all restrictions on use of the Gelbman-Andrus patents, the order of this court should not impose any great hardship except that there must be no conditions attached to disposal of the Stearns stock. When this is done, sanctioned by the approval of this court, the purposes of this action will have been accomplished.

(S.) FRANK A. PICARD,
United States District Judge.

Dated: January 30, 1951.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

Civil Action No. 8144

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

BESSER MANUFACTURING COMPANY, STEARNS MANUFACTURING COMPANY, INC., JESSE H. BESSER, LOUIS GELBMAN and HAMLIN F. ANDRUS, *Defendants*

FINAL JUDGMENT

Plaintiff, United States of America, filed its complaint herein on April 28, 1949, and defendants answered denying the substantive allegations thereof. The cause came on for trial May 16, 1950, and was completed June 23, 1950. The court filed its opinion January 30, 1951, finding that the defendants have violated Sections 1 and 2 of the Sherman Act. The court hereby adopts said opinion as its findings of facts and conclusions of law.

Now, therefore, it is hereby ordered, adjudged and decreed as follows:

I

Defendants Besser Manufacturing Company, Stearns Manufacturing Company, Inc., Louis Gelbman, Hamlin F. Andrus and Jesse H. Besser have combined and conspired to unreasonably restrain, and to monopolize, trade and commerce in concrete block making machines in violation of Sections 1 and 2 of the Sherman Act; and defendants Besser Manufacturing Company and Jesse H. Besser have attempted to monopolize and have monopolized said trade and commerce in violation of Section 2 of the Sherman Act.

II

As used in this final judgment:

(A.) "Besser Company" means Besser Manufacturing Company;

(B.) "Stearns" means Stearns Manufacturing Company, Inc.;

(C.) "Besser" means Jesse H. Besser;

(D.) "Gelbman" means Louis Gelbman;

(E.) "Andrus" means Hamlin F. Andrus;

(F.) "Patents" means United States Letters Patent and applications therefor, and all reissues, divisions, continuations of extensions thereof, and patents issued upon said applications;

(G.) "Person" means any individual, partnership, firm, corporation, association, trustee or any other business or legal entity.

III

The provisions of this final judgment applicable to any defendant shall apply to such defendant, its subsidiaries, successors, assigns, and each of its officers, directors, agents, employees and any other person acting under, through or for such defendant.

IV

(A) Within sixty (60) days following the entry of this final judgment, defendants Besser Company and Besser shall present to this court for approval their plan for divesting themselves, by July 1, 1951, of all stock holdings and other interests, direct or indirect, in defendant Stearns.

(B) Defendants Besser Company and Besser are hereby ordered and directed to cancel and terminate any and all contracts, agreements and understandings between said defendants or either of them, and any other person, calling for the disposition of any of the capital stock of defendant Stearns, where such contracts, agreements or understandings were entered into prior to entry of this final judgment. Defendants Besser Company and Besser are hereby enjoined and restrained from adhering to, enforcing or

claiming any rights under any of the aforesaid contracts, agreements or understandings.

V

Defendants Besser Company and Besser are each enjoined and restrained from

(A) Acquiring, directly or indirectly by purchase, merger, consolidation or otherwise after entry of this final judgment, and from holding or exercising after such acquisition ownership or control of, the business, physical assets or good will, or any part thereof, or any capital stock or securities of any person engaged in the manufacture, sale or distribution of concrete block making machines until after said defendant has, upon reasonable notice to the Attorney General and an opportunity on the part of the latter to be heard, shown to this court that such acquisition would not substantially lessen competition in the manufacture, sale or distribution of concrete block making machines;

(B) Causing, authorizing or knowingly permitting any officer, director, agent or employee to serve as an officer, director, agent or employee of any other person engaged in the manufacture of concrete block making machines.

VI

(A) The license agreement to which defendants Gelbman, Andrus, Stearns and Besser Company are parties, dated December 7, 1942, is adjudged to be unlawful under Sections 1 and 2 of the Sherman Act and is hereby declared null and void.

(B) Defendants are jointly and severally enjoined and restrained from conveying or receiving any patent rights under any license, contract, agreement or understanding which gives the licensee or licensees control over the number of licenses issued or to be issued, or which has the same unlawful purpose and effect as the afore-described license agreement of December 7, 1942.

(C) Except for now pending actions, appeals and proceedings pursuant thereto in *Andrus and Gelbman v. Whit-*

man; Andrus and Gelbman v. *Wenzel, et al; Besser Manufacturing Company* v. *Whitman;* defendants Besser Company, Besser, Gelbman and Andrus are enjoined and restrained from instituting or threatening to institute, or maintaining or continuing any action, suit or proceeding for acts of infringement of any patent referred to in Section VII (A) of this judgment occurring prior to the date of this judgment.

VII

(A) Defendants Gelbman, Andrus, Besser Company and Besser are each ordered and directed to grant to any applicant therefor a non-exclusive license to make, use and vend concrete block making machinery under any, some or all patents and patent applications pertaining to concrete block making machinery now owned or controlled by the defendant, or which are issued or applied for within ten years from the entry of this final judgment, and each of said defendants is hereby enjoined and restrained from making any sale or other disposition of any of said patents or patent applications which deprives it of the power of authority to grant such licenses, unless it sells, transfers or assigns such patents and patent applications and requires as a condition of such sale, transfer or assignment that the purchaser, transferee or assignee shall observe the requirements of this Section VII, and the purchaser, transferee or assignee shall file with this court prior to consummation of said transaction, an undertaking to be bound by the provisions of this Section VII. The reference to an "Undertaking" shall not be construed as requiring the posting of a bond.

(B) Defendants Gelbman, Andrus, Besser Company and Besser are hereby enjoined and restrained from including any restrictions or condition whatsoever in any license or sublicense granted by or pursuant to the provisions of this Section VII and in order to arrive at a fair royalty price for the use of the various patents, present and future, as above enumerated, and the form and contents of the royalty contracts—

1. Said plaintiff government and said defendants Gelbman and Andrus, shall on or before April 21, 1951, each

select two persons, which said four persons so selected shall act as a committee to determine such fair royalty prices and the form and contents of the royalty contracts; provided, however, that if they are unable to so agree on or before May 5, 1951, then said four persons so selected may then select and against a fifth person to act with them as the fifth member of said committee; and provided further that if said four are unable to agree upon the fifth member by at least a three to one vote, on or before May 12, 1951, then such questions and points not agreed upon shall forthwith be referred to this court which shall then have the right to act as the fifth member himself or select another person in his stead to aid in making the final decision; and

2. It is further ordered that the same method and manner shall be used in arriving at a fair royalty price and the form and contents of the royalty contracts covering the patents, present and future, as above enumerated, owned and/or controlled by defendants Besser Manufacturing Company and Jesse H. Besser and when arrived at shall be filed as provided in sub-paragraph (C) following.

(C) It is further ordered that said final royalty price together with the form and contents of the royalty agreement, when determined, shall be forthwith filed by the government with the United States District Court Clerk and upon so filing will then become a part of this judgment just as though it were now included herein.

(D) Nothing herein shall prevent any applicant from attacking in the aforesaid proceedings, the validity or scope of any of the patents, nor shall this final judgment be construed as importing any validity or value to any of the said patents.

VIII

(A) Defendant Besser Company is hereby ordered and directed, within thirty (30) days from the entry of this final judgment to notify each person presently leasing a concrete block making machine from said defendant that the lessee may, at its option,

(1) terminate the said lease agreement at any time prior to January 1, 1953, or

(2) continue under the terms of the lease, or

(3) enter into an agreement to purchase the machine or machines leased, and the accessory equipment used, as mutually satisfactory to the parties concerned;

provided, however, that the provisions of sub-sections 1 and 2 of this sub-paragraph (A) shall be contingent upon said lessee making his election in writing on or before October 1, 1952.

(B) Defendant Besser Company is hereby ordered and directed to sell to any existing lessee or purchaser under this Section VIII, of concrete block making machinery and accessory equipment of said defendant repair parts upon reasonable, uniform and non-discriminatory prices, terms and conditions of sale.

IX

Defendants are jointly and severally enjoined and restrained from entering into, adhering to or claiming any rights under any contract, agreement or understanding with any person presently or hereinafter engaged in the development or manufacture of concrete block making machinery which has the purpose or effect of preventing such person, or any other person from competing with defendants or any of them in the development, manufacture or sale of concrete block making machinery.

X

Each of the defendants is enjoined and restrained from compelling, coercing or influencing any person to refrain from manufacturing concrete block making machinery or supplying steel or other materials, used in the manufacture of said machines, to any manufacturer of such machines.

XI

For the purpose of securing compliance with this final judgment duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General, or an Assistant Attorney General, and on reasonable notice to the defendant, made to its principal office, be permitted (1) access during the office hours of said defendant to all books, ledgers, accounts, correspondence, memo-

randa and other records and documents in the possession or under the control of said defendant relating to any matters contained in this final judgment, and (2) subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of said defendants, who may have counsel present, regarding any such matters. No information obtained by the means provided in this paragraph shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of such Department, except in the course of legal proceedings in which the United States is a party for the purpose of securing compliance with this judgment, or as otherwise required by law.

XII

Jurisdiction is retained for the purpose of enabling any of the parties to this judgment to apply to the court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this judgment, or the modification thereof, or the enforcement of compliance therewith and for punishment or violation thereof.

XIII

Judgment is entered against the defendants for all taxable costs to be taxed in this proceeding.

FRANK A. PICARD,
United States District Judge.

Dated: April 12, 1951.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 230

BESSER MANUFACTURING COMPANY AND JESSE H. BESSER,

Appellants,

vs.

THE UNITED STATES OF AMERICA

BRIEF ON BEHALF OF APPELLANTS

WILLIAM J. DONOVAN,
ROY W. McDONALD,
2 Wall St.,
New York 5, N. Y.

CARL R. HENRY,
Alpena, Mich.

JOHN W. BABCOCK,
2280 Penobscot Bldg.,
Detroit 26, Mich.

Attorneys for
BESSER MANUFACTURING COMPANY
and JESSE H. BESSER.

PEYTON H. MOSS,
DONOVAN LEISURE NEWTON LUMBARD & IRVINE,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1951

BESSER MANUFACTURING COMPANY AND JESSE H. BESSER, *Appellants*, *vs.* THE UNITED STATES OF AMERICA.	No. 230

BRIEF ON BEHALF OF APPELLANTS

Opinion and Judgment Below

The district court opinion (R. 1011)[1] is reported, 96 F. Supp. 304; the judgment (R. 1063) is not reported.

Jurisdiction

Jurisdiction is invoked under §2 of the Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 58 Stat. 272; 62 Stat. 989; 15 U. S. C. §29); and §2101(b) of the Judicial Code (62 Stat. 962, 28 U. S. C. §2101(b)).

The judgment below was entered April 12, 1951 (R. 1063). The appeal was allowed June 6, 1951 (R. 1148). This Court noted probable jurisdiction October 8, 1951 (R. 1178).

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[1] In this brief, the abbreviation "R." refers to the pagination of the printed record.

Statutes Involved

The Sherman Act (26 Stat. 209, 15 U. S. C.):

> "Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . .
>
> . . . . . .
>
> Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Statement of the Case

The United States sued under §4 of the Sherman Act "to prevent and restrain continuing violations . . . of Sections 1 and 2 of said act" (R. 3). Defendants were Besser Manufacturing Co., Jesse H. Besser, Stearns Manufacturing Co., Inc., Louis Gelbman, and Hamlin F. Andrus (herein referred to as "Besser Co.," "Besser," "Stearns," "Gelbman," and "Andrus"). Besser Co. and Besser appeal.

The complaint charged that, beginning in 1931, appellants attempted to and did monopolize interstate trade and commerce in concrete block making machines; and that, beginning in 1942, appellants engaged in a combination and conspiracy with the other defendants to restrain and monopolize such trade and commerce (R. 5-6).

To support these charges the government alleged the acquisition by one or both appellants of certain business properties and patents; the making of a 1942 patent license agreement whereby defendants Gelbman and Andrus gave

appellant Besser Co. and defendant Stearns each a license, exclusive but for the other, under their patents; the purchase by appellants of a controlling stock interest in defendant Stearns; the "harassing" of competitors by appellants and their co-defendants; and the policy of appellant Besser Co. of leasing rather than selling certain of its concrete block making machinery (R. 6-9).

The opinion (R. 1011), adopted as the findings of fact and conclusions of law (R. 1063), rejected certain of the government's contentions, but sustained others against all defendants. It concluded that appellants had attempted to monopolize and had monopolized the concrete block making machine industry; and that appellants and their co-defendants had combined and conspired to restrain and monopolize interstate trade and commerce in concrete block making machinery by reason of the 1942 patent license agreement and the subsequent acts of the parties thereto (R. 1028-9).

The judgment (R. 1063-9) incorporated extensive and far-reaching provisions including, among others, a rigid schedule for the divestiture of appellants' stock holdings in defendant Stearns (R. 1064), the cancellation of the 1942 patent license agreement (R. 1065), the compulsory unrestricted licensing by all defendants, except Stearns, of all present patents and all future patents acquired or applied for in the next ten years (R. 1066-7), the creation of a sixteen month option in present lessees of appellant Besser Co. to terminate their leases of machinery and to buy them outright (R. 1068), and a novel provision that the compulsory license royalties be fixed by an extra-judicial "committee" designated in part by the government and in part by the defendants, with the judge, in case of disagreement, privileged to act as a fifth member, the committee's "report" to "become a part of this judgment just as though it were now included therein" (R. 1067). The post-judgment proceedings of this "committee" are summarized in the statement of facts (see pages 43-52, *infra*).

Questions Presented

I. Did the district court clearly err when it found and concluded:

(A) that Besser Co. and Besser unlawfully monopolized interstate commerce;

(B) that the 1942 patent license agreement and the subsequent attempts of the parties to protect their patent rights constituted an unlawful combination or conspiracy in restraint of trade and an attempt to monopolize?

II. Whether each of the following provisions of the judgment is unnecessary and inappropriate to restrain and prevent antitrust violations, as applied to the facts of this case:

(A) the attempt to make the judgment binding on the successors and assigns of each defendant, corporate and individual [Par. III];

(B) the requirement that appellants Besser Co. and Besser divest themselves within 80 days of the judgment of $1,000,000 worth of stock in defendant Stearns [Par. IV(A)];

(C) the declaration that the 1942 patent license agreement is null and void [Par. VI(A)];

(D) the injunction restraining all defendants "from conveying or receiving any patent rights under any license . . . which gives the licensee or licensees control over the number of licenses issued or to be issued" [Par. VI(B)];

(E) the injunction restraining all defendants from conveying or receiving any patent rights under any license or agreement "which has the same unlawful purpose and effect" as the 1942 patent license agreement [Par. VI(B)].

(F) the requirement that the defendants (other than Stearns) issue unrestricted and unconditional licenses to any applicant under all patents and applications presently owned or controlled by them and on all future patents issued or applied for within the next ten years [Par. VII(A)(B)];

(G) the proviso that the judgment should not prevent any such applicant from attacking the validity or scope of any of the said patents [Par. VII(D)];

(H) the requirement that appellant Besser Co. within 30 days extend to each lessee of one of its machines an option either to cancel or continue such lease or "purchase the machine or machines leased . . . as mutually satisfactory to the parties concerned" [Par. VIII(A)];

(I) the general injunction against violating the antitrust laws [Par. IX];

III. May a district judge lawfully (a) delegate the judicial function of setting compulsory royalty rates and license terms to a committee of four laymen, two of whom are financially and personally interested adversely to the appellants; (b) designate himself as a fifth member of the committee; (c) refuse to allow appellants an opportunity to present evidence relevant to value; and (d) by a 3-2 vote arbitrarily impose upon appellants royalty rates and license terms without the possibility of judicial review?

The Facts

A. The appellants' position with respect to the findings.

This Court, of course, reverses fact findings only when they are clearly erroneous (Fed. R. Civ. Proc. 52). Certain of the findings below are challenged on that ground. Appellants recognize, however, that some of the adverse find-

ings, though in appellants' opinion resulting from an incorrect appraisal of the evidence, have sufficient support in the record to rebut a contention that they are "clearly erroneous." Such findings the appellants, without conceding their correctness, accept on this appeal as a basis for the framing of appropriate relief.

So approaching this argument, the appellants in Point IV concede *arguendo* that the findings support a conclusion of an attempt to monopolize in violation of §2 of the Sherman Act, and in the same point outline the provisions of the judgment which are not attacked and which afford adequate and appropriate relief for such finding. In making this concession, the appellants of course reserve the right to contest these issues *de novo* if they should hereafter become material to a controversy in any trial court.

Appellants submit that the record does not support findings either of monopolization (as distinct from attempt to monopolize) or of combination and conspiracy in restraint of trade. The errors in the findings, they submit, flow from the trial court's erroneous view that virtually every act of the appellants after 1941 was the result of a vicious disregard of the law which led to a continuous course of predatory conduct. Such a view is not supported by this record. It is appellants' position that the opinion is basically faulty in this exaggeration, and that its errors carried over into excessive findings of law violations and harsh, inappropriate, and punitive provisions in the decree.

This approach does not invite this Court to try the case *de novo*. Appellants will confine themselves to developing those facts which show that the district court clearly erred in finding and concluding that appellants had a monopoly, that the 1942 patent license agreement was an illegal combination and conspiracy in restraint of trade, and that the attempts of appellants and their co-defendants to protect their patent rights constituted such a combination and conspiracy and, on appellants' part, an attempt to monopolize.

However, the principal thrust of appellants' appeal is directed to establishing that certain of the judgment provisions are inappropriate, discriminatory, arbitrary and punitive. The errors in the judgment result partially from the erroneous conclusions above outlined, but, even accepting *arguendo* the trial court findings, these provisions of the judgment cannot stand, as will appear from the facts and argument herein.

B. The industry.

This action concerns the manufacture and distribution of machinery for making concrete blocks. Such blocks are used for various structural purposes. Besser Co. and Stearns are manufacturers. Besser is the controlling stockholder of Besser Co. Gelbman and Andrus jointly own several patents used in some models of such machines.

Block machines may be divided between "tamping" and "vibrating" machines. These terms refer to the method of compacting the wet concrete aggregate in the molds which shape the blocks. In tamping machines, the aggregate is packed by tamper bars, working up and down, as it is fed into the mold. In vibrating machines the material is compacted by vibrating (*i.e.*, shaking) the mold (R. 911). Vibrating machines, developed in the late 1930s, are now more important in the industry than tampers (R. 43). Most manufacturers produce vibrators (Ex. 184, R. 1396, 999), but a substantial number of manufacturers make tamping machines (Ex. 183, R. 1395, 998, 1005). Only a very few companies, of which Stearns is one, make both types (Ex. 183-85, R. 1395-99, 998-1005). Since 1939 Besser Co. has made only vibrator machines (R. 909-10).

All concrete block machines, regardless of type or capacity, produce blocks which are useful for the same purposes. The blocks so produced are wholly fungible. All statistics are computed in terms of a standard block 8" x 8" x 16". While different sizes are produced for diverse uses, the several sizes have become more or less standard

by long usage, and any two blocks of the same size are completely interchangeable.

In 1946-1948, block machines were produced by over 40 companies:

NUMBER OF MACHINES PRODUCED AND SOLD, 1946-8 INCLUSIVE

	Tamping		*Vibrating*		*Total*	
Miscellaneous manufacturers	2041	79.6%	4770	86.4%	6811	84.3%
Stearns	522	20.4%	257	4.7%	779	9.6%
Besser Co.	0		490	8.9%	490	6.1%
Total	2563	100%	5517	100%	8080	100%

(Sources: Exs. 183-186, R. 1395-1400, 998-1004).

ANNUAL CAPACITY OF MACHINES PRODUCED AND SOLD, 1946-48 INCLUSIVE

(In thousand blocks)

	Tamping	*Vibrating*	*Total*
Miscellaneous manufacturers ..	716,877.6—75.1%	1,861,268—65.9%	2,578,146—68.3%
Stearns	238,080. —24.9%	278,976— 9.9%	517,056—13.7%
Besser Co.	0	682,200—24.2%	682,200—18.0%
Total	954,957.6—100%	2,822,444—100%	3,777,402—100%

(Sources: Ex. 187, R. 1401, 1004-5, percentages carried to first decimal)

Though all machines produce concrete blocks of various standard sizes which are consequently interchangeable, the machines themselves vary greatly in productive capacity and size. Besser Co. specializes in high production capacity vibrating machines. They are larger and hence more expensive than most of the competitive machines. The vibration process requires a heavy machine, weighing approximately 25,000 pounds against 15,000 for a tamper (R. 912). Moreover, the vibration process is somewhat slower than tamping (R. 896). To increase production while exploiting the superior vibration process, Besser Co. in 1939 developed a model which produced three blocks at a time (R.

896). Besser Co. has continued to move with the industry trend. In 1946 its largest machine produced 600 blocks an hour; in 1947 it introduced and made five machines of a new model with 750 hourly capacity; by 1948, 56 of the 87 machines it produced were of 750 hourly capacity, and 19 others were of 600 hourly capacity.

Because Besser's constant improvement of its product has thus made it a leader in the relatively recent introduction of multiple-block machines, the "dollar value" of its products naturally averages higher than that of most of its competitors, who have lagged in the introduction of these improved models.

DOLLAR VALUE OF MACHINES PRODUCED 1946-1948

	1946		*1947*		*1948*	
Non-defendants	$3,790,943	50.3%	$2,306,001	32.8%	$1,760,800	35%
Stearns	1,253,043	15.8	1,363,206	19.4	651,779	12.9
Besser Co.	2,692,500	33.9	3,366,500	47.8	2,623,000	52.1

(Source: Ex. 188, R. 1402, 1006).

The advances of technology, largely under the leadership of Besser Co., which have brought about the increased productivity of block machines, have resulted in cost savings which are reflected in the retail price of concrete blocks. For twelve to fifteen years prior to the trial, the retail cost has remained fairly constant at 16¢ to 17¢ per block (R. 955). The trial court discussed this evidence under the subhead "A Good Monopoly," and attributed the constancy of the price level not only to the increased productivity of Besser machines, but also to "the tough fiber of the competition, although limited, that refused to give up" (R. 1028). If the latter comment means that other companies have produced improved machines, the appellants concede the point. An efficiently managed company with competent engineering can, without infringement, produce high production machines, and a number have done so. But the evidence as to the retail price of blocks was not offered to show that this was a "good monopoly." It was offered to

show that the technological advances accomplished by Besser Co. and other competent companies had been a normal and necessary response to the demands of a free market economy, and had borne fruit in the increased usage of concrete blocks, virtually the only building material which had not been affected by the nation-wide inflation in construction costs.

The patent situation was the subject of much evidence at the trial. In the field of tamping machines, nothing is restricted by any Besser patent (R. 898). In the field of vibrators, the patent situation is more confused. Gelbman and Andrus jointly have several patents. Besser Co. has some. Other manufacturers rely on other patents and patent applications: e.g., the Gene Olsen Corp. on an O'Connor patent (R. 117); the Lith-I-Bar Co. on a Samuelson application (R. 384-5); the Darden Co. on a Darden patent and a Warren application (R. 475, 476, 530). From the welter of evidence, one fact emerges clearly: it is certain that both vibrating and tamping machines of all established capacities can be and are being manufactured and sold without infringement of the Gelbman-Andrus or the Besser patents (see R. 957-960, 967-8, 980-1).

C. Early history of Besser Co.

Besser Co., organized in 1897, since 1905 has devoted all its efforts, with the exception of two periods of war production, to concrete block machinery (R. 887-8; Ex. 3, R. 1183, 796). The defendant Besser, now nearly seventy years of age, worked in the business from its beginning, became secretary of the company in 1903 and president in 1925 (R. 887, 889). He and his wife own the stock of the company (R. 890; Ex. 4, R. 1184, 797).

The advance from the first wholly hand-operated machine making, with two men, 200 blocks per day, to the fully automatic machine making 6,000 blocks per day (both illustrated, Ex. 180, R. 1389, offered R. 892), resulted largely from the inventive genius of Besser (R. 893-5, Ex. 180, R.

1390, 892). Among the many developments of the company, one of the more important was the "plain pallet stripper," invented by Besser and covered by patent issued in 1929. This greatly simplified the production of blocks by eliminating time and labor incident to the passage of the material through the mold (see description, R. 895).

In 1929, 22 manufacturers reported production of block machines to the Department of Commerce (Ex. 109, R. 1308, 76-7). These included 10 to 12 important manufacturers. Most of these are still in business (R. 902-4), though between 1929 and 1931 the reporting manufacturers, under the impact of the depression, dropped from 22 to 18, and their reported "value" from $1,147,000 to $416,800 (Ex. 109, R. 1308, 76).

D. Consolidated Concrete Co. and Industrial Brownhoist purchases.

In 1931 Besser Co. purchased the stock of the Consolidated Concrete Co. of Adrian, Michigan, and in 1935 it bought certain assets of Industrial Brownhoist Co. The government charged that these purchases evidenced an attempt to monopolize trade in block making machines (R. 6). The trial court rejected both of these charges (R. 1017-8).

E. Flam patent license of 1938.

Plaintiff's third charge of attempted monopoly rested on an agreement between Besser Co. and one Stephen Flam in 1938. Other than the agreement itself, there is no evidence on this charge.

Flam or a company bearing his name manufactured a block machine, sold in the west and southwest, but "not used generally because it was restricted to a mix of concrete so wet" that it would not make acceptable standard blocks (Olsen, R. 290). In 1938 Flam owned nine patents (all of which expired prior to the trial) and one patent application.

In October 1938, Flam granted Besser Co. an exclusive license under these patents and the application, except that in nine western states Besser Co. received no license on machines having "hand operated stripping mechanisms" (Ex. 9, R. 1192, 798). A royalty per machine was specified, with an annual minimum of $3,000. Both parties were to use their best efforts to promote the business done under the license. Improvements by either party were to be licensed to the other party. Flam was to spend not over 90 days annually away from his residence in consulting service in the manufacture and sale of equipment falling under the license.

The trial court did not find anything unlawful in this license.

F. The 1942 patent license.

The charge of combination or conspiracy relates to a patent license by Gelbman and Andrus to Stearns and Besser Co. dated December 7, 1942 (R. 6-8).

(1) Gelbman-Andrus licenses to Olsen and Stearns, 1934-1942.

Beginning in 1934 Gelbman and Andrus licensed their patents exclusively to Eugene F. Olsen (Ex. 111, R. 1310, 95-7). Olsen, a principal government witness, and one of the government's "arbitrators" on the post-judgment royalty "committee," has been almost continuously in the block machine business since 1919 (R. 56, 256). In the late 1920's he was president of Consolidated Concrete Co. (R. 70, 262, 270, 272). After the Besser purchase, Olsen continued with Consolidated and Besser Co. until 1932. In 1934 he reentered block machine manufacture, in 1936 incorporating the defendant Stearns, of which he was principal owner and president until 1948 (R. 92, 97-8, 150, 602, 604). Having sold his stock in Stearns for over $800,000 in April 1948, he incorporated the Gene Olsen Corp. on June 1, 1948 to manufacture block machinery (R. 55, 116). He is president and principal owner of that company (R. 110).

Between 1934 and 1939 Olsen's Stearns Co. passed Bessel Co. in total sales. In 1937 Olsen began making vibrating machines (R. 92). Stearns total sales for 1939 were $375,089, including 105 block machines sold for $205,717; as against Besser Co. sales of $356,910, including 52 block machines sold for $243,856 (Exs. 1, 2, R. 1179, 1180; 100, 101). In the same year, reporting manufacturers produced 1627 machines of a "value" of $1,092,006 (Ex. 113, R. 1337, 98). There is no showing that the "*value*" of machines "*produced*" is comparable to the *price* of machines *sold*. Consequently there is no way accurately to figure percentages, though it is undisputed that Stearns and Besser Co. were two of the leaders in the industry in 1939.

On March 1, 1940 Gelbman, Andrus, Olsen and Stearns entered into a new agreement, granting Stearns an exclusive license (except for New York City) on four patents and three applications, and any improvements, without power to assign or sublicense. Olsen and Stearns agreed to disclose and assign to Gelbman and Andrus all inventions made previously or during the contract term by Olsen or any company with which he was connected (Ex. 112, R. 1323; R. 95-7). From this provision resulted three patents and one application carrying Olsen's name (R. 352-3; Ex. 10, R. 1202, 98).

Neither Besser Co. nor Besser was concerned or involved in any of these agreements.

(2) Gelbman, Andrus and Stearns sue Besser Co. customer.

In 1940, Gelbman, Andrus and Olsen, through Stearns, brought a suit against H. W. Bell & Co., Inc., a Besser customer in New York, alleging infringement of a patent which expired prior to the antitrust case (R. 30, 94, 855). Olsen participated for Stearns (R. 145-6). The district court found for the defendant, and the plaintiffs appealed (R. 94, 147, 337, 855).

This litigation was settled by the license of December 7, 1942 (Ex. 10, R. 1201; R. 98). This settlement was promoted

by Olsen, and the agreement was drafted in New York by the patent counsel for Stearns, Gelbman and Andrus (R. 146, 855-6).

(3) Terms of 1942 license.

The plaintiffs dismissed their appeal and waived any claim against Bell. The 1940 license to Stearns was cancelled. Licenses were issued to Stearns and Besser Co., each being (except for the other company) exclusive and nonassignable. The license covered the patents previously licensed to Stearns, and also three United States patents and one application issued to or filed by Gelbman, Andrus and Olsen subsequent to the Stearns license. It also covered any improvements or inventions made by the licensors in concrete block making machinery, any such improvement licenses terminating on July 1, 1952. It provided that during its term the licensors would grant further licenses only with the consent of the licensees. Royalties ranged from $225 to $75 per machine, depending on the size of the machine. Unlike the earlier Stearns agreement, it contained no provision giving Gelbman and Andrus any claim on the inventions of the licensees.

By this license the prior status in which Stearns was the exclusive licensee was superseded by a status in which Stearns and Besser Co. each had a license, exclusive save for the other. Olsen, appearing for the government, stated unequivocally that there was no discussion of "keeping out other manufacturers," other than that the parties understood that their rights to the patents were exclusive (R. 150).

G. Scott and Wellnitz patents.

In 1938 one Scott obtained a patent pertinent to vibrating machinery (R. 93; Ex. 162, R. 1378, 788). This patent, referred to during the trial as the "Scott" patent, was purchased in 1947 by Besser Co. (R. 93, 96, 990).

During the trial there was passing reference to a "height and density control" patent known as the "Wellnitz" pat-

ent, also owned by Besser Co. (R. 941, 943). This was a new patent (R. 941).

There is no allegation, evidence, or claim that Besser Co.'s acquisition of either of these patents was illegal in its inception, its motivation, its consummation, or its effect.

H. Efforts to protect patent rights.

The government charges as an offense that the defendants (which includes Stearns) harassed their competitors by assertion of their patent rights (for detailed charge, see R. 8-9).

A fair appraisal of the evidence on the question of patent infringement is essential. This statement is subdivided as follows:

(1) The patents of defendants were being infringed;

(2) The defendants in good faith, and with reasonable grounds, believe their patents valid and infringed;

(3) The economic climate in 1946-48 put a premium upon operators prepared to risk infringement;

(4) In this situation, the defendants (including Stearns) attempted to protect their patents.

(1) The patents of defendants were being infringed.

The government called nine manufacturers or builders of block machines: Olsen, Graveley, Winn, Hanneman, Milewski, Samuelson, Randolph, Darden and Warren.

Olsen, whose extensive experience has been outlined above, testified:

> "*It is my opinion that there is not a large number who are making such machines* (i.e., concrete block making machines) *and who are not infringing the*

Gelbman and/or Scott patents . . . It would be very few, if any.

"The Court: *But you claim your own is not, don't you?*

"A. *No, I have not claimed that . . .*

"The Court: You don't think, according to your statement, that you infringe, as far as your machine is concerned, either the Gelbman or Scott patents, if those claims are good? Even if they are valid claims?

"A. *If they are valid, it is my personal opinion that we may be infringing on some part of it*" (R. 319-20).

While Olsen was president of Stearns, from 1942-1948, and licensed under the Gelbman patents, numerous claimed infringements came to his attention and he urged Gelbman to protect his patents (R. 150; Exs. 13, 22, 52, 54, 68, 70, 81, 88, R. 1211, 1218, 1259, 1261, 1268, 1270, 1279, 1283, offered R. 799-801, 804, 814, 809, 811, 815).

Graveley, who manufactured only three automatic vibrating machines (R. 181), did not deny infringement. He stated that, if sued, he would attack the validity of the patents (R. 166).

Winn did not deny infringement. His position also was that the patents were invalid (R. 206-7). His testimony that one prospective customer would not buy without a guarantee against suit (R. 213)—a normal precaution in a complex patent field—omits any statement that he was willing to give such a guarantee. His machine was substantially the same as the Milewski Lith-I-Block machine (R. 201, 207), which later was held by the district court to infringe (see next subsection).

Hanneman consulted his own patent lawyer (R. 247), and thereafter sought and was granted a license to make enough machines to "get my money out of the set-up" (R. 221-22, 247). His machine, with the exception of the controls, was

the same as marketed by Besser, Stearns, and Milewski (R. 239).

Milewski, president of Lith-I-Bar Company which manufactured the Lith-I-Block machine (R. 383), could not be expected to concede infringement, since certain of his customers were defendants in infringement actions undecided at the time of this trial (R. 401). In those cases the district court held that there was infringement (see next subsection).

Samuelson was directly involved with Milewski, since his 1946 patent application was relied on by Milewski (R. 383, 438). The adjudication of infringement by Milewski thus reaches Samuelson.

Randolph, not a manufacturer, built one machine for his own use, after having used a Stearns machine (R. 445). At meetings in his plant, one attended by Olsen, the "general theme . . . was the fact that [he] might be infringing," but that he had no intention of manufacturing for sale (R. 447-9).

Darden, who began manufacture in 1944, had previously been superintendent of a block plant using two Stearns machines, which he knew were patented (R. 471, 502). He admitted his machine embodied the ideas of the Stearns machines (R. 502). It was his opinion that the Gelbman patents were not good, but he evaded the judge's question whether, assuming they were good, he infringed (R. 524). As a government representative on the "royalty committee," Darden concurred in setting royalties running as high as $187.50 per machine for the Gelbman-Andrus patents (R. 1072). His conduct from 1944 through the post-trial proceedings is consistent only with a recognition that, if the patents were valid, his activities, before he was licensed, were infringing.

Warren was not a manufacturer. In the early 1940's he bought a Besser tamping machine which he converted into a vibrating machine (R. 540). In 1945-1947 he made for his

own use three "Warren 800" machines. In 1946 he applied for patents which at the date of trial had not issued (R. 529-30, 540, 541). Thereafter Darden made these machines (R. 537). Warren stated, of conferences in Knoxville in 1947 with Besser, Stark and Darden, that "at that time we did not feel that we were infringing" (R. 533).

Of the nine witnesses:

The machines in which Milewski and Samuelson were interested were later held by the district court to infringe the Gelbman patents.

Six did not deny infringement if the patents were valid: Olsen, Grayeley, Winn, Hanneman, Randolph and Darden.

Warren expressed a carefully worded opinion that in 1947 he did not think his machine was infringing.

(2) The defendants in good faith and with reasonable ground believe their patents valid and infringed.

Before the trial of this case began, actions had been tried and were awaiting decision, in the same district and before the same judge, charging infringement of two of the Gelbman-Andrus patents and the Scott patent by the Milewski-Samuelson Lith-I-Block machine. The district court subsequently held that the Scott patent was valid, but not infringed, and that the two Gelbman-Andrus patents were valid and infringed. (*Andrus* v. *Whitman*, 93 F. Supp. 383 (E. D. Mich., 1950.))

On February 19, 1952, the Court of Appeals for the Sixth Circuit affirmed in part and reversed in part, holding the claims urged under both the Scott and the Gelbman patents invalid. *Whitman* v. *Andrus*, unreported (6th Cir., Feb. 19, 1952). Application for a writ of certiorari is now in preparation.

The last word in the patent actions has not been spoken. But assume *arguendo* that counsel for the defendants were mistaken in their opinions that the patents were valid: the

defendants certainly had a reasonable basis for this belief, since they were sustained by Judge Picard on a full record in the patent actions, after he secured further enlightenment in the course of the antitrust trial.

(3) The economic climate in 1946-1948 put a premium on operators prepared to risk infringement.

The years immediately following the war were particularly tempting to operators prepared to accept the risk of patent infringement. Stimulated by wartime shortages, an unprecedented demand developed for building materials, including concrete blocks. "A great many people . . . started small block plants with low cost equipment and also little capacity" (Olsen, R. 298). During the war there developed a shortage of block making machinery, with a resultant post-war surge of demand (Winn. R. 215). Numerous individuals and companies rushed into the manufacture of concrete block machinery. As Olsen said, "the mortality rate was nearly 100% after that" (R. 298). Typical are some of the witnesses selected by the government:

Graveley began manufacturing low cost machines in 1945, with sales in 1946 of $300,000; 1947, $69,500; and 1948, $29,800 (R. 152, 157). He prospered "when the trade would accept hand operated machinery" (R. 168). His gross sales of all products in 1946 exceeded $1,000,000 (R. 197). He made only three fully automatic machines, two of which were sold for export (R. 181). By the date of trial, Graveley was making metal awnings (R. 152), and another company was operating in his former plant (R. 175). No one from his successor testified.

Winn manufactured block machines from 1946-1950, then became a contract engineer (R. 198). Winn named his company the Vibra-Tamp Co. and his machine "Vibra-Tamp" (R. 199), an obvious effort to capitalize on the long established Besser trade name "Vibrapac." The resulting confusion probably accounts for the testimony of the govern-

ment witness Goldcamp that he had a "Besser Super Vibra-Tamp" (R. 355).

Hanneman, a former tavern and fair park operator (R. 227), was a "manufacturer" of block machines from 1946 to 1948, and at the time of the trial was a building superintendent (R. 217). Aside from three machines built for him by a former Besser employee, Hanneman had made one machine for which he had not been paid because, though some two years had elapsed since the sale, he had not completed it so it would work (R. 225-6, 237).

Milewski produced his first automatic vibrating machine in 1946, delivered 2 in 1946, 27 in 1947, and 45 in 1948 (R. 384). He made only one model (R. 383), the one adjudicated to infringe.

Darden began manufacture of block machines in 1944 (R. 471) and in 1946 began to make the "Warren 800" (R. 473).

This sudden influx of manufacturing talent should be appraised against the fact that Olsen, with a 15 year background and a license under the Gelbman patents, in 1934 required several months to design a simple tamping machine, and over a year additional to develop his more advanced machine, and not until 1938 was his model fully developed (R. 283-4, 295). As Olsen said, and the experience of the witnesses proved, "if you have not built one before, you make a lot of mistakes" (R. 284).

(4) In this situation, the defendants (including Stearns) attempted to protect their patents.

It is undisputed that when this flood of new "manufacturers" struck the industry, the defendants demanded that their patent rights be respected. The evidence shows that Stearns, under Olsen's presidency, was extremely active. This is significant, since the court, while not distinguishing in its opinion between the defendants, in its judgment did not require Stearns to open even its present

patents to compulsory licensing, but ordered Besser Co. and Besser to license not only existing patents but all patents developed for ten years in the future (R. 1066-7).

(a) *Investigation.*

The record shows that every approach by Besser Co. or Besser to a claimed infringer rested on knowledge of that maker's actual or contemplated product:

Olsen, while president of Stearns, actively attempted to compel respect for the Gelbman-Andrus patents, in some of which his own name was included (see pages 13, 16, *supra*). Naturally, therefore, he recognized the patent problem in 1948 before he began manufacture in his new corporation (R. 117-8). In that summer Gelbman, a close associate of Olsen since 1934, met Olsen in Adrian, Michigan, several times, and they discussed the patents (R. 117-8). In December one Bailey of Besser Co. visited Olsen's factory while the first machine was being assembled, and discussed the patent situation (R. 119-20). These several visits elicited full knowledge of Olsen's plans, though this hardly seems crucial since Olsen admitted that if the patents were valid he was probably infringing (R. 319-320).

Machines in operation were inspected with respect to *Graveley* (R. 181-2, 185);[2] *Milewski* (R. 387) and *Samuelson* (R. 440).[3] *Warren's* machine was inspected (R. 533). *Winn's* machine was seen in assembly at Winn's plant (R. 203-7). The government witness Lloyd testified to visits in company with one Thompson, a Besser representative, to two persons in Birmingham who were making machines. Thompson carefully inspected the machines at both places before talking with their makers (R. 553-4).

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[2] Gelbman was requested by a Graveley customer to see if he could make the machine operate. One of Gelbman's sons spent several days trying to make it work (R. 884).

[3] Stearns representatives had seen a Milewski machine as early as November 1946, though it was not in operation and the "men were not very cordially received" and could not get full details. (Stearns to Gelbman, November 20, 1946, Ex. 84, R. 1280, 811).

Hanneman's first machine, built by one Leemon, a former Besser Co. employee, "didn't work too well" (R. 221). Hanneman asked Besser Co. to put it in working order, which Besser agreed to do (R. 221, 243). Stark and a Besser salesman inspected one of the Leemon machines at Charlevoix (R. 438-9). Some months after Hanneman's visit to Besser, Stark called at Hanneman's plant and discussed the claimed infringements (R. 221). Obviously Besser Co. was fully informed as to the Hanneman machine.

Randolph's machine was discussed at two conferences in his block plant (he made blocks, not machines) at Ann Arbor, Michigan (R. 447-8). While a physical inspection is not mentioned, it would be incredible to suppose that the parties did not examine the machine they were discussing, located within the very plant where they met.

Darden's machines were fully investigated. Early in 1946, when Gelbman advised Darden of his infringement, Gelbman had a picture of the Darden machine (R. 477). This was at a convention in Chicago, at which Gelbman told Olsen that Darden's machines "are a definite infringement" (Ex. 52, R. 1259, 814). Shortly after the convention, Besser visited Darden in Atlanta, and then came to "New York for some information and copies of [Gelbman's] patents. [Gelbman] gave him the information he wanted and [Besser] went back to Atlanta for further investigation" (Ex. 53, R. 1260, 807). Darden confirmed that he conferred with Besser in Atlanta (R. 478-9). In October 1946, Fox of Besser Co. met Darden in Atlanta, Darden gave him a full description of the machine, and Fox went over with Darden the various patents (Ex. 19, R. 1215, 813-4). On November 4 Gelbman had a report of International Service Corporation on the Darden machine (Ex. 67, R. 1267, 808).

The finding of reckless and uninformed charges of infringement (R. 1024) is further negatived by exhibits which were ignored in the opinion:

In October 1947, Olsen for Stearns wrote Gelbman urging action against users of an F. C. George Machinery Co. machine if investigation revealed that litigation was indicated (Ex. 88, R. 1283, 815). Besser Co. ignored this letter (Ex. 89, R. 1284, 811) until about November 24, when Stark urged that before any decision was made they should see a George machine in actual operation (Ex. 91, R. 1285, 812).[4]

The same attitude is reflected in Stark's letter to Columbia Machine Works of Vancouver, Washington, February 7, 1948 (Ex. 95, R. 1291, 815-6). Besser visited the Columbia plant, and Stark sent Columbia copies of two Gelbman patents and the Scott patent for inspection and consideration by Columbia and its patent counsel. Stark pointed out that since he had not inspected the Columbia product, he could not advise as to whether or not the company might be "innocently operating" under other patents. He anticipated a visit later to Vancouver, when he would go over the matter in more detail, "subject to confirmation, of course, by an attorney of your own choosing" (Ex. 95, R. 1291, 815-6).

Precisely the same type of letter was written on February 3, 1948 by Stark to Scripps-Pearson Machinery Co. of Edmonds, Washington (Ex. 98, R. 1295, 812).

(b) *Notices of Infringement.*

(i) **Conversations with manufacturers.**

It is undisputed that some block machine manufacturers were advised by the defendants of their belief that their patents were infringed. In most instances this advice was

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[4] In December, 1946, Gelbman authorized his patent attorney to send a notice of infringement to F. C. George Machinery Co. (Ex. 72, R. 1273, 809-10). Gelbman described at the trial the respects in which the George machine infringed his patent (R. 883). In November, 1947 Gelbman notified George Co. that its advertised machine infringed and requested the location of the nearest one so he could inspect it (Ex. 90, R. 1285, 811-2).

given at the plant of the claimed infringer. At least six were shown, and four were supplied with copies of the patents, at least one with the claimed infringements indicated by check marks (Olsen, R. 120; Graveley, R. 159; Winn, R. 203; Hanneman, R. 221, 247; Milewski, R. 387; Samuelson, 439; Randolph, R. 447; Darden, 477, 478; Warren, R. 531, 532; the Birmingham individuals, R. 553-4; Columbia Machine Works, Ex. 95, R. 1291, 815-6; Scripps-Pearson Machinery Co., Ex. 98, R. 1295, 812). After investigation, it was concluded that Scripps-Pearson was not infringing (R. 968). Apparently the same conclusion was reached in reference to Columbia Machine Works, after an exchange of views by the lawyers (Exs. 96, 97, R. 1292, 1294, 816, 812). Randolph made it clear that he did not expect to manufacture his infringing machine for sale, and the matter was dropped (R. 449).

(ii) Discussion with customers.

Some admissible evidence was offered that persons connected with the defendants mentioned to four block machine users the claim that certain competitors' machines violated patents.

In 1948 the witness Miller was interested in a machine, "and a lot of other people wanted to sell me one" (R. 51). Miller informed the Besser salesman that he was going to buy a Lith-I-Block machine. This was the Milewski machine which had been inspected in operation in May, 1947 (R. 387), and with respect to which an infringement suit later was prosecuted and a finding of infringement made in the lower court. Miller says the salesman advised him against the machine on three grounds: first, it produced an inferior block; secondly, it violated patents, so that a user would be liable for infringement; and thirdly, the manufacturer would not remain in business (R. 52-3). The impact of this sales talk is evidenced by the fact that Miller proceeded to buy the Lith-I-Block machine (R. 53).

The witness Goldcamp, in December 1948, entered negotiations to change from a small to a large Besser machine (R. 356). On January 26, 1949 he and Besser Co. executed a lease contract covering equipment valued at $62,185, and he paid $2,000 (R. 356-7, Ex. 136, R. 1351, 380). Nevertheless, Goldcamp on February 2 made a deal with Olsen to install a Gocorp vibrating machine on a 45-day trial basis, and stopped payment on his check to Besser (R. 356-7). The Olsen machine, delivered some 30 days late (R. 360), was the first Gocorp machine installed (R. 138). It worked so unsatisfactorily during the next 45 days that it was shut down half the time (R. 360-1). As Olsen admitted, Goldcamp "had considerable trouble" (R. 139). Besser Co. continued to try to place its Besser machinery with Goldcamp. The effort is reflected in a sales letter of March 25, 1949 which, without disparaging any competing machine, expressed Besser Co.'s disappointment at losing an old customer (Ex. 135, R. 1349, 368). Goldcamp says, ambiguously, that in one of many conversations a Besser Co. representative commented that Olsen's machine was "undoubtedly infringing possibly" (R. 361). This is merely what Olsen admitted on the stand (R. 319-320). After the Gocorp machine had been tried for 68 days, with Goldcamp constantly losing money, it was removed (R. 378-379). Goldcamp then installed a Besser machine (R. 365) under a lease contract dated July 11, 1948, covering equipment of a value of $53,488 (Ex. 134, R. 1345, 355). Olsen testified that the only reason given by Goldcamp for the return was that "in the light of the trouble he had had with the Gocorp machine, he had decided to send it back" (R. 139). Goldcamp, though a government witness, flatly denied that the conversation about possible infringement had any influence on his decision to remove the unsatisfactory Gocorp machine (R. 378). Olsen had never heard of any other potential customer being approached by a Besser representative with respect to a Gocorp machine (R. 139).

The witness Lloyd owned a Besser machine, and *after* he bought a Warren machine two Besser representatives,

at his plant, commented that the machine "infringed" patents, but that it had been made under a license (R. 548). This was the Darden license, discussed below. Obviously this was no threat: Warren had already bought the machine, and the conversation contradicted infringement by reference to the license under which it was manufactured and sold. Lloyd himself says he did not construe this as a threat, and the colloquy between the court and government counsel at the conclusion of his testimony illuminates the insignificance of the incident (R. 556-560).

The witness Longenecker, owner of a concrete block plant known as Building Units, Inc., had negotiated for years with Besser representatives. He did not suggest that in any conversation through these years, prior to 1950, the question of patents was ever mentioned. In April, 1950, a few weeks before the trial of the antitrust action, Fox of Besser called to collect delinquent rentals on a leased machine (R. 466, 845). During this conference Fox tried to negotiate the placement of a second machine. Longenecker said he was going to buy a Lith-I-Block machine (R. 466-7, 847). Longenecker had learned at an industry convention, months before, about the pending patent litigation against Lith-I-Bar (R. 467). This case had been tried in early 1950 but was undecided at the time of Fox's visit. Longenecker claims Fox told him that the case "was concluded in favor of the Besser" Co. (R. 467). Fox denied that he made the statement, or that the patent case was mentioned (R. 845). If the statement was made, it was premature, and probably resulted from a misconstruction of some remark by the judge during the patent trial. Judge Picard recognized this (R. 579). And, in any event, the trial court did on June 25, 1950 sustain the Gelbman-Andrus infringement claim.

This summarizes all the admissible evidence of contacts between Besser representatives and potential customers. The record is cluttered with statements by witnesses improperly admitted over valid objection to its hearsay character, as to what witnesses had been told by others. The

court offered to recess to allow the Government to take depositions which would obviate the objectionable character of this hearsay (R. 144), but no depositions were taken for this purpose. There were also improperly received in evidence several exhibits, consisting of letters from concrete block makers, purporting to tell stories of what they had heard. The trial court, when the matter first arose, recognized that such hearsay testimony was incompetent (R. 135). Thereafter, the trial judge, when (erroneously) admitting this hearsay testimony, and these hearsay exhibits, observed that he was not "taking this in any way as proof of the fact itself" (R. 136. See also, e.g., R. 141, 168, 418). As the court said, "I have been around long enough to know not to believe everything I hear through hearsay, and this is not the best testimony and doesn't prove it at all" (R. 144). Rather the court "permitted [it] not as proof of the fact that they did it but as proof of what was told to [the witness] by one of [his] customers" (R. 137). Such testimony, clearly inadmissible, should not have been received. Being incompetent, it will not be summarized here.

(iii) Discussion with suppliers.

The trial court found that "Besser brought influence on a material supply source of Darden that curtailed the Warren output since Darden was building the Warren machine" (R. 1023). This finding is clearly erroneous.

This can only refer to Link Belt Co. The Atlanta branch of that company was to make certain machines for Darden. There is no evidence whatsoever that Besser Co. or Besser ever spoke or wrote to Link Belt Co. or any of its personnel.

Olsen, for Stearns, wrote Besser on July 8, 1946, that it had occurred to him that in the event of litigation the home office of Link Belt might decide they would not want to get involved in such (Ex. 54, R. 1261, 814). On July 31, Paulson of Besser Co. passed Olsen's idea along to Gelbman, in connection with the correspondence respecting

the Darden infringement action then in preparation (Ex. 56, R. 1263-4, 814). There is no evidence that Gelbman communicated with Link Belt Co.

Six months later a Darden customer was sued for infringement (see page 29, *infra*). On February 17 and 18, 1947, the manager of the Atlanta branch of the Link Belt Co. went with Darden to Chicago to an industry convention (R. 486). Darden had requested the lawyers handling the infringement case to arrange a meeting at this convention with Gelbman, Olsen and Besser (R. 482). On February 18, Darden, Olsen, Besser, Gelbman and "several other people" met in Olsen's room to discuss Darden's request for an unlimited license, which Olsen refused to permit, Besser concurring (R. 482-3). The Link Belt manager then flew back to Atlanta (R. 486). Darden testified to a conversation by phone with the branch manager on February 20. This was clearly inadmissible as hearsay, was objected to, and should not have been received (R. 486). But if this incompetent evidence be accepted, all the branch manager told Darden was that the president of Link Belt had instructed him not to serve Darden until the pending patent litigation was cleared up (R. 486).

This evidence, even including that which was incompetent, is inconsistent with the finding that Besser influenced Link Belt. The incident occurred nearly seven months after Paulson's letter. The record is consistent only with the conclusion that Link Belt had its Atlanta manager in Chicago with Darden to observe or promote the settlement negotiations, received his report of Darden's broad demands, and decided to take precautions against infringement. This was a normal reaction of any company under the circumstances.

(c) *Litigation.*

To stop the widespread infringement which the defendants, as a result of their investigations, believed was occurring, test actions were instituted.

In January, 1947, Gelbman and Andrus sued a Darden customer (R. 480). Shortly thereafter, Gelbman advised Stearns and Besser Co. that Darden and his lawyer had visited Gelbman in New York to discuss settlement by a license (Exs. 20, 21, R. 1217, 803-4). Olsen for Stearns insisted that the infringement action continue (Ex. 22, R. 1218, 804-5).

Subsequently, meetings were arranged at the Chicago convention (R. 482). On February 20, 1947 a preliminary agreement was made by Darden and Gelbman (Ex. 76, R. 1274, 488-9). This was replaced by the formal license of March 17, 1947 (Ex. 25, R. 1224, 489-490). This recited the desire of the parties to settle the pending litigation and avoid future litigation, licensed Darden under the Gelbman patents to manufacture, use and sell 35 machines, and provided that Darden thereafter "cease and desist from the further making and selling of any machines *embodying the inventions covered by any of the claims" of the patent* (R. 1226). Olsen and Besser approved this settlement (Ex. 77, R. 1276, 489).

There is nothing to impugn the good faith of the patent owners or their attorneys in prosecuting the action to enforce their patents, or in settling it by a license to manufacture 35 machines and thereafter to cease operations which were infringing the patents. Nothing in the agreement barred Darden from developing a business which would not infringe the patents.

Actions also were instituted by Gelbman, Andrus, and Besser Co. against users of the Milewski Lith-I-Block machine. As early as November, 1946, Stearns had reported on the machine to Gelbman (Ex. 84, R. 1280, 811), but Gelbman had suggested that the present efforts be concentrated on the action against Darden (Ex. 85, R. 1281, 814-5). Olsen of Stearns urged on April 14, 1947, after the Darden settlement, that "it would be wise to start suit against some user of one of the other infringing machines," and suggested the Lith-I-Bar Company (Ex. 81, R. 1279,

811). The subsequent decision by the district court sustaining the Gelbman-Andrus claim of patent infringement has been stated *supra*.

(d) *Negotiations.*

Of those who were believed to be infringing the patents, Hanneman and Darden received licenses: Hanneman for 10 machines (Ex. 24, R. 1221, 223), Darden for 35 (Ex. 25, R. 1224, 489-90). At the time of trial, neither licensee had made the number covered by his license (R. 248, 490).

The Appley license mentioned in the opinion (R. 1023-4) did not involve infringement. Appley—who did not testify—had shown the respect for patent rights which is the normal attitude of ethical businessmen (See Appley's letter, Ex. 11, R. 1209, 798-9). Early in 1950 he requested a license for one-at-a-time and two-at-a-time *cored pallet* machines (R. 790-793). These were the only types he manufactured (R. 793). His success is reflected in the fact that in the three years 1946-1948 he produced some 1,750 machines, all of the same hourly capacity (Ex. 184, R. 1396, 999). His company ranks fourth in the industry (Opinion, R. 1014). At Appley's request, Stark visited his plant, and a satisfactory license was negotiated and signed (R. 789). Stark says that the license was approved by Gelbman (R. 791), while Gelbman says he did not authorize it (R. 870-1). In any event, it was signed by Besser Co. and by Besser on behalf of Gelbman and Andrus (Ex. 162, R. 1378, 788). Under the terms of the 1942 license agreement, however, it could not be delivered to Appley until Stearns consented (R. 793), and such consent had not been forthcoming.

The failure of Stearns to agree to this license contract is consistent with the attitude of that company when Olsen was dominant. Olsen's judgment for Stearns was, he concedes, his own independent judgment, uninfluenced by Besser (R. 318). In 1947, as in 1950, the defendant Stearns

blocked Appley's request for a license (Ex. 13, R. 1211, 799-800.)

In 1947 one Lagarde had built and was using in his block business two machines which were believed to infringe the Gelbman-Andrus patents. He, Gelbman and Andrus "desired . . . that any differences between them regarding said possible infringement be settled without resorting to litigation" (Ex. 23, R. 1219, 800). To this end, on March 21, 1947 a release was executed by Gelbman and Andrus licensing Lagarde to continue to use his machines in consideration of his agreement not to make additional machines infringing their patents (Ex. 23, R. 1219, 800).

On April 1, 1947 Besser Co. made a contract with Lagarde. It recited that Lagarde had built and was using certain machines on which he had filed patent applications, that Besser Co. had certain patents which might be infringed by such machines, and it was the desire of the parties to settle any difference between them without litigation (Ex. 92, R. 1286, 815).

Besser granted Lagarde a royalty-free, non-exclusive license under its present and future patents. Lagarde granted Besser an exclusive license under his pending applications, at $100 per machine employing such patents, terminable if royalties failed to reach an annual minimum of $600 beginning six months after issuance of the patent. Besser Co. was granted a privilege of access to Lagarde's plant to observe any new developments, for which it was to pay $50 monthly the first three years, with the privilege continuing thereafter without cost so long as Besser Co. paid the minimum royalties on Lagarde's patent. If new developments were deemed patentable, Besser Co. could pay the expense of patents; but if it elected not to do so, Lagarde could patent, in which event Besser Co. would have the first option to purchase or license under them "on mutually agreeable terms." If Lagarde conceived ideas which were too large for him to develop, Besser Co. might at

its option undertake such development for the mutual benefit of the parties.

Lagarde did not testify, and we have no evidence about the circumstances of this transaction. It is clear from the agreement that Lagarde, like Randolph, was not a manufacturer of machines; he made blocks, and for his own use built two machines. Besser Co. did not make blocks, and Lagarde did not manufacture machines for sale. How the arrangement, whereby Lagarde secured a market for his patent, affected competition is not explained by anything in the record.

Discussions looking to the possible license of Olsen and Milewski were unproductive. Olsen, after organizing his new corporation in 1948, approached Gelbman for a license (R. 117). Since Olsen had been Gelbman's exclusive licensee until 1942, had been one of the two exclusive licensees from 1942 to 1948, had consistently refused to agree to licenses to others, and had been most aggressive in supporting Gelbman's efforts to stop infringements, it was not surprising that Gelbman's reply was that Olsen, in view of the Stearns policy which he had himself established, "ought to know what would happen" (R. 118). Nevertheless, discussions continued. Early in 1950, shortly after the trial of the patent action against Milewski, and while it was under advisement (R. 29, 401), Olsen invited Milewski to meet with him and Besser to discuss licenses to both companies (R. 122). Olsen says that he did this at Besser's "request" (R. 123), which seems somewhat doubtful in view of Milewski's testimony that at the resulting conference Besser stated that his company had no proposition to make but was glad to confer and to receive any suggestions (R. 434). The reasonable inference is that the conference was to explore the possibility of settling all disputes arising from the Milewski litigation and the probable infringement admitted by Olsen on the stand.

Besser was prepared to consent to an unrestricted license to Olsen and a license to Milewski permitting use

of the patents on one-at-a-time and two-at-a-time machines (R. 122-3, 399-406). Besser asserted that it was "positively not" his intent to eliminate a competitor manufacturing three-at-a-time machines, and that the only thing his proposal contemplated was that the Milewski three-at-a-time machines not be so constructed as to infringe (R. 987). He said:

> "The only thing in connection with the three-at-a-time was that they would not use the latest patented developments of the Besser Co., which would soon be their property anyway, as the patents ran out in a few years" (R. 988).

Milewski was unwilling to accept the license (R. 123, 407-8), and the discussions ended.

I. Purchase of Flam assets in 1946.

On November 21, 1946, Besser Co. purchased certain patents owned by Stephen Flam and certain assets owned by Stephen Flam, Inc.

Except for the agreements, there is virtually no evidence about Flam or about the company which bore his name. Flam, Inc. manufactured small vibrating units (R. 48).

Flam individually, for $80,000, sold to Besser Co. four patents issued in 1930-1943, and the rights under two pending and one immediately forthcoming patent application (Ex. 26, R. 1229, 814). Flam was employed for five years in a consulting capacity for not over three months of each year. For his services, Flam was to be paid $6,000 per year, terminating in the event of his death. Any inventions made by him during his employment relating to concrete block, tile and brick making machines and concrete mixers were within the grant. Ancillary to the sale and employment, Flam covenanted that for eight years from January 1, 1947, he would not engage or be employed, or permit his name to be used, in any business or enterprise for the manufacture of apparatus or machinery for making concrete

blocks, tile, brick or other wall building units, or concrete mixers, except in connection with Besser Co.

Stephen Flam, Inc., for a consideration of $75,000, executed to Besser Co. a conditional sales agreement covering an extensive inventory of personal property in California (Ex. 27, R. 1235, 805; inventory R. 1242-1246).

Besser Co. also purchased the finished goods, work in process, and raw materials of Stephen Flam, Inc. (Ex. 28, R. 1238, 805). The amount payable was fixed by physical inventory, plus $20,000 for services in purchasing, handling, storage, and caring for the items prior to delivery of possession in June 1947. This contract recited that for some years Flam, Inc. had been selling in California machines for making concrete blocks, etc.; that it was selling its good will; and that it would not carry on such business in California while the purchaser, or one deriving title to the good will from it, carried on the business. Provisions were made for orders received during the closing period, and for the continuance of the sellers' sales and other employees with the buyer.

Finally, Flam, Inc. sold Besser Co. certain real estate in California for a consideration of $80,000 (Ex. 29, R. 1246, 805).

J. Purchase of stock of Stearns Co.

During 1946 Besser purchased 13,765 shares of the common stock of Stearns Co., which was recorded in the names of nominees (R. 590-2). On March 26, 1948, Besser Co. acquired 61,325 shares from Olsen and his family for a total consideration of $813,750 (R. 599-600; Ex. 36, R. 1253, 806). Additional stock was acquired from others by Besser Co., making its total holdings between 85,000 and 89,000 shares (R. 16, 931). Stearns has outstanding approximately 189,000 shares (R. 928).

These purchases were negotiated by Pierce E. Wright of Detroit (R. 586), who became and was at the time of the trial a vice-president and director of Stearns. Wright's

testimony as a government witness reflects his hostility toward Besser. Yet Wright testified:

> "Q. Now beginning on May 4, 1948, can you state whether or not Mr. Besser participated in the management of the Stearns Manufacturing Company in any way?
>
> A. He did not.
>
> Q. So that beginning on that day to your knowledge, Mr. Hultmark and the other officers of the company are the ones who ran the Stearns Manufacturing Company?
>
> A. Yes, sir.
>
> . . .
>
> Q. Did Mr. Besser make any comments to you about your management of the company?
>
> A. None whatever.
>
> . . .
>
> Q. Did Mr. Besser ever make any comments to you on the management of the Stearns Manufacturing Company following your election as vice president?
>
> A. No, none specifically." (R. 605)

Besser likewise testified positively that since the purchase of the Stearns stock he had not participated in or otherwise influenced the management of Stearns, which had continued to manufacture the machines it had made prior to the purchase and had added new models (R. 930-1). During this period, the companies had no common agents or representatives (R. 930).

Wright testified that Besser instructed him that Olsen, in selling his stock, should agree to stay out of business for five years (R. 597). Wright admitted, however, that before the purchase he reported to Besser that Olsen was not going to agree to this, and Besser told him to proceed (R. 598). Wright's testimony was flatly contradicted by Olsen, who, on direct examination by the government, not only stated that he had told Wright at the closing there was no such agreement (R. 109), but directly to the contrary: *"I had told the representative of the purchaser of my stock before he bought it, that I did intend to start again"* (R.

115). Olsen repeated later in the trial his positive denial of any such agreement (R. 849). Besser corroborated the fact that there were no "strings of any nature" on the purchase (R. 931). Nineteen days after Olsen received over $800,000 for his stock, and while he was still drawing his salary as Stearns' president, he announced to a gathering of important potential customers his intention to form a new company (R. 115). On June 1, 1948, which was 27 days after he retired as president of Stearns, Olsen incorporated his new company (R. 602-4, 110).

Early in 1950 one Ben Stone became interested in purchasing Besser's stock in Stearns. Stone was engaged in buying and operating manufacturing and other businesses, making his gain from increased profits obtained by improved operations under his supervision (R. 657). Stone planned to expand the Stearns operation into an additional line of aglite or sintering equipment, for which he would need added factory space (R. 670). Both the Stearns plant and Olsen's company are in Adrian, Michigan, and the Olsen properties would be adequate to supply the added space (R. 673). On March 30, 1950 Stone contracted to buy 25,000 shares of the Stearns stock owned by Besser Co., with an option to buy and a proxy to vote the balance (Exs. 159, 160, R. 1374, 1377, 658, 662). In these negotiations Stone was represented by his own attorney (R. 937), and there was no arrangement or agreement between Besser Co. and Stone other than as expressed in the contract (R. 938). Olsen was interested in the possibilities of working out a deal, as shown by his conferences with Stone and his trips with him to inspect an Ohio plant (R. 125, 328, 333). The purchase of Olsen's facilities by Stone was in no sense a condition to the Besser sale (R. 674, 944), and it was made clear to Olsen that there was no suggestion that he discontinue his block manufacture (R. 125).

The judgment ordered Besser Co. and Besser within 60 days to present to the court for approval a plan for divesting themselves *by July 1, 1951* of all stock holdings in Stearns, and ordered cancellation of any and all contracts

or agreements in existence relating to the disposition of such stock (R. 1064). This, of course, struck down the proposed sale to Stone, and the Stone contract has been cancelled.

K. Other negotiations.

In December 1948, Bernard Flam of California (apparently the son of Stephen Flam) had two patent applications, one of which had been filed. At that time Bernard Flam granted Besser Co. an exclusive license under patents issued on the applications, with a first option to acquire exclusive licenses under any inventions within a defined field made by Bernard Flam during the term of the agreement (Ex. 99, R. 1296, 816). The consideration was $65,000, of which $62,000 was payable $1,000 monthly. During such payment period and for five years thereafter Bernard Flam agreed not to "engage in, be connected with, or be employed, or permit his name to be used . . . in any business or enterprise for the manufacture of apparatus, equipment, or machinery for making concrete block, structural tile, brick, or other wall building units or concrete mixers (saving and excepting so-called portable 'transit' mixers, and roof covering tile) except in connection with any consultant services which" might be rendered to Besser Co.; and also agreed to change the name of his company so as not to include the name "Flam."

There is no evidence with respect to Bernard Flam other than the contract.

There is some evidence that Besser Co. representatives suggested to Olsen and Milewski the possibility of Besser Co. buying their companies and employing them. Besser denied having negotiated to buy Gocorp (R. 945). In any event, both men replied that they were not interested (R. 131-3, 390-3). Warren, who was not a block machine manufacturer but had made three machines for his own use, also testified to a vague suggestion that he might work with Besser Co. at his own plant. He also was not interested (R. 533-5).

L. Leases of Besser machines.

In 1947 Besser Co. was developing a new technique for more efficient operation of its machines. Without detail, this may be described as a method whereby pallets to receive the blocks were fed empty into and discharged loaded from the front of the machine, instead of being fed in at the back or side and discharged at the front (R. 948). The process necessitated a different frame and different style of handling the blocks, and permitted higher speed operation with production increased by approximately 25% (R. 754; production figures from Ex. 186, R. 1400, 1002). A more advanced machine was designed, known as the Super Vibrapac front pallet or "return-feed pallet" (R. 948-9). This would make simultaneously one, two, or three blocks. The most popular size was the three-block machine (R. 947, illustrated Ex. 180, R. 1389, 892), with an hourly capacity of 750 blocks.

In October, 1947 the company announced a revised distribution policy under which other models would be sold, but its front-feed machines would be distributed exclusively on lease (R. 752, 945. See also Ex. 100, R. 1300, 816-7). The rear-feed Super Vibrapac, three-block size, sold at from $25,000 to $28,000 (R. 751). There was no retail price for front-feed machines available only on lease, but Besser Co.'s investment in such machines when installed was in excess of $30,000, with a continuing service obligation running for the period of the lease (R. 953-4). A minimum figure to pay their cost plus a "fair" profit would have been $40,000 (R. 755).

A lease form is shown in blank in Exhibit 101 (R. 1303, 813); and executed in Exhibits 134 (R. 1345, 355), 136 (R. 1351, 380), and 152 (R. 1365, 564). The leases are for five years, with the lessee having an option to renew for an additional five years, the rental being fixed at 1¢ a block, with a monthly minimum, and with an advance rental deposit, a portion of which is credited against each month's accrued rental. These customer deposits, on 70 machines

having a capital value of over $1,500,000, amounted on December 31, 1948 to $78,949.67 (Ex. 40, R. 1256, 806)—an average of slightly over 5% of capital value. This rental entitled the lessee to have the guidance, after installation, of an expert to instruct the lessee in operation (R. 952); and the services of a staff of engineers who periodically visit the lessee's plant to make recommendations for more efficient operations (R. 953). A lessee is not required to buy any supplemental equipment from Besser Co. (R. 951). He may buy such items from any supplier, though of course Besser Co. is prepared to sell them if the lessee desires (R. 952).

The following table reflects Besser Co. operations for the three years 1946-8 (from Ex. 1, 1179, 100 and Ex. 186, R. 1400, 1002).

		Machines for Sale (rear-pallet feed)		*Machines for Lease (front-pallet feed)*	
	Hourly Capacity	*Produced*	*Sold*	*Produced*	*Leased*
1946	600	170	184	—	
	250	16		—	
	Total	186	184		
1947	750	—	—	5	
	600	186	208	—	7
	250	21		3	
	Total	207	208	8	7
1948	750	—	—	56	
	600	19	16		63
	250	2		12	
	Total	21	16	68	63
Total 1946-8		414	408	76	70

Longenecker testified that in October, 1946, during development of the front-pallet feed, he made two contracts with Besser Co., one for a Besser Vibrapac without return pallet and one for the pallet return and changeover (R. 561-2; Exs. 148, 149, R. 1360, 1362, 562). A deposit of $3500 was made (R. 451, 563; Exs. 150, 151, R. 1363, 1364, 563). Prior to delivery, the policy of distributing on lease was introduced. In October 1947, Besser Co. advised Longenecker of this policy and declined to sell, but offered to lease the front-pallet machine (R. 452-4). Longenecker's attorney advised him that he could seek specific performance; purchase another machine and sue for damages; or negotiate a lease (R. 454-6). Machines made by other manufacturers were then available. This was about the time Miller was in the market, a "lot of people" were trying to sell him a machine, and he bought a Lith-I-Block because he elected not to lease a Besser machine (R. 50-52).

Being fully advised by his counsel, Longenecker elected to lease (R. 455, 570). The lease was executed October 21, 1947 with Longenecker's attorney as witness (R. 570; Ex. 152, R. 1365, 564). The Besser representative agreed that if machines of this type were later offered for sale, Longenecker would have the privilege of buying the leased equipment; and that if any other customer received a lease on more favorable terms Longenecker would be granted the same (Ex. 153, R. 1369, 565).

In December 1947, the machine was delivered, but due to delays in development the front-pallet feed was not attached (R. 456). Subsequently, Longenecker leased two other machines (R. 569). In May, 1949, a new machine was installed, including the front-pallet feed (R. 457). Shortly thereafter Besser Co. confirmed its policy of leasing rather than selling these machines (R. 462-4, Ex. 155, R. 1371, 567). Longenecker claims that in October, 1949, the Besser representative, offered to sell him the leased machine for $60,000, which he thought was too high (R. 465).

The lease plan is attacked by the government in one short paragraph which alleges that it was "for the purpose of retaining control over used concrete block machines and preventing the marketing of such used machines in competition with new concrete block machines manufactured by Besser Co." (R. 9).

There is no evidence to support this allegation. When Besser was called by the government, he was not asked a question with respect to used machines (R. 728-761). Longenecker made no reference to used machines. No witness testified that he had ever bought or sold, or ever had any interest in buying, selling, or negotiating for a used machine. In fact, used concrete block machinery is nowhere mentioned in the record.

At the first argument upon the form of the final decree, eight months after the government concluded its case (R. 991, 1011), the government returned to the subject of leases. Without any reservation of a right to offer evidence relating to the decree, without prior notice, without securing leave to reopen the evidence, and over objections of the defendants (R. 1041, 1048), the government called three witnesses. One was a lessee of a Besser machine, whom the government first approached some 30 days after the opinion (R. 1044-5), who testified that "if the price was reasonable" he would like to buy his leased machine (R. 1043). Two were manufacturers, Olsen and Milewski, who had previously testified, who between them had on hand sufficient materials to manufacture some 35 machines of the capacity the first witness was using (R. 1049, 1052). Neither testified that additional materials were unavailable, though they stated that supplies were "slowing up" (R. 1050) or "difficult" (R, 1053).

A second argument on the form of judgment was held April 3, 1951. The government on March 26th had filed its amended proposal (R. 1056) which in Section VIII would have required that the defendant Besser Co. sell to any

lessee electing to purchase, any, some, or all of the concrete block making machinery and accessories on lease (R. 1061). Counsel for the defendant proposed to argue the factual and legal reasons why such relief should not be granted. He was stopped by the court with the following statement:

> "And I don't see any great reason why you should discuss that further. If I switch, I certainly would give you the opportunity to be heard. But right now I don't feel that I am going to compel them to sell. I think I might destroy competition by it, because it discourages the other fellow from going into the business" (Record, original p. 2465, omitted in printing).

Relying upon this ruling from the bench counsel for the defendant did not discuss the subject of compulsory sale of the leased machines. No further opportunity for argument was afforded to the defendants. Nevertheless, in the judgment as finally entered, the trial court, despite the absence of any proof tending to reflect upon the propriety of the leasing program, directed Besser Co. within 30 days to notify every lessee of one of its machines that the lessee at his option might (1) terminate the lease at any time prior to January 1, 1953, or (2) continue under the lease, or (3) "enter into an agreement to purchase the machine or machines leased, and the accessory equipment used, as mutually satisfactory to the parties concerned; provided . . . that the provisions of sub-sections 1 and 2 . . . shall be contingent upon said lessee making his election in writing on or before October 1, 1952" (R. 1068). The provisions of subparagraph 3 were subject to a later comment by the trial judge:

> "Are you assured now that the judgment provides that there is no compulsory method outlined in the judgment, or any compulsion in the judgment itself, that you have got to sell or lease to anyone?" (R. 1084-5).

M. Post-decree proceedings.

After directing that Gelbman, Andrus, Besser Co. and Besser (but not Stearns) grant to any applicant licenses under all patents now owned or controlled by them, "or which are issued or applied for within ten years" from the judgment, the trial court conceived an unprecedented procedure for fixing a "fair royalty price for the use of the various patents, present and future, . . . and the form and contents of the royalty contracts". He provided that the government should appoint two persons and Besser Co. and Besser two persons to act as a "committee" to determine royalty rates and the form of the licenses. If they were unable to agree, the four should select a fifth member. If they could not agree on a fifth member, the court would have the right to act as a fifth member or appoint one. The prices and form of agreement determined by the committee should be filed with the clerk "and upon so filing will then become a part of this judgment" (R. 1066-7).

Appellants contend that these provisions, and the proceedings under them, unlawfully attempted to delegate judicial functions to laymen, and deprived these appellants of the fundamental guarantees of due process.

On April 23, 1951, the government designated, as its representatives, Darden and Olsen (R. 1070). The government confessed that it had no knowledge of the value of the patents, and asserted that "the holders of the patents . . . and the prospective licensees are better equipped to work out, through private negotiation, a form of license and the rates of royalties" (R. 1070-71). The government repudiated any obligation "to direct, guide and control the actions and decisions of Messrs. Darden and Olsen" (R. 1071).

Thus the government renounced any responsibility for fairness either in the "committee" activities or its report, while naming as its representatives two of its witnesses, both competitors of Besser Co., both—as the designation states—"prospective licensees and designees of other

prospective licensees" (R. 1071), both having direct and adverse pecuniary interests in the issues to be "worked out"—to use the government's language—"through private negotiations" (R. 1071).

Besser Co. and Besser consistently objected to these judgment provisions. On May 8, 1951, they applied for a stay pending perfection of appeal (R. 1080). An inquiry by the district judge casts light on his concept of the procedure:

> "May I ask if the defendant Besser has now appointed the *arbitrators* or the *members of the committee* that are *suggested* in Paragraph VII(B)" (R. 1080, italics added).

The court was advised that the appellants would contend on appeal that the provisions for a "committee" were erroneous, and that they would be in a contradictory position if they complied in the interim (R. 1080).

In the ensuing colloquy, in the course of which the judge castigated defense counsel (see R. 1082, third paragraph; R. 1083, first paragraph), the court referred again to the "two *arbitrators*" who were to be appointed (R. 1081). The judge could see "no excuse why the Besser people did not at that time appoint two *arbitrators*" (R. 1082). Yet he conceded the possibility of prejudice, and directed that compliance should "not prejudice your case one bit" (R. 1082). The court then declined the stay, intimating that after the committee acted he would be "inclined" to grant a stay (R. 1084, 1085).[5]

Directing that the committee meet, the court commented:

> "If they can't finally get together, the Court will act, and my knowledge of the concrete building block machines, or the patents, has increased 1000 per cent in the last year. I will be able to make a good selection." (R. 1084)

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[5] Subsequently it was necessary for defendants Besser Co. and Besser, in order to be protected pending appeal, to secure a stay from Mr. Justice Reed of this Court (R. 1176).

Reserving their objections, appellants on May 9, 1951, appointed Marx Rosenthaler and John Stark their representatives (R. 1086).

The "committee" met in Detroit May 21, 1951. Rosenthaler and Stark appeared alone; Darden brought along one Vernon H. Doane, an attorney of Washington, D. C.; and Olsen brought E. J. Balluff, an attorney of Detroit (R. 1119, 1126). In the ensuing discussion, the attorneys representing Olsen and Darden offered $25 per "opening" per machine for both the Scott and Wellnitz patents, i.e., $75 on a three-at-a-time machine (R. 1120, 1127). Rosenthaler and Stark, pointing to the heavy investments in the patents, asserted that a fair royalty for the Wellnitz patent was $600 per machine, for the Scott patent, $100 per "opening", and for the Besser patent, $25 per "opening" (R. 1120, 1127). Being unable to agree, the "committee" adjourned.

The "committee" met again May 22, 1951, at 9:15 A. M., with the same persons present. Rosenthaler and Stark swear that the lawyers for Darden and Olsen "stated that since Besser Co. had been found guilty of anti-trust violations it could expect nothing other than a nominal royalty and that the cost of Besser's investment in the patents and in experimental work and the relative differences in dollar value between the 1938 and 1951 situations had nothing to do with fixing a royalty rate" (R. 1120, 1128). Neither Darden nor Olsen in their affidavits dispute this account (R. 1142, 1145). In an unsworn statement, Olsen admitted that substantially this statement was made by Darden, but that Olsen disagreed (R. 1093). Rosenthaler replied that "it was not his understanding that . . . the judgment . . . contemplated any such penalty. It was his understanding that . . . the so-called royalty committee was to arrive at fair patent royalty rates" (R. 1120-21, 1128).

The government representatives then announced that there was no need of further discussion: they were going to see Judge Picard. No effort was made to agree on a fifth "arbitrator." Rosenthaler informed the government

representatives that the Michigan attorneys for Besser Co. and Besser were on that day in New York and requested that they not approach the judge until counsel for both parties could draw up a report. The government representatives said they were not interested in such a report, and the "committee" adjourned (R. 1121, 1128).

Later that morning Olsen telephoned Rosenthaler and stated that he had talked to Judge Picard on the phone and Judge Picard had sent word that he would make himself the fifth member of the committee and the committee would meet at 9 o'clock on May 23 "and that the committee would then fix the royalty rates whether or not the Besser representatives on the committee were present. Mr. Olsen further said that Judge Picard had stated that whether or not the attorneys for Besser Co. and Besser were available did not make any difference to him" (R. 1121-22). This is not disputed by Olsen (R. 1142-4).

On the same day, John W. Babcock and Carl R. Henry, Michigan counsel for the Besser defendants, sent a telegram to Judge Picard. This telegram (quoted in full, R. 1122-23), informed Judge Picard that counsel were in New York to expedite the appeal, reviewed counsel's information as to the proceedings of the "committee," explained that counsel could not return in time for the session the following morning, and concluded:

> "In view of these facts we respectfully except to any informal proceedings at the conference on May 23rd, and except to any formal action during that conference. We also respectfully except to any procedure then or thereafter, either by the court or the committee, which purports to set royalty rates or terms without affording to our clients a full opportunity to present evidence to the full committee of five, to be heard by such committee, and to have a formal record of all future proceedings with respect to this matter." (R. 1123)

On the morning of May 23, Judge Picard, Olsen, Darden and Rosenthaler met. Stark had left Detroit before Olsen

advised Rosenthaler of the meeting (R. 1089, 1121, 1128), and Rosenthaler had been unable to contact him to return (R. 1089). Judge Picard designated himself as fifth member of the committee (R. 1090).

With all respect, appellants submit that this was the last act of Judge Picard in connection with his "arbitration committee" which, under the most liberal interpretation, could be viewed as a judicial act. Having made himself a part of the "arbitration" machinery which he had imposed on defendants over their protest, with the decision of his "committee" to be determined by majority vote, he abandoned his judicial role. It would not be inappropriate for appellants hereafter to refer to Judge Picard without judicial title. Such a reference, however, might suggest a discourtesy which would not be intended. We shall, therefore, continue to use the judicial title, but with the clear caveat that none of his subsequent acts in connection with his "committee" constituted the performance of judicial functions.

Olsen then told Judge Picard that it was the view of Olsen and Darden that the rate per opening per patent, on the Scott, the Wellnitz and the Besser patents, should be $25 (R. 1090). Rosenthaler told Judge Picard that he and Stark were the opinion that Wellnitz (which had no relation to the mold) should be $450 per machine, Scott $75 per opening, and Besser $25 per opening (R. 1090). Rosenthaler then asked Judge Picard for an opportunity to submit formal evidence (R. 1091) and handed Judge Picard a copy of counsel's telegram containing the same request (R. 1091-92). Judge Picard's reply was: "How long will it take you to prepare that? I am ready to decide this question today some time" (R. 1091).

Judge Picard asked Olsen and Darden if their figures were a "fair" royalty, and they replied in the affirmative (R. 1093). If Judge Picard had the knowledge to evaluate a given figure as a "fair" royalty, this question was superfluous. If he did not, his subsequent vote was an uninformed

vote, deliberately so since he refused the defendants an opportunity to present evidence. It is appropriate, therefore, to consider the qualification of Judge Picard (in his non-judicial capacity as an "arbitrator") to determine a "fair" royalty for these patents. Three were involved:

A. *The Wellnitz patent*, on which the government representatives argued for $25 an opening, or $75 for a three-opening machine, and the Besser representatives urged $450 per machine.

Judge Picard had never heard of the Wellnitz patent prior to the trial (R. 941). When it was mentioned during the trial, he stated he did not want to get interested in it and would not look at it (R. 943). It was vaguely described, in answer to a later question of the judge, as an electrical control to set automatically the height of the block, a "little bit" like an electric eye (R. 990). There was no evidence in the record as to any facts pertinent to this patent. In the meeting of the committee, Judge Picard confessed his desire "to learn more about the Wellnitz patent" (R. 1094). In undertaking to vote on a royalty for this patent, Judge Picard could not have been relying on any knowledge acquired as a judge in either this case or the earlier patent case.

B. *The Scott patent.* This patent was mentioned repeatedly during the trial and was also involved in the prior patent infringement suit tried before Judge Picard. There was, however, no evidence here as to its value, and there is nothing in this record to hint that the question of value had been developed in the patent cases, which sought injunctive relief. In undertaking to vote on the license fee for this patent, Judge Picard as "arbitrator" could not have been relying on any information obtained by him as a judge.

C. *The Besser patent.* Judge Picard apparently knew nothing about this patent, but since the government and the Besser representatives were in agreement on the rates for it, his lack of information was immaterial.

At the morning meeting of May 23, 1951, Judge Picard criticized the presence of counsel for Olsen and Darden (R. 1092, 1093-94). He then adjourned his "committee" until 2 P.M. His attitude toward the request for a formal hearing was clear:

> "What I want to hear is a little bit more evidence as to why you think it should be $450 and why you think it should be $25, $25 is enough.
>
> Mr. Rosenthaler: I haven't Mr. Stark or anybody here.
>
> The Court: I don't care about that. You know what your arguments were.
>
> Mr. Rosenthaler: I can give them to you as a general basis.
>
> The Court: All right. Then I want the general basis, and I don't want counsel here. I don't want to hear it." (R. 1095)

Olsen, Darden and Rosenthaler met during the recess. Rosenthaler again asked an opportunity to submit proofs and accounting records relevant to the royalties (R. 1124). Olsen and Darden declined to agree (R. 1124, 1143). Olsen and Darden admitted that they could negotiate fair royalties with Besser (R. 1124, 1143), but refused to meet with Besser (R. 1124). Rosenthaler states that they gave as reasons for declining that they had to consider both the industry and their private instructions from the Department of Justice to insist on a low royalty (R. 1124). Olsen excuses the refusal to talk to Besser on the ground that while he and Darden could have agreed on royalties fair to their own companies, they were obliged to reach terms "which would be equitable and fair to any applicant," and that the committee procedure should be followed (R. 1144). Darden is silent (R. 1146). Both Darden and Olsen deny that they stated they had private instructions from the Department of Justice (R. 1144, 1146).

The "committee" met again on May 23, 1951 at 2:30 P.M., with Judge Picard, Olsen, Darden and Rosenthaler present. Rosenthaler immediately requested "an opportunity of bringing in the final [i.e., formal] evidence and

proof of the factual statement that I will make, to the best of my knowledge" (R. 1098). Rosenthaler pointed out that Besser Co. had paid $75,000 cash for the Wellnitz patent and a Meeker application, to which had been added some $200,000 of development costs. This purchase had been made early in 1950, with about 8 years to run, and the maximum number of machines likely to use it would be 150-200 per year. On a machine costing $36,000, the projected royalty of $450, necessary to recoup the investment, would be nominal (R. 1098-1100).

Olsen did not know what Besser Co. had paid for the Wellnitz patent, but conceded that his hearsay information was that at least $31,000 had been paid for the Meeker application (R. 1101). There was then further discussion of the patent and application (R. 1101). Olsen thought that if the Wellnitz patent was available "*at the nominal figures which I think are equitable*" perhaps 1,000 machines a year would use it (R. 1103). Since Olsen previously had testified under oath that he had made only 30 machines in 1949-50, and that he would not make any promises as to future deliveries due to "difficulties" in obtaining materials (R. 1053-4), Judge Picard doubted this estimate (R. 1103). Olsen then suggested that possibly existing machines might be equipped with the device (R. 1104).

No summary could portray the confusion of this discussion of the Wellnitz patent and the Meeker application. No copy of the patent or the application was before the committee. It is reasonably clear that they are interrelated. It is also clear that the Wellnitz patent is in the developmental stage. Rosenthaler, not an engineer, doubted that the Wellnitz patent and the Meeker application could be separated (R. 1099, 1106); Olsen was positive they could (R. 1102); and it is obvious that Judge Picard did not know (R. 1099-1107). Having elsewhere confessed he knew little about the Wellnitz patent (R. 941-43), Judge Picard here conceded he knew nothing about the Meeker application (R. 1109). Darden had nothing to add. As he said, "Mr. Olsen speaks for me" (R. 1108). At the conclusion, Judge

Picard cast his vote for the figures as urged by Olsen and Darden, saying:

> "I will tell you what I am going to do. I am going to accept the recommendation of you two gentlemen, and the main reason for that is that I think they could have had the information, if they wanted to, if they wanted to present it in proper form, that right from the beginning of this—not from the beginning, but especially from the rendition of judgment, there has been a surprising lack of cooperation between the defendants, their counsel and this Court, so that to me, to the Court, it appears as though it is but another attempt to delay matters and not get the judgment complete." (R. 1109)

On May 29th a proposed form of license contract, containing the royalty rates, was filed as the report of the "committee" (R. 1112).

The Besser representatives tried to file a minority report. The Department of Justice refused even to receive a copy (R. 1118, 1129). The clerk refused to accept it for filing (R. 1118), acting on oral instructions from the judge (R. 1131, 1132, 1136). Thereafter a formal motion was pressed (R. 1117), heard (R. 1133) and granted with the comment that it fairly showed what happened (R. 1134, 1135). The minority report finally was filed. The position of appellants is thus stated therein:

> "9. It was and is the view of the affiants that the royalty rates set by the majority of the 'Royalty Committee,' to-wit, Frank A. Picard, Eugene F. Olsen and Roy W. Darden were and are so inadequate as to be confiscatory. It was and is the opinion of affiants that fair royalty rates could be determined only after giving due consideration to the items of original cost and development expense of each patent, and the reasonably foreseeable number of machines likely to be manufactured or operated under such license. It was and is the view of the affiants that the royalties set by the majority of the Committee are not fair royalties. The affiants therefore dissent from the decision of the majority and

without prejudice to the rights of Besser Company, Besser on appeal, present this as their dissenting report." (R. 1125)

In ruling on the application for leave to file the minority report, the court again made clear his conception of the procedure when he referred to his action in preventing Olsen and Darden's attorneys from continuing "as part of the arbitration board" (R. 1134).

ARGUMENT

Summary of Argument

Briefly outlined, appellant will argue that the trial court committed clear error in finding that Besser Co. and Besser monopolized interstate commerce in concrete block-making machinery; that the 1942 patent license agreement was illegal and constituted a combination and conspiracy in restraint of trade and an attempt to monopolize; and that appellants' efforts to enforce their patent rights were also part of an illegal combination and conspiracy and an attempt to monopolize.

In addition, they will show that certain other findings of fact, such as those involving the Flam purchases, are clearly erroneous and cannot support a finding that appellants monopolized or were a part of a combination or conspiracy in restraint of trade or were engaged in an attempt to monopolize. Appellants will concede, however, that there are certain findings of fact which have sufficient support in the evidence to escape a showing that they are clearly erroneous. Appellants will show that such findings do not support a conclusion of monopolization or of combination and conspiracy. The most that these latter findings will support is a finding of an attempt to monopolize.

In any event, but particularly in view of these conclusions, appellants will show that the judgment of the trial

court is punitive, discriminatory, and inappropriate in its provisions for the cancellation of appellants' legitimate leasing system; the compulsory licensing of all its present patents and those acquired or applied for in the next ten years; and in other respects. Finally, appellants will demonstrate that they were deprived of due process of law by the novel provision designed by the district court for getting compulsory royalties and license terms by a non-judicial "committee" of "arbitrators" of which he was a member and by making the report of such "committee" a part of the final judgment without any possibility of judicial review of its determinations.

POINT I

The finding of fact that Besser Co. and Besser have monopolized interstate commerce is clearly erroneous.

In finding that Besser Co. and Besser monopolized interstate trade in violation of Section 2 of the Sherman Act (R. 1029), the trial court employed the so-called percentage base. Prime emphasis was placed on the proportion of the total industry production represented by the *dollar value* of machines manufactured by Besser Co. and Stearns, and their proportion of the total *dollar value* of vibrating machines (R. 1011-16). No effort was made to consider the significance of technological skill, patent rights, or any other factor as accounting for the position of Besser Co.

Mere percentage figures do not—indeed, they can not—determine the legality of a company's position in an industry. Preeminence may result from a complex of factors, none a violation of the Sherman Act. Among such factors, typical ones are that the company was first to enter the industry; that by its inventive and research efforts it has introduced superior techniques, frequently involving important patents; that it has improved its product while

others exercised less initiative; that it has evolved distinct distribution policies which better serve its trade.

All those factors are shown in this record. Besser Co. was the pioneer. By its technological contribution, it has kept its products in the forefront of the industry. One of the most important advances in this type of machinery was Besser's invention of the plain pallet, covered by patent from 1929 to 1946. The superiority of the plain pallet machine is undisputed, and during the period of its patent protection Besser Co. had a lawful monopoly in the production of such machines. Until the 1930's, block making machines produced one block at a time. In the late 1930's Besser Co. began to make a three-block machine. In 1947, the mid-year of the three covered by the statistics, Besser Co. introduced its front-pallet model which increased production by 25%. At the same time, it devised its lease system of distribution, which made this most efficient model widely available to the trade.

Obviously, when a company conceives and engineers a new and more productive machine, and attention is artificially focused upon the commerce in machines of that productive capacity, the company—even without patent protection—has a temporary 100% position until its competitors copy its model or design an equally effective substitute. When Besser Co. introduced its three-at-a-time block machine as a new development in the years before the trial, naturally Besser Co. had an important position in that segment of the trade. But it has not yet been held unlawful for a company to introduce better products, even though temporarily the new development may give its creator a predominant position in the portion of the market it supplies.

Accordingly, it has been held repeatedly that percentage analyses, without more, are insufficient to establish an unlawful monopoly under the Sherman Act. In *United States* v. *International Harvester Co.*, 274 U. S. 693 at 708

(1927), where the defendant controlled some 60% of the market, this Court said:

> "The law . . . does not make the mere size of a corporation, however impressive, or the existence of unexerted power on its part, an offense, when unaccompanied by unlawful conduct in the exercise of its powers."

See also:

> *United States* v. *U. S. Steel Corp.*, 251 U. S. 417 at 451 (1920).

In *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 at 424 (2nd Cir., 1945), Judge Learned Hand, while holding that control over 90% of the aluminum production was enough, in the context of that case, to constitute monopoly, added "it is doubtful whether 60 or 64% would be enough; and certainly 33% is not."

In the recent case of *United States* v. *Columbia Steel Co.*, 334 U. S. 495 at 527 (1948) this Court reiterated its previous position:

> "In determining what constitutes unreasonable restraint, we do not think the dollar volume is in itself of compelling significance; we look rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market."

When United States Steel sought to purchase the Geneva Steel plant, the Attorney General of the United States approved the purchase in spite of the fact that the corporation admitted that it would then control 51% of ingot capacity on the west coast (see *United States* v. *Columbia Steel Co.*, *supra*, at p. 506).

Thus the percentage of production or dollar volume is not in itself the key to the issue of monopolization. The

ultimate test is whether there is added an unlawful power to exclude competition when it is desired to do so, and a purpose and intent to exercise such power.

American Tobacco Co. v. *United States*, 328 U. S. 781 (1946);
United States v. *Paramount Pictures*, 334 U. S. 131 (1948).

Without such power, a finding of monopoly must fall where, as here, the accused defendant has a minority position in the industry (with the exception of one year and then only on one statistical basis), and such position was properly attained through technological and business efficiency.

cf. *United States* v. *Columbia Steel Co.*, 334 U. S. 495 (1948);
United States v. *International Harvester Co.*, 274 U. S. 693 (1927);
United States v. *United Shoe Machinery Co.*, 247 U. S. 32 (1918).

Against this background, we turn to the fact here:

A. Besser's percentage of the industry.

The government charged that Besser Co. and Besser had "acquired and obtained control over approximately 80% of the production of such [concrete block] machines" (R. 10). No matter how the evidence is viewed, this charge was not established.

The Court used "dollar sales" of the industry (R. 1013). More accurately, these were the "dollar value" figures summarized at page 9, *supra*, of this brief, which included "value" for the Besser Co. machines which were leased rather than sold. In so doing, the Court added Besser Co. and Stearns together for the entire period 1946-8. This was improper, since Besser Co.'s stock interest in Stearns, originating with the purchase in 1948, could not have had

any effect until the meeting of stockholders in May, 1948. Olsen testified flatly that Besser Co. never influenced Stearns during the 1942-8 period. If it were proper to add Besser Co. and Stearns production for any period, it could only be for that from May 1 to Dec. 31, 1948. No allocation of Stearns' figures for 1948 was in evidence, but a close approximation can be reached by allocating two-thirds of Stearns' production for the year to the eight months May through December. The dollar value figures, correctly stated, then would be:

	1946	*1947*	*1948*
Besser Co.	33.9%	47.8%	52.1%
Stearns (pro rata estimate after May 1, 1948)..			8.6%
			60.7%
Other manufacturers (including Stearns until May 1, 1948)	66.1%	52.2%	39.3%

None of these—even the 1948 statistics—approach the figure alleged in the complaint. No statistics were offered for 1949.

Analysis will demonstrate how misleading gross percentages are.

Besser Co.'s production *declined* from $2,692,500 in 1946 to $2,623,000 in 1948 (Ex. 188, R. 1402, summarized page 9, *supra*); yet Besser Co.'s percentage of the total *increased* from 39% to 52%. The percentage rise reflects the fact that Besser Co. almost held its own while nondefendant manufacurers, with the end of the post-war boom, dropped from $3,990,943 to $1,760,800.

Over $700,000 of the decline in production of nondefendants was in tamping machines (Ex. 188, R. 1402, 1006). Besser Co. has made no tampers since before 1940 (R. 909-10).

In the vibrator field, once the immediate post-war demand was satisfied, success depended on the initiative with which the manufacturer met the need for better machines. Exhibit 190 (R. 1408-12, 1006) shows this. In 1947 Besser Co. introduced a new machine with 750 block hourly capacity. In 1948 these new models accounted for 78% of the "dollar value" of its output. In 1947 Stearns introduced a new model with 720 per hour capacity: in 1948 that model accounted for 52% of its production.

Of the numerous other vibrator manufacturers, only six introduced improved models during these years. Fleming brought out a new model, and its production rose from $200,512 to $208,850, with over 85% in the new model. Columbia Machine did the same, and its "value" rose from $17,246 to $65,000, not allocated as to source. F. C. George Co. also introduced a new model, and the sales of its original small model fell from $330,676 to $23,827, while the new model rose in two years from zero to $182,805. *No witnesses appeared from any of these companies.*

Three manufacturers who tried larger models were unsuccessful: Winn, Gravely, and Darden. *All three of them appeared as government witnesses.*

In short, 1946-48 were significant years for competent manufacturers who had the initiative and engineering skill to develop new models which performed satisfactorily. Besser Co., by following the trend of demand, almost held its own; but because it did so in a declining market its percentage of the industry total increased.

The inertia of competitors content to continue the production of outmoded machines could pose for Besser Co. a neat dilemma. Is it the duty of Besser Co. to cease improving its machinery and cut its production to reduce its percentage? Such is the necessary consequence of legal reasoning which finds evidence of a Sherman Act violation by looking solely at percentage figures and condemns a percentage rise resulting from a constant sales volume maintained by model improvements.

If percentage figures are deemed significant, a more accurate appraisal of Besser Co.'s position would result from analysis of the number and productive capacity of machines produced by the forty-odd manufacturers. All concrete blocks of the same size are interchangeable, regardless of the type or capacity of the machines on which they are produced. A local operator does not select his machine because of its "dollar value." His only interest is in the number of blocks it produces, and he buys or leases the machine which will give him the output his market will absorb.

However viewed, the figures on machines and productive capacity do not establish monopolization by Besser Co. and Besser, *the only two defendants charged with that violation.* In 1946-8, over 84% of the 8080 machines produced were made by non-defendants; and these machines accounted for 68.3% of the productive capacity added to the industry in those three years (see table, page 8). Besser Co. produced only 6.1% of the machines, principally large models which accounted for 18.0% of the new capacity. Stearns Co. had 9.6% of the machines manufactured, with 13.7% of the capacity.

B. Absence of power to exclude competitors.

The very figures which establish that Besser Co. and Besser do not have a monopoly from a statistical point of view likewise demonstrate that neither of them meets the ultimate test of monopoly power, i.e., the "power to exclude competition when it is desired to do so" (see *United States* v. *Paramount Pictures,* 334 U. S. 131 at 173 (1948)).

No man could have been in a better position to appraise Besser Co.'s "power to exclude competitors" than was Olsen when he sold his Stearns stock in the spring of 1948. Closely associated with Gelbman and Andrus since 1934, Olsen had been a dominant figure in all transactions from 1942-8 now claimed to be conspiratorial. With nearly thirty years of activity in the industry, he was not a youth when

he received the $800,000 for his stock. But he promptly re-entered the industry, was in production by the end of the year, produced 10 machines in 1949, doubled that number in 1950, and (assuming normal material flow) was tooled to produce 48 in 1951 (R. 1052, 1054).

Milewski's record likewise rebuts any Besser Co. "power to exclude competitors." In 1946 he made 2 machines; in 1947, 29; in 1948, 45 (Ex. 184, R. 1397, 999); and in 1951 he was tooled to produce 72 (R. 1049). This is the machine claimed to infringe existing patents, and so held by the lower court, with a reversal in the court of appeals which is not yet final. If the machine is held to infringe, presumably Milewski will release a model, as other manufacturers have done, which does not infringe. But the four-year growth of his company clearly refutes any claim that Besser Co. has "power to exclude" competitors.

Other illustrations of companies which have prospered because they met the demand of the market have been given in the preceding subdivision of this point. It is unnecessary to multiply examples. The statistical record, of course, shows the important position of Besser Co. which resulted from the technological and commercial factors previously outlined. But the statistical record even more significantly demonstrates the ability of able competition to enter the industry and to prosper. Such a showing is wholly inconsistent with a claim of monopolization.

It is therefore respectfully submitted that the finding and conclusion that Besser Co. and Besser monopolized interstate commerce is clearly erroneous.

POINT II

The 1942 patent license was valid, and evidenced neither an unlawful monopolization or attempt to monopolize nor an illegal combination in restraint of trade.

The trial court concluded that by the 1942 license the defendants Besser Co., Stearns, Andrus and Gelbman had "conspired to restrain and to monopolize" interstate commerce (R. 1028).

This finding is challenged as clearly erroneous.

Every patent confers a monopoly over the patented process, method, or apparatus for a limited period. As declared in *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32 at 57 (1918):

> "Of course, there is restraint in a patent. Its strength is in the restraint, the right to exclude others from the use of the invention, absolutely or on the terms the patentee chooses to impose. This strength is the compensation which the law grants for the exercise of invention. Its exertion within the field covered by the patent law is not an offense against the Anti-Trust Act."

There is an apparent—but only an apparent—conflict between the public policy manifested in the statutory monopoly granted to a patent owner and the public policy manifested in the antitrust laws. As stated in *United States* v. *Line Material Co.*, 333 U. S. 287 at 308 (1948):

> "During its term, a valid patent excludes all except its owner from the use of the protected process or product . . . This monopoly may be enjoyed exclusively by the patentee or he may assign the patent 'or any interest therein' to others . . . [A] patentee may license others to make and vend his invention and collect a royalty therefor. Thus we have a statutory monopoly by the patent and by the Sherman Act a prohibition, not only of monopoly or attempt to monopolize, but of every agreement in restraint of trade" (Citations deleted).

The apparent conflict is resolved by barring the patentee from utilizing his patent right to gain a monopoly in areas not covered by the patent.

In *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436 at 456 (1940), this Court stated the applicable principle:

> "The patent law confers on the patentee a limited monopoly, the right or power to exclude all others from manufacturing, using, or selling his invention . . . The extent of that right is limited by the definition of his invention, as its boundaries are marked by the specifications and claims of the patent . . ." (Citations deleted).

This conception was reiterated in *United States* v. *Line Material Co.*, 333 U. S. 287 at 308-309, 310 (1948):

> "The progress of our economy has often been said to owe much to the stimulus to invention given by the rewards allowed by patent legislation. The Sherman Act was enacted to prevent restraints of commerce but has been interpreted as recognizing that patent grants were an exception . . . The monopoly granted by the patent laws is a statutory exception to this freedom for competition and consistently has been construed as limited to the patent grant . . . It is not the monopoly of the patent that is invalid. It is the improper use of that monopoly" (Citations deleted).

Within these general limitations, we must analyze the 1942 patent license agreement. We start with Gelbman and Andrus being awarded patents on methods and processes applying the principle of vibration under pressure in concrete block machines: patents the validity of which is not in issue here. (Government Memorandum in Opposition to Motion for Adjournment, March 1952, p. 2.) These were not the first patents in the field of vibration. Vibration was a recognized method of compacting the aggregate before the Gelbman patents (R. 925). Gelbman showed how to add vibration under pressure, so that the top of the block was compacted properly and it was brought "down to an accurate height" (R. 925-6). At this point, Gelbman as the patentee-inventor "gets nothing from the law that he did

not have before and . . . the only effect of his patent is to restrain others from dealing with or using [his] device." *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32 at 57 (1918).

Gelbman and Andrus had a choice of courses: they could decline to use the patents (*Special Equipment Co.* v. *Coe*, 324 U. S. 370 (1945)); could exploit their patents themselves, excluding all others (*United States* v. *Line Material Co.*, 333 U. S. 287 (1948); *United States* v. *Dubilier Condenser Corp.*, 289 U. S. 178 at 186-7 (1933)); or could license others "to make, use or vend, restricted in point of space or time, or with any other restriction upon the exercise of the granted privilege, save only that by attaching a condition to [their] license [they might] not enlarge [their] monopoly and thus acquire some other which the statute and the patent together did not give."

Ethyl Gasoline Corp. v. *United States*, 309 U. S. 436 at 456 (1940);
United States v. *Line Material Corp.*, 333 U. S. 287 at 308 (1948);
General Pictures Co. v. *Electric Co.*, 304 U. S. 175 at 181 (1938).

Exercising their privilege to license, they could grant the right to all applicants (*United States* v. *Line Material Co.*, 333 U. S. 287 at 308 (1948)); or they could license some and withhold it from others, "a right of selection of persons and terms" (*United States* v. *United Shoe Machinery Co.*, 247 U. S. 32 at 58 (1918)).

Gelbman and Andrus elected, beginning in 1934, to grant Olsen the exclusive right to exercise their patent monopoly. This they had a right to do.

R. S. Sec. 4898, 35 U. S. C. Supp. V, §47, 35 U. S. C. A. §47.

During the next eight years, Olsen enjoyed a monopoly of the licensed patents. No criticism was or could be di-

rected to the part played by his license under the Gelbman patents in the success of his company. Yet during those years—years in which it is now charged with attempted monopoly—Besser Co., like every other competitor, was barred by Olsen's exclusive license from using the Gelbman patents.

Of course, the license to Olsen deprived Gelbman and Andrus of the power to license another unless Olsen waived its exclusive features. This is inherent in any exclusive license, and the license is not shorn of validity by explicit statement of its inherent effect.

Cf. Bement v. *National Harrow Co.*, 186 U. S. 70 at 94 (1902).

In 1940 Gelbman, Andrus and Olsen (through Stearns) unsuccessfully sought to establish that the Besser machine infringed one of their patents. They appealed the adverse ruling of the trial court. Pending the appeal, Olsen, Gelbman and Andrus negotiated a settlement which was formalized in the 1942 agreement, drafted by their counsel. Such settlements of patent actions are not uncommon, and have the approval of this Court. So in *Standard Oil Co.* v. *United States*, 283 U. S. 163 at 171 (1931), this Court, through Mr. Justice Brandeis, declared:

> "Where there are legitimately conflicting claims or threatened interferences, a settlement by agreement rather than litigation, is not precluded by the [Sherman] Act."

See also: *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32, 51-52 (1918);

United States v. *Aluminum Co. of America*, 44 F. Supp. 97 at 113 (S. D. N. Y. 1941), aff'd 148 F. 2d 416 (2d Cir., 1945).

The patent license of December 7, 1942 is described by the Court, in a somewhat rhetorical paragraph, thus:

"This deal was the climax" (R. 1020).

Since the court did not find unlawful anything occurring prior to 1942, it is not clear what the agreement "climaxed." Such a description manifests the attitude of the trial court which condemned every action of appellants, beginning with that date.

In essence, aside from reciting the settlement of the litigation, the license did two things which are criticized:

(a) It granted licenses to Stearns and Besser Co., each exclusive except for the other, and provided that further licenses could be granted only upon the consent of the licensees. The Court said: "It is this combination requiring collective action that primarily invalidates the agreement" (R. 1021).

The only case cited in the opinion (R. 1021), *United States* v. *Parker-Rust-Proof Co.*, 61 F. Supp. 805 (E. D. Mich., 1945), gives no support to the trial court's conclusion. The *Parker* case, like this action, was a wholesale attack upon the activities of the defendants. The trial court there absolved the defendants of every accusation save one. That charge involved a contract between Parker and American Chemical Paint Co., a competitor, whereby in settling patent litigation Parker in effect bought out American and American retired from business, with a permanent injunction barring it from carrying on the process it had been promoting. It was found as a fact that this agreement "between American and Parker was intended to eliminate American as a competitor and it had that result" (61 F. Supp. at 811, Finding 19). It was this contract which the Court condemned in the language quoted in the opinion below (R. 1021).

The 1942 license had no such purpose or effect. To make the situations analogous, Stearns would have had to sell to Besser Co., or vice versa, and the seller would have had to retire permanently from business. Instead, the two licensees remained vigorous competitors. Nothing in the license could affect their competitive struggle. Its only effect was to eliminate litigation between them as to the

Gelbman patents, and leave each one free to exploit such patents in its machines.

No one here argues that the prior license exclusively to Olsen (Stearns) was unlawful. Admittedly Stearns and Besser Co. were vigorous competitors. Certainly competition between them was furthered, rather than restrained, by giving both access to the patents.

Does the fact that the license ran to two competitors, exclusive save for the other, make it a violation of the Sherman Act? If so, this will be the first case so to hold. Nothing in prior cases even suggests that a patentee must choose between (i) using the patent himself, (ii) licensing only one person, or (iii) licensing all comers. So far, the cases indicate to the contrary.

In *Extractol Process* v. *Hiram Walker & Sons*, 153 F. 2d 264, at 268 (7th Cir., 1946), it is stated:

> "The patentee is the sole judge of the licensee he shall select . . . No legitimate attack can be made on the patent or patent grant because the patentee chooses A and B as its licensees and refuses a license to X, Y, or Z . . . He may make A an exclusive licensee and he may make B as limited a licensee as he and B may agree to. In other words, patentee may grant both broad and narrow licenses."

In *Flexwood Co.* v. *Faussner & Co.*, 145 F. 2d 528 (7th Cir., 1944), it is specifically held that a "joint exclusive license" is not *per se* invalid. The contention that the license violated the antitrust laws was rejected in the following language:

> "The defendant complains because the two licensees have a joint exclusive license. Possibly such a license might under some circumstances be a vehicle for illegal action but we find nothing in the circumstances of this case to indicate illegality." (p. 539)

Every exclusive license, by its very grant, prevents the licensor from granting a license to another. An exclusive license in which the licensor remained free to license others

would be a logical and legal impossibility. Whether the restriction on further licenses is or is not explicitly stated does not affect either the rights granted or the licensor's power. Since it is lawful when implicit, how can it be unlawful when expressed?

The trial court could see no reason for the exclusivity, accompanied by the requirement of consent, other than "that the parties intended this contract to be a means whereby control of the industry could be acquired and competition eliminated" (R. 1021). That the Gelbman-Andrus patents did not offer "control of the industry" is apparent from the statistics, which show over forty companies engaged in the business. It is obvious also from the fact that it dealt only with the application of pressure during vibration, leaving manufacturers free to use vibration in any other manner. It is clear likewise from the fact that numerous other manufacturers of vibrating machines are making products which do not infringe.

Of course, a patent may be so used as to violate the anti-trust laws and an act lawful in itself may be unlawful because it is a part of a conspiracy. If the 1942 patent license were shown to be a part of a conspiracy— if there were any evidence to suggest that an unlawful combination had been formed—it would fall. But that was not the contention of the government: the government asserted rather that the license was illegal *per se*.

The government, committed to its theory that the license was *per se* illegal, offered no evidence whatsoever to support a finding that the mere grant of the license was either itself a combination or conspiracy, or the result of one. There is no evidence that the 1942 license resulted from anything save the legitimate desire of the patentees to settle the litigation they had started, and to consummate that settlement by licensing their patents to two reliable manufacturers, potential sources of satisfactory royalty income. There was in the license none of those indicia which point to an unlawful conspiracy, or an improper effort to extend the scope of the patent monopoly. There was no limit on

the type or volume of production; no division of available markets or territory; no effort to dominate an industry by fixing prices.

See *United States* v. *New Wrinkle, Inc.*, 342 U. S. 371 (1952);
United States v. *Line Material Co.*, 333 U. S. 287 (1948);
United States v. *United States Gypsum Co.*, 333 U. S. 364 (1948);
Ethyl Gasoline Corp. v. *United States*, 309 U. S. 436 (1940).

There was no agreement that the licensee would assign present or future patents to the licensors; no provision for cross licensing; no pooling of existing or future patents and know-how; no effort to tie the use of the patents to the use of unpatented materials, processes, or devices.

See *Timken Co.* v. *United States*, 341 U. S. 593 (1951);
United States v. *National Lead Co.*, 332 U. S. 319 (1947);
International Salt Co. v. *United States*, 332 U. S. 392 (1947).

Entitled to a total monopoly in the use of their patents, all that Gelbman and Andrus did was to agree, for a substantial royalty, to divide that lawful monopoly exclusively between two companies. Undoubtedly, if Besser Co. had been the patentee it could have granted its competitor Stearns an exclusive license, subject to its own right to use the patents.

See
Independent Wireless Co. v. *Radio Corp.*, 269 U. S. 459 at 461 (1926);
United States v. *General Electric Co.*, 272 U. S. 476 at 488-9 (1926).

Is the situation any different where a non-manufacturing patentee makes an agreement of like effect? The agreement to license Stearns and Besser Co. exclusively is not an extension but rather a diminution of the patent monopoly of Gelbman and Andrus.

United States v. *United Shoe Machinery Co.*, 247 U. S. 32 (1918);

Extractol Process. v. *Hiram Walker & Sons*, 153 F. 2d 264 (7th Cir., 1946).

(b) The second criticism of the 1942 license was that, as part of the consideration for the royalties to be paid by Stearns and Besser Co. to Gelbman and Andrus, the patentees agreed that the license should extend to "all improvements or inventions hereafter made by Licensors, or either of them, during the term of this agreement, in concrete block making machines of the vibrating type" (R. 1203-4). Significant in this connection is the fact that although the license on existing patents was to last through the life of such patents, the agreement as to improvements or future inventions was to terminate on July 1, 1952, unless renewed or extended by mutual agreement (R. 1206).

In support of its conclusion, the trial court cited three cases (R. 1022).

(1) *United States* v. *National Lead Co.*, 63 F. Supp. 513 at 524 (S. D. N. Y., 1945). The discussion in 63 F. Supp. at 524 deals with defendants among whom "the closest cooperation prevails. Territories are allotted; patents and patent applications are interchanged and cross-licensed; technological information or 'know-how' of one is promptly made available to the other. . . . Each operates in its own exclusive territory. . . . Competition among them is non-existent" (63 F. Supp. at 522). In this factual context, an agreement to license future patents was condemned. But in the present case, none of these elements was present. The two licensees, Stearns and Besser Co., were and remained vigorous competitors. They allotted no

territory, exchanged no patents or know-how, fixed no prices. If the *National Lead* case is authority here, then any patent license which gives the licensee access to future patents must fall.

(2) *United States* v. *General Electric Co.*, 80 F. Supp. 989 (S. D. N. Y., 1948). The discussion of improvement patents in this opinion comes in the middle of a review of widespread activities indicated by the subheadings employed by Judge Knox: cross-licensing of patents with one licensee fixing prices for all; licenses providing price control over unpatented products; resale price fixing; boycotts; territorial division of markets; purchase of competitors; and direct price fixing. Not one of those indicia of conspiracy is shown here. As one of these many subheads, the Court in the cited case referred to licensing on condition that the *licensee* shall assign or cross-license future patents. There was no such provision in the 1942 patent license. Each licensee retained complete freedom to develop its own patents. All it received was the right to license patents on improvements and inventions of the *licensors*. The *General Electric* case is not in point.

(3) *Transparent-Wrap Machine Corp.* v. *Stokes & Smith Co.*, 329 U. S. 637 (1947). This case is discussed below.

This Court has pointed out that:

> "An improvement patent may, like a patent on a step in a process, have great strategic value. For it may, on expiration of the basic patent, be the key to a whole technology."
>
> *Transparent-Wrap Machine Corp.* v. *Stokes & Smith Co.*, 329 U. S. 637 at 642 (1947).

There is nothing abnormal or unusual, much less illegal, in *licensees* making sure that, being committed to pay substantial royalties on each machine they produced under the patents, they should also have the benefit of future improvements in those patents or of related inventions which other-

wise might destroy the value of their product. This affords a proper and basic protection, and there is no illegality in its negotiation as a part of the over-all consideration.

Cf. Transparent-Wrap Machine Corp. v. *Stokes & Smith Co., supra.*

In *Aspinwall Mfg. Co.* v. *Gill*, 32 Fed. 697 (C. C. N. J. 1887), app. dis. 140 U. S. 669 (1891), the court lucidly set forth the reasons for such an agreement:

> "That such assignments of future improvements upon a machine, in connection with the assignment of a patent for such machine, are valid, is settled, I think, by the case of *Littlefield* v. *Perry*, 21 Wall. 226 . . . [W]here a man purchases a particular machine secured by a patent, and open to an indefinite line of improvements, it is often of great consequence to him that he should have the benefit of any future improvements that may be made to it. Without that, the whole value of the thing may be taken away from him the next day. A better machine might be made by the inventor, and sold to another party, which would make the machine acquired by the first purchaser entirely useless. These things happen every day. And hence it has become the practice, in many cases, to stipulate for all future improvements that may be made by the same inventor upon any particular machine which he induces a party to purchase from him, sometimes by way of license to use such improvements, and sometimes by way of purchase and ownership thereof . . . If based upon a valuable consideration, they are sustained as collateral or incidental stipulations connected with the conveyances of a principal subject" (700-1).

Of like tenor is *Westinghouse Air-Brake Co.* v. *Chicago Brake & Mfg. Co.*, 85 Fed. 786 at 795 (C. C. Ill., 1898):

> "But men will not pay much for a right that may to-morrow be the common possession of their competitors; nor will they, for the same reason, pay much for an invention that may to-morrow be outclassed by another from the same brain. Purchasers of rights under patents realize more keenly than others that one invention is, in all probability, only the

> father to a train of others, and that the offspring will soon displace its predecessor. A full monopoly, therefore, is not obtained unless the outgrowth, as well as the original root, of the conception is secured. On this basis alone will capital deal upon any liberal scale for the inventor's property. It is along these lines of commerce, inevitably regulating true value, that the inventor's real chances for compensation must be found. The public policy that recognizes this, and does not attempt, out of momentary or special considerations, to fly in its face, is the only policy truly advantageous to the inventive class."

See also:

Littlefield v. *Perry*, 21 Wall. (U. S.) 205, 226 (1874);
Flakice Corporation v. *Short*, 115 F. 2d 567 (2d Cir. 1940);
West Disinfecting Co. v. *United States Paper Mills*, 44 F. 2d 803 (3d Cir. 1930), cert. den. 283 U. S. 836 (1931).

There is no evidence that Stearns and Besser Co. were doing anything more than thus protecting themselves. Since they would have been free to buy or secure licenses under any future Gelbman-Andrus patents at some future date, there is no reason why they should not bargain for them in advance as part of the original.

Transparent-Wrap Machine Corp. v. *Stokes & Smith Co.*, 329 U. S. 637 at 642 (1947);
United States v. *Bell Telephone Company*, 167 U. S. 224 at 249-250 (1897).

Since the parties were within their rights in granting and receiving a dual exclusive license which covered for a limited period improvements and future inventions in the same field, it is respectfully submitted that the finding that it was illegal and a combination or conspiracy in restraint of trade, as well as a step in the appellants' attempt to monopolize, is clearly erroneous.

POINT III

Appellants' efforts to prevent the infringement of their patent rights did not violate either § 1 or § 2 of the Sherman Act.

The 1942 patent license agreement made the enforcement of the Gelbman-Andrus patents the proper and lawful concern of all of the defendants. Appellants had, and still have, a *bona fide* belief in the validity of all patents which they own or under which they are licensed. The decision of the trial court upholding the validity of the Scott and certain of the Gelbman patents establishes beyond question the reasonableness of that belief (see *Andrus* v. *Whitman*, 93 F. Supp. 383). The subsequent reversal of that decision (as to which a petition for certiorari is in preparation) does not impair the reasonableness of the belief, or the good faith of defendants and their counsel in entertaining it. As the government concedes, the validity of the patents is not in issue.

The patents, if valid, were being widely infringed (see pages 15-19, *supra*). The owner or licensee of a patent undoubtedly is entitled to protect his rights against acts which he believes to infringe. During the trial, the judge recognized this (R. 558-60). Whatever else may be said of the early case of *Rubber Tire Wheel Co.* v. *Milwaukee Rubber Co.*, 154 Fed. 358 (7th Cir., 1907), no decision has yet impaired its succinct statement that "the public was not entitled to profit by competition among infringers" (p. 364). There was no impropriety in the joint nature of the enforcement attempted by Stearns and Besser Co., and the fact that the license agreement provided for mutual reimbursement or contributions between the interested parties did not make such efforts illegal.

See *Morny* v. *Western Union Telegraph Co.*, 40 F. Supp. 193 (S. D. N. Y., 1940);
Davis v. *A. H. Reid Creamery & Dairy Supply Co.*, 187 Fed. 157, 158-159 (C. C. Pa., 1911), aff'd 195 Fed. 80 (3d Cir., 1912).

The years 1945-1948 were years in which an abnormal post-war boom, designed to catch up with war shortages, gave tempting promise of rich rewards to those prepared to risk infringement (see pages 19-20, *supra*). Against the piracy of their patent rights, the defendants countered with efforts to enforce their patents. "It is the experience of the world that the utility of an invention entices to its infringement, but it would be a perversion of things to facilitate the wrong by a sacrifice of the [patent] right in revulsion from the restraint which the [patent] right imposes."

> *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32 at 57 (1918).

The efforts followed a logical sequence which is consistent only with good faith.

First came investigation. Every charge of infringement rested on inspections or equivalent investigation (see pages 21-23, *supra*). Clearly this was not illegal. The trial court itself recognized the propriety of inspections, his only criticism being that "there were two or three instances where suit was threatened involving machines that agents of defendants had never even seen" (R. 1024). The fact statement reveals that this finding is clearly wrong.

Next came notices of infringement. The trial court described them as "recklessly made threats of suit, illegal under" three cited cases:

(1) In *Maytag Co.* v. *Meadows Mfg. Co.*, 35 F. 2d, 403 (7th Cir. 1929), Maytag had no patents: obviously the threat of infringement actions by representatives of a company that had no patents was reckless and subject to equitable relief. The case was for unfair competition, did not mention the antitrust law, and has no relevance to the issues here.

(2) *Dittgen* v. *Racine Paper Goods Co.*, 164 Fed. 85 (C. C. Wisc. 1905), is also inapposite. That also was an equity action charging unfair competition, and again

the Sherman Act was not involved. Plaintiff and defendant were the only companies making paper cigar pouches. Plaintiff for 20 years has made such pouches, for the last 5 years under patent. The defendant, fully informed of this, had engaged in a widespread propaganda campaign through instructions to salesmen, a "large number of letters," and contact with "a multitude of witnesses," charging infringement of its patents. Not only had defendant failed to sue: it had ignored plaintiff's request that it sue and his offer to accept process. Properly the court concluded that "all charges of infringement against complainant, were falsely and maliciously made" (164 Fed. at 88).

Contrast the facts here, where infringement is virtually conceded if the patents are valid. The notices of infringement were directed almost exclusively to manufacturers. In January, 1947, an action was brought against Darden and settled at his instance. Shortly afterward an action was started against Milewski and litigated through the district court and the court of appeals, and is yet not finally determined. It is not required that a patent owner file a multitude of suits: that in itself can be an abuse, as noted in the *Dittgen* case, p. 89, citing *Commercial Acetylene Co.* v. *Avery Co.*, 152 Fed. 642 (C. C. Wisc., 1906). As stated in *H. W. Johns-Manville Co.* v. *Lovell-McConnell Mfg. Co.*, 212 Fed. 923 at 925 (2d Cir., 1914):

> "It is well settled that the owner of a patent is under no obligation to prosecute every supposed infringer simultaneously; it is entirely consistent with good faith on his part to wait until the decision in a test case has determined the validity and scope of his patent."

Here the defendants proceeded with promptness to follow the charges with test cases: there was no impropriety in this.

There is no evidence of a reckless campaign against prospective customers. There is not a single letter or other writing from Besser Co. or Besser to any prospective customers, referring to infringements. The admissible evi-

dence (see pages 24-27, *supra*) shows that the patent problem was mentioned to only four block machine users. Three of the four were interested in machines which were made by Darden or Milewski, both of whom were defendants in test cases. In no instance did the passing reference to the patent situation affect the user's decision as to the type of machine he bought. This falls far short of the type of propaganda campaign which in the *Ditfgen* case was condemned as false and malicious.

(3) *United States* v. *Patterson*, 205 Fed. 292 (S. D. Ohio, 1913), has no relevance whatever. It was a ruling on evidence. There is no mention in the case of "recklessly made threats of suit," the point on which it is cited below. The court held, on the contrary, that the defendants could show that a competitor knew of the patents and was advised of its infringement, as explanatory of its retiring from business. This holding was approved, but the case was reversed on other grounds, in *Patterson* v. *United States*, 222 Fed. 599 (6th Cir., 1915), cert. den. 238 U. S. 635 (1915).

That a patentee who believes in good faith that his patents are valid and infringed is entitled to notify the infringers of the illegality of their activities will hardly be questioned. Here, as in *Oil Conservation Engineering Co.* v. *Brooks E. Co.*, 52 F. 2d 783 at 785 (6th Cir., 1931):

> ". . . . the situation was the not uncommon one where the older manufacturer has patents which seem to cover the competitive article. The patents are presumedly valid. Litigation is expensive and to be avoided, if possible. Notices to the competitor that he is infringing, and perhaps to the manufacturer for the competitor, and to a limited number of his chief customers, are the normal procedure and not to be condemned, when characterized by good faith."

The fact that suits for infringement may interfere with the business of the infringer is not a violation of the Sherman Act.

Morny v. *Western Union Telegraph Co.*, 40 F. Supp. 193 (S. D. N. Y., 1940).

Publicity given to past or pending infringement actions likewise does not violate the Act.

> *International Visible Systems Corp.* v. *Remington-Rand*, 65 F. 2d 540 (6th Cir., 1933), cert. den. 296 U. S. 618 (1935).

This Court has aptly said:

> "Patents would be of little value if infringers of them could not be notified of the consequences of infringement or proceeded against in the courts. Such action considered by itself cannot be said to be illegal. Patent rights, it is true, may be asserted in malicious prosecutions as other rights, or asserted rights, may be. But this is not an action for malicious prosecution. It is an action under the Sherman Anti-Trust Act for the violation of the provisions of that act, seeking treble damages."
>
> *Virtue* v. *Creamery Package Co.*, 227 U. S. 8 at 37-8 (1913).

After notices of infringement came litigation. Actions were brought against customers of Darden and Milewski. There is no evidence and no finding that these actions were malicious. The Darden case was settled at his instance, with the advice and cooperation of his counsel. The Milewski case was won in the trial court, reversed on appeal, and is not yet closed. The institution of such actions was not a violation of the Sherman Act.

> *Morny* v. *Western Union Telegraph Co.*, 40 F. Supp. 193 (S. D. N. Y., 1940).

Prior to or alternative to litigation there were negotiations.

The trial court condemned the efforts to compel patent respect as part of "a deliberate campaign to wipe out all remaining competition" (R. 1023).

In elaboration he mentioned claimed efforts to buy out Olsen and Lith-I-Bar, the purchase of a patent of Bernard Flam, and offers of jobs to Olsen and the Milewskis. These will be treated in Point IV below.

The Court then mentioned seven names as men who "felt the persuasion of the Besser arguments": Warren, Milewski, Darden, Samuelson, Hanneman, Lagarde, and Bernard Flam (R. 1023). It found that "practically all of these men [1] got out of their own business, [2] generally impelled by threats of lawsuits, [3] being given a job, [4] pressure on customers, [5] or all three, and [6] usually Besser picked up their then patents with a mortgage on the fruits of their genius for years to come" (R. 1023). The bracketed numbers are inserted for convenient reference. Bernard Flam will be discussed later.

The evidence with respect to each of these individuals is summarized in the statement of facts, *supra*, pages 21-24, 27-33. This summary reveals:

[1] Warren, Samuelson and Lagarde did *not* get out of business. They never built machines for sale. Milewski and Darden did *not* get out of business: the former continued manufacture while contesting the patent litigation, Darden had an unexpired license under the Gelbman patents, and obviously could continue indefinitely to manufacture non-infringing machines, as Appley was doing in the same geographic area. Hanneman still had a license and if he was out of business it is not surprizing in view of his lack of knowledge of the industry and his inability to deliver an operating machine. Winn, not mentioned by the judge, was out of business because, as he himself said, there was no longer a demand for the type of machine on which he had his temporary post-war boom, and successors were continuing his business.

[2] It is not disputed that most of these men were notified of their infringements. Besser stated that his company "was always careful not to threaten anybody" (R. 942). The trial court commented: "I don't mean 'threaten' in a way that is wrong. I mean 'advise'." (R. 942). If the court used "threaten" in its opinion, as it did at the trial, as synonymous with "advise," then there is no dispute that most of them were advised of their infringement.

[3] Not one of the persons named in the opinion was "given a job."

[4] The admissible evidence disproves any contention that "pressure on customers" caused anyone to get out of business. The only "customers" to whom patents were mentioned before they had purchased machines were those of Olsen and Milewski, both of whom were manufacturing on the date of the hearing on relief (see Olsen testimony, R. 1052, Milewski R. 1049).

[5] In no instance could "all three" be supported by the record.

[6] Besser Co. acquired no patents from Warren, Milewski, Darden, Samuelson or Hanneman. Besser Co. did acquire rights under a patent application of Lagarde, in connection with an agreement for cooperative development activities. This agreement is summarized at pages 31-32, *supra*. Lagarde did not testify, and there was no other evidence about the circumstances. Consequently, there is no basis whatsoever for condemning the contract. And certainly an agreement with one of six named individuals hardly warrants the court's characterization as "usual."

The trial court then stated that Besser "attempted to limit Appley" to two-at-a-time cored pallet machines (R. 1023). It is undisputed that Appley never made any other type of machine. In the three years 1946-1948 he made 1750 such machines. There is no evidence that he ever indicated an interest in shifting his operations to a different type of machine. It is undisputed that all he asked was a license for use of the patents on the type of machines he was making. Obviously, the grant of a license covering use of the patents on one type of product "does not mean that the licensee is prohibited from manufacturing or selling other apparatus."

Automatic Radio Co. v. *Hazeltine*, 339 U. S. 827 at 831 (1950).

Thus Besser Co. was condemned for its willingness to grant Appley what he asked.

The court then quoted from a Besser letter to Gelbman of December 21, 1946 that "about the worst thing that could happen to this industry would be to have it wide open so that anybody and everybody could make machines and thus have no control on quality and no opportunity for anyone to do anything very important" (R. 1024). This letter referred to the infringement action against Darden and in fairness must be read in context.

The occasion for the letter was the reimbursement of Gelbman for infringement suit expenses and the approval of proposed advertisements notifying manufacturers of the patent rights of Gelbman and Andrus. That Besser's interest was limited to protection of his right by legitimate means is evident from the concluding paragraph, not quoted by the trial court:

> "We will support you in every way on this Louie [Gelbman] and we will work together and use *every proper means* to take care of this situation" (Ex. 71, R. 1271, offered R. 814).

To construe the letter as evidencing an intent to crush legitimate competition is to construct a proclivity to wrongdoing from a reasonable objection to patent infringement.

The opinion then commented that "there were other letters that denote Besser's objective to accomplish the elimination of almost every competitor" (R. 1024). A specific finding would have been helpful. All relevant exhibits have been printed. The remaining letters from Besser or Besser Co. are exhibits 7 (R. 1187, 66), 16 (R. 1213, 801), 19 (R. 1215, 813-4), 32 (R. 1252, 805-6), 38 (R. 1255, 806), 56 (R. 1263, 814), 63 (R. 1266, 808), 79 (R. 1277, 810-1), 95 (R. 1291, 815-6), 97 (R. 1294, 812), 98 (R. 1295, 812), and 135 (R. 1349, 368). Most of them are referred to in this brief and they will not be summarized here. Not one of these exhibits supplies any support for the finding that they "denote" an "objective to accomplish the elimination of

almost every competitor." That finding, if such it be, is clearly erroneous.

This concludes the review of those portions of the opinion which condemned the efforts of appellants to protect their patent rights. It is respectfully submitted that there is clear error in the finding and the conclusion that because of these efforts appellants were guilty of monopolization, attempted monopoly, or restraint of trade, in violation of the Sherman Act.

POINT IV

The residual findings do not support a conclusion that appellants violated the Sherman Act by monopolization or by combination or conspiracy.

Appellants contend that some, though not all, of the remaining findings of the trial court are clearly erroneous. Those not so challenged are believed to result from an incorrect appraisal of the evidence, and would be contested *de novo* if arising in any other action. But in view of the limitations of appellate review, findings which seem to have some support in the evidence will be assumed *arguendo* not to be clearly erroneous. Appellants maintain, however, that such of the residual findings as are not clearly erroneous do not support a conclusion of an unlawful combination or conspiracy or an unlawful monopolization.

A. Findings which are clearly erroneous.

(1) Stephen Flam and Stephen Flam, Inc.

The trial court found illegal the 1946 acquisition by Besser Co. of certain patents of Stephen Flam and certain assets of Stephen Flam, Inc. The trial court declared:

> "The reasonable deduction is that Flam was giving Besser too much competition in the nine states reserved to it. Flam was then fourth in dollar sales in the United States so Besser decided to remove the fly in the ointment." (R. 1019-20)

This finding, we submit, is clearly erroneous.

There is no evidence about these transactions except the contracts themselves (see pages 33-34, *supra*). Unless the purchase of the patents of Flam individually, and the purchase of the assets of Flam, Inc., are illegal *per se*, the finding cannot stand.

Specifically, there is no evidence of the nature of the competition of "Flam" and Besser "in the nine states" or elsewhere. There is no evidence that Besser considered Flam a "fly in the ointment" or decided to remove him. There are no letters or memoranda, no hints of predatory practices, in short, there is nothing save the agreements. Stephen Flam was not called as a witness. No witness was asked a question about the contracts.

We suggest some of the questions unanswered on this record: Who was Stephen Flam? What was his career and experience? What was his relation to the company which bore his name? What was his age and financial condition? Was he a mature and successful business man who chose at the peak of a post-war boom to liquidate an investment and retire to the less onerous but lucrative field of consultation? Who proposed the 1946 transactions and what was their motive? What motivated the directors of Flam, Inc., to approve the transactions? What, if any, effect did the transactions have on Besser Co.'s competitive position? What, if any, effect did they have on the positions of competitors? On these and all other crucial circumstances the record is silent.

Without more, there is nothing illegal *per se* in the acquisition of the stock or assets of a competitor,

United States v. *Columbia Steel Co.*, 334 U. S. 495 at 508, 519, 531 (1948);
International Shoe Co. v. *F. T. C.*, 280 U. S. 291, 297-298 (1930);
cf. United States v. *Associated Press*, 52 F. Supp. 362, 374 (S. D. N. Y., 1943), aff'd 326 U. S. 1 (1945);

whether or not accompanied by an agreement not to compete,

> *Cincinnati Packet Company* v. *Bay*, 200 U. S. 179, 185 (1906);

or a contract to assign future patents to the purchaser,

> *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32 at 52-54 (1918).

If such transactions are unlawful, they become so because of surrounding circumstances shown in the evidence. Here the agreements stand alone, without the production of any facts which taint them. In this situation, they fail to show any illegality.

(2) Bernard Flam agreement.

The trial court stated that ". . . Bernard Flam, son of Stephen . . . felt the persuasion of the Besser arguments . . ." (R. 1023)

If this be treated as a finding of illegality, it is, we submit, clearly erroneous.

What "arguments" did Besser make? We do not know. Did Flam "feel" their "persuasiveness"? We are not told. Again, we have nothing save the contract (Ex. 99, R. 1296, 816). Such questions as are listed with respect to Stephen are likewise unanswered as to Bernard. Bernard Flam did not testify, nor did any other witness mention his name.

Bernard Flam had two patent applications, one already filed. These he sold. What they were, what effect they might have on the technology of block making, what impact they might have on competition—such inquiries are left wholly unanswered. Surely there is no illegality *per se* in the purchase of these applications.

(3) Millard Warren transaction.

The court found that Warren "yielded to pressure, threats, and being offered 'pay' without leaving his own business" (R. 1023).

This finding also, we submit, is clearly erroneous.

Warren never manufactured block machinery for sale. He made blocks (R. 529), and for his own use in his own plants, he built three machines known as Warren 800's (R. 541). Later he licensed Darden to make these machines (R. 530). Darden, it will be recalled, was sued by Gelbman for infringement and the controversy was settled in February 1947 by a license (see *supra*, page 29). Shortly thereafter, Darden, Besser and Stark, patent attorney for Besser Co., met with Warren in his home city to discuss the claim that the Warren machines infringed the Gelbman patents (R. 531-2). Warren claims that about two months later Stark, while still discussing the infringement, suggested that there was a possibility that "we might work together with Besser and I would receive a nominal fee as a salary from the Besser Company, not to go to work for them but to stay where I was, and we were not to build any more machines" (R. 533-4). Warren described this as a "suggestion" (R. 535), and his reply was that he was not interested (R. 535).

It is clear from Warren's testimony that he did not "yield" to anything. He continued in his business as in the past.

B. Findings not challenged as "clearly erroneous."

The trial court made findings adverse to appellants with respect to the acquisition by Besser Co. of a large block of the stock of Stearns Co. There is no dispute that this stock was purchased in 1948. The relevant facts are set out in the summary (*supra*, pages 34-37) and need not be elaborated.

The trial court also found that approaches were made to Olsen of Gocorp and Milewski of Lith-I-Bar suggesting that Besser Co. might buy their companies and employ them (R. 1023). In addition, as noted above, Warren testified to a suggestion of possible employment. Each of these witnesses rejected such suggestions as were made, and each continued his prior activities.

These findings give no support to a conclusion either of monopolization or conspiracy. At most, they support a conclusion of an attempt to monopolize. The provisions of the judgment (R. 1063) which are not attacked on this appeal afford full and appropriate relief for any such supportable conclusion.

Paragraph IV of the judgment requires that appellants divest themselves of the Stearns' stock. This provision is not questioned. Though it is undisputed that neither Besser nor Besser Co. has attempted to influence the management of Stearns, appellants concede that the stock holdings are sufficient to give them a strong voice if they elect to assert it. The appellants have sought to dispose of this stock, and their sole assignment upon this appeal is as to the length of time allowed for such divestiture. The mechanics prescribed by the trial court, which would have required divestiture in 78 days from the date of judgment, are believed unduly harsh, but a provision for terminating the power to vote the stock, while allowing time for the orderly liquidation of the investment, will be suggested as a method of dissipating the situation.

Paragraph V(A) of the judgment enjoins the appellants from acquiring, directly or indirectly, in any manner, the business or assets of any person engaged in any part of the concrete block machine business, except after leave of court granted at a hearing of which the Attorney General will have notice, and an affirmative showing that the proposed acquisition will not substantially lessen competition. This provision is not questioned.

Paragraph V(B) enjoins the appellants from having any officer, director, agent, or employee serve in any of these capacities with any other person manufacturing block machines. This provision is not questioned.

Paragraph IX of the judgment enjoins contracts which would prevent another from engaging in the business. The intent of this provision will not be questioned, though it will be urged that as presently worded it is too broad in its

scope. It will not be suggested that it be deleted in its entirety. A modification will be proposed which would allow lawful ancillary covenants under proper safeguards, yet have the injunction effective to bar any unlawful agreements.

Paragraph X of the decree enjoins interference with other manufacturers or their suppliers. The intent of this provision will not be questioned, but it will be suggested that as worded it is too vague and an appropriate modification will be suggested.

Paragraph XI grants wide powers of inspection to the Department. This is not questioned.

Paragraph XII is the usual provision retaining jurisdiction in the trial court. This is not questioned.

A judgment containing the above provisions, with the two modifications proposed, will fully protect the public interest and prevent any future acts which could be open to criticism.

POINT V

The judgment of the trial court erroneously imposes provisions of a punitive and discriminatory nature, inappropriate to the case proved.

A. Applicable principles.

The appropriateness of a given decree—whether it is challenged by the government as inadequate (as in *United States* v. *United States Gypsum Co.*, 340 U. S. 76 (1950) or by the defendants as punitive and excessive (as in *Hartford-Empire Co.* v. *United States*, 323 U. S. 386 (1945))—is a proper item for review in this Court. As stated in the *Gypsum* case:

> ". . . Notwithstanding our adherence to trial court responsibility in the molding of a decree as the wisest practice and the most productive of good results, we

> have never treated that power as one of discretion, subject only to reversal for gross abuse. Rather we have felt an obligation to intervene in this most significant phase of the case when we concluded there were inappropriate provisions in the decree" (340 U. S. at 89).

And in examining into the appropriateness of a decree, it is pertinent to consider the nature of the misconduct found. This was made clear in the *Gypsum* case:

> "... Acts in [conscious] disregard of law call for repression by sterner measures than where the steps could reasonably have been thought permissible" (340 U. S. at 89-90).

For this reason the facts have been summarized to demonstrate that here substantially every act of Besser Co. and Besser was either lawful or "could reasonably have been thought permissible." It is submitted that the facts negative any conclusion that the appellants' acts were motivated by the inherent viciousness which is implied in the almost emotional language of the opinion below.

The considerations pertinent to a defendant's contention that the decree is inappropriate are summarized in *Hartford-Empire Co.* v. *United States*, 323 U. S. 386 at 409 (1945):

> "The applicable principles are not doubtful. The Sherman Act provides criminal penalties for its violation, and authorizes the recovery of a penal sum in addition to damages in a civil suit by one injured by violation. It also authorizes an injunction to prevent continuing violations by those acting contrary to its proscriptions. The present suit is in the last named category and we may not impose penalties in the guise of preventing future violations. This is not to say that a decree need deal only with the exact type of acts found to have been committed or that the court should not, in framing its decree, resolve all doubts in favor of the Government, or may not prohibit acts which in another setting would be unobjectionable. But, even so, *the court may not create, as to the defendants, new duties, prescrip-*

tion of which is the function of Congress, or place the defendants, for the future, 'in a different class than other people,' as the government has suggested. The decree must not be 'so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt'; enjoin 'all possible breaches of the law'; or cause the defendants hereafter not 'to be under the protection of the law of the land'" (409-10, emphasis added).

More recently the Court took occasion to underline the non-punitive aspects of antitrust relief:

> "Assuming, as is justified, that violation of the Sherman Act in this case has consisted primarily of the misuse of patent rights placing restraint upon interstate and foreign commerce, that conduct is not before this Court for punishment. It is brought before this Court in order to secure an order for its immediate discontinuance and for its future prevention . . ."
>
> *United States* v. *National Lead Co.*, 332 U. S. 319 at 348 (1947).

The judgment provisions which, it is submitted, violate these fundamental principles may be divided into three categories: the lease provisions; the patent provisions; and miscellaneous provisions.

B. Lease provisions.

The judgment directed Besser Co. to give notice within 30 days to each lessee of one of its machines that such lessee could elect, at any time prior to October 1, 1952, either: (1) to terminate the lease at any time prior to January 1, 1953; or (2) to continue under the lease; or (3) to purchase the machine or machines leased and the accessory equipment used "as mutually satisfactory to the parties concerned" (R. 1068). This provision was stayed pending appeal (R. 1176).

We submit that the above provision is erroneous and improper in that (1) the lease program itself is a lawful

form of distribution and the record fails to show that in employing it the appellant violated any law; (2) the judgment provision impairing existing leases, because of its impact upon the business operations and financial structure of the company, is arbitrary, punitive and confiscatory; and (3) this Court has previously condemned analogous provisions.

(1) The lease program is a lawful method of distribution.

Initially, let us examine the record and the opinion to determine what the Court found to be wrong.

We discover first a total failure of proof. The government alleged, in its only reference to these leases, that the lease plan was for the purpose of controlling used machines and preventing their being marketed in competition with new machines (R. 9). There is no evidence pertinent to this allegation, and no finding sustained it. Used machines were not mentioned in the trial or in the opinion. On the contrary, the trial court concluded that the lease plan "of itself is not to be condemned."

The lease program applies only to the front-feed Besser model, while the other models are sold (see page 38, *supra*). A prospective customer thus has a wide choice. He can buy a machine from any of Besser Co.'s forty-odd competitors. He can buy a Besser machine with rear or side feed. Or he may lease a Besser machine with front feed. There is no compulsion on him to choose any one of these options. As this Court said in *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32 at 57 (1918):

> "The old instrumentalities exist for all who are content with them and who care not for the better ones which inventive genius creates."

In the sole reference to the leases in the opinion, the trial court ignored the fact that the policy was limited to one model. He said that distribution by lease "adds to the realization of a complete monopoly" (R. 1025). There is no evidence to sustain this statement. The reasoning which

purports to bolster it is found in one short paragraph (R. 1025):

The trial court pointed out that these large units "run as high as $50,000 each" and "there will be no stampede to buy" since "it is far beyond the reach of the small manufacturer." It seems obvious that a "small manufacturer" will not be interested in a machine that turns out 30,000 blocks each 40-hour week. At the average sales price of 17¢ per block (R. 1028), that reflects an annual production of over a quarter of a million dollars.

The Court continued: "So Besser began the leasing system paid for at the capacity of the machine at 1¢ a block" (R. 1025). If the criticism here is that a local operator will lease a Besser machine because it suits his business situation better not to tie up $30,000 to $50,000 in machinery, where is the illegality in thus adapting distribution to the customer's needs?

The Court went on: "This is possibly as economical as these blocks can be made by hand or by other automatics and the ultimate effect on small companies can easily be visualized" (R. 1025). Apparently the meaning of this elliptic statement is that in a given competitive market, with a demand capable of absorbing 50,000 or more blocks a month, a local operator leasing a Besser machine can produce blocks as cheaply as another local operator using hand or automatic machines which he owns. Is there any requirement in the law that Besser must produce machines on which blocks can not be made so economically? If it means that a leased Besser machine produces blocks cheaper than other machines, is there any violation in Besser's providing a better machine with which a customer can succeed in his own competitive area?

Thus the court concedes that the leases are not illegal, yet strikes them down because they provide a local operator, who has limited capital, access to a more efficient machine with a minimum investment, thus permitting him to compete more successfully in his local market.

(2) The decree provisions impairing existing leases are punitive and confiscatory.

As early as December 31, 1948, the 70 machines on lease, with a depreciated capital cost of $1,519,573.79, represented over 21% of Besser Co.'s total assets (Ex. 40, R. 1250, 806). Assuming minimum rentals, these leases involved some $30,000 monthly income. These lease rentals, with other assets, were pledged as collateral for outstanding bank loans of $1,150,000 (Ex. 40, R. 1250, 806).

By the judgment striking down all existing leases, Besser Co. was to be thrown into chaos for nearly 18 months, from its entry on April 12, 1951 to the expiration of the lessee's election date October 1, 1952. How many lessees would elect to cancel? When would they give their notices and when would they be effective? What receipts would be available to maintain current operations and service maturing bank loans? Of the (indefinite) number cancelling, how many would insist on purchasing? Was there a right to purchase? The judgment said this was one option "as mutually satisfactory to the parties concerned," but the trial judge was vehement that the judgment did not compel Besser to sell (R. 1082, 1084-5). How many new machines should be produced, and how many leased ones would come back to inventory? These and many other questions, decisive in material purchases, production scheduling, employment policies, sales effort, and financial management, were to be unanswered and unanswerable for 18 months.

To uncertainty there was added arbitrariness.

The trial court did not condemn the lease system or prohibit its continuance: only the leases made on or prior to April 12, 1951 were encumbered with the option of cancellation. Nothing in the record accords any such magic to the date April 12, 1951. The leasing system in itself is a proper and appropriate method of distribution. If, because it makes available to the customer a highly efficient machine with a minimum cash outlay, it brings to Besser Co. a larger demand, that is no more than the proper reward in a com-

petitive market for business initiative. No basis exists in the record, the findings, or the conclusions for striking down the leases which were in effect on April 12, 1951.

(3) This Court has previously condemned analogous decree provisions.

In *Hartford-Empire Co.* v. *United States*, 323 U. S. 386 (1945), this Court ordered deleted from the trial court's judgment a provision of similar import. This becomes especially significant when one considers the violations found in the *Hartford-Empire* case, greatly overshadowing any impropriety of these appellants. Indeed, by its huge aggregation of patents, Hartford had made it "impossible" to get some of the basic machines of the industry except on lease (see *United States* v. *Hartford-Empire Co.*, 46 F. Supp. 541 at 552, 613, 618 (N. D. Ohio, 1942)). The court, admitting that a leasing system might be perfectly legal (*id.*, at page 621), ordered that all future distribution of machinery be by sale at a reasonable price and required the cancellation of all existing leases and an offer of sale to all existing lessees (*ibid*).

This Court described the Hartford leasing system as follows (323 U. S. at 409):

> "The licensing system of Hartford remained that of leasing machinery built for it embodying the patented inventions. Rentals consisted of standard royalties on production. Under this system Hartford rendered a service in the repair, maintenance, and protection of the machines, which is valuable, if not essential to the users. This was the status with which the court had to deal."

This Court pointed out that leasing machines was an appropriate and legal method of distribution (see *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32, 57-58, 64-65 (1918); *International Salt Co.* v. *United States*, 332 U. S. 392, 398 (1947); *International Machines Corp.* v. *United States*, 298 U. S. 131 (1936)); that the Government

had not attacked the validity of Hartford's patents[6] nor the reasonableness of the royalties under the leases; that the leases were now unrestricted in any way; and that any remaining offensive provisions could be cancelled (see 323 U. S., at 412-414).

This Court then held that the provisions of the decree were confiscatory and went "beyond what is required to dissolve the combination and prevent future combinations of like character" (323 U. S. at 414).

The Court thereupon ordered the offending paragraphs eliminated (323 U. S. at 419).

Thus, in a case exhibiting absolute control by one concern over an entire industry, this Court refused to require the cancellation of existing leases with an offer of a new one or a right to buy the leased machines. In the instant case such a provision is even less defensible. The leases contained no restrictive clauses such as have previously been invalidated [cf. *International Salt Co.* v. *United States*, 332 U. S. 392 (1947); *International Machines Corp.* v. *United States*, 298 U. S. 131 (1936); *United Shoe Machinery Co.* v. *United States*, 258 U. S. 451, 460-462 (1922); see 38 Stat. 731, 15 U. S. C. §14]. There is no indication that Besser lessees were forced to lease a Besser machine rather than purchase a different Besser model or the machine of a competitor. As a legal business arrangement, Besser Company is most assuredly entitled to continue its leasing program (see *Hartford-Empire Co.* v. *United States*, 323 U. S. at 420).

Regardless of the government's desire to impose this condition on appellants as a penalty for antitrust violations, the courts have so far refused to sanction it on the ground that leasing programs are lawful and that a decree should not go beyond what Congress has provided in the way of remedies. As this Court said in similar circum-

[6] Similarly, the government concedes that the validity of patents is not in issue on this appeal.

stances in *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, at 728-729 (1944):

> "Congress has been liberal in enacting remedies to enforce the anti-monopoly statutes. But in no instance has it indicated an intention to interfere with ordinary commercial practices."

The provision requiring appellant Besser Company to grant the lessees an option to withdraw and to buy the leased machines is an unwarranted and inappropriate provision in the final judgment and should be stricken.

C. Compulsory licensing of present and future patents.

Appellants assign error to the provision of the final judgment requiring them and two of their co-defendants (*inexplicably omitting Stearns*) "to grant to any applicant therefor a non-exclusive license to make, use and vend concrete block making machinery under any, some or all patents and patent applications pertaining to concrete block making machinery now owned or controlled by the defendant [sic], or which are issued or applied for within ten years from the entry of this final judgment" (R. 1066). Going even further, the provision enjoins defendants (again with the omission of Stearns) "from including any restrictions or condition whatsoever in any license or sub-license granted by or pursuant to the provisions" of the judgment (R. 1066-7). Neither of these requirements is necessary or appropriate in this case.

(1) Present patents.

The addition of compulsory licensing of patents to the judicial armory as an appropriate weapon against Sherman Act violations stems from *Hartford-Empire Co.* v. *United States*, 323 U. S. 386 (1945). In its Memorandum on Burdens, Proof and Scope filed in that case in the district court on November 4, 1946 the government said:

> "As far as is known, there has been no previous proceeding determining the value of (i.e., reasonable

> royalty for) a group of patents *owned by a company which has been adjudicated in an antitrust suit to hold an illegal patent monopoly* (italics added).

The compulsory licensing of patents is an extreme and drastic remedy for antitrust violations, as is shown by the fact that it has been sanctioned by this Court only in cases where huge corporate aggregations had been involved in patent monopolization implemented by long standing and intricate patent aggregations, patent pooling and cross-licensing, price-fixing and other instruments of control, none of which facts is found in this case.

Hartford-Empire Co. v. *United States*, 323 U. S. 386 (1945);
United States v. *National Lead Co.*, 332 U. S. 319 (1947);
United States v. *United States Gypsum Co.*, 333 U. S. 364 (1948), 340 U. S. 76 (1950).

The *Hartford-Empire* case was the first. With twelve corporate and 101 individual defendants, "the gravamen of the case [was] that the defendants cooperated in obtaining and licensing patents covering glass making machinery, . . . limited and restricted the use of the patented machinery by a network of agreements, and . . . maintained prices for unpatented glassware" (323 U. S. at 392). "Hartford, with the technical and financial aid of others in the conspiracy, had acquired . . . more than 600 patents. These, with over 100 Corning controlled patents, over 60 Owens patents, over 70 Hazel patents, and some 12 Lynch patents, had been, by *cross-licensing agreements*, merged into a *pool* which effectually *controlled the industry*. This control was exercised to *allot production*. . . . The result was that *94%* of the glass containers manufactured in this country on feeders and formers were made on machinery licensed under the *pooled patents*" (323 U. S. at 400, italics added).

While sustaining compulsory licensing on the flagrant patent monopoly proven in the *Hartford-Empire* case, the

Court took pains to point out that Congress frequently had refused to adopt a system of compulsory licensing of patents, had rejected a proposal that antitrust violators be compelled to license at a reasonable royalty all future inventions, and had failed to act upon the recommendation of the Temporary National Economic Committee that it adopt such a system (see 323 U. S. at 417). No Congressional action has been taken on the subject since that decision.

Next came *United States* v. *National Lead Co.*, 332 U. S. 319 (1947), involving two major conspirators who controlled over *90%* of the composite titanium pigments and over *90%* of the pure TiO_2 made in the United States, who had achieved this *monopoly* by a *prolification of patents* in a new industry, who had *cross-licensed* each other under their patents, who had entered into *cartel arrangements to divide the world market,* who for years had *exchanged technical data,* and who by their patents had *controlled and regulated the sale* of titanium pigments and compounds in the United States and throughout the rest of the world. A decree ordering compulsory licenses of existing patents and future patents issued during the *five* years after the decree was sustained.

The harsh and discriminatory nature of the present decree is highlighted by the *National Lead* case. There both defendants were required to license; here Stearns, the original Gelbman licensee and consistently the most aggressive defendant in seeking to enforce the patents, is found equal in guilt with Besser Co. but is exempted from the requirement to license even its present patents. Stearns, for example, has an exclusive license under Gelbman sintering process patents (R. 874). Moreover, the *National Lead* case provided that the defendants compelled to license might make the grant conditioned upon the reciprocal grant of licenses at reasonable royalties on patents owned by the applicant: here the decree forfeits the research and creative ability of Besser Co. and Besser to all their present forty-odd competitors, while leaving every applicant free to block

Besser Co. and Besser from access to any patents of the applicant:

The latest case involving compulsory licenses was the second *United States* v. *United States Gypsum Co.*, 340 U. S. 76 (1950). The nature of the wrongdoing is revealed in the first appeal, 333 U. S. 364 (1948). The defendants had conspired to establish an *industry-wide control* through some *fifty patents and seven applications* of United States Gypsum, with the objective and result of *price fixing, elimination of the production of unpatented products, control of customer selection, the terms of sale, the method of sales* through commission agents, and *the methods of delivery*, all of which were *policed* through a special subsidiary.

In the *Gypsum* case the trial court ordered the compulsory licensing of *existing* patents at reasonable royalties, but declined to grant the government's request for licensing of future patents (see 340 U. S. at 100). This Court, in remanding the cause, sustained the government's request, but left to the trial court the decision as to the period that such right to license new patents should embrace.

This exhausts the cases in which this Court has considered decrees in litigated actions compelling the defendants to grant licenses under existing patents. Consent decree provisions of this character are of little significance, for they represent the outcome of bargaining by defendants whose desire or necessity to avoid the burdensome expense of the average antitrust case has been recognized as an important lever in forcing, without trial, the discontinuance of activities condemned by the Antitrust Division.

ARNOLD, *Bottlenecks of Business* (1940) 210.

None of the litigated cases deals with the rationale behind the assumption of judicial power to order compulsory patent licensing at reasonable royalties. However, the facts of the decisions and the opinions of the district courts make plain that this remedy is applied only to flagrant monopolies acquired by misuse of patents.

In the instant case there is no finding of a patent monopoly. The record shows no aggregation of controlling patents, no patent pooling, no cross-licensing, no price-fixing, no allocation of markets, no industry-wide regulation. Appellants have used their patents in lawful ways for the benefit of their own corporate business and without regard to industry control. No evidence was adduced which indicated, far less proved, that the patents owned by appellants had been improperly acquired or abused in any way. Appellants and their co-defendants have a *bona fide* belief in the validity of the 1942 patent license agreement, and their actions in attempting to prevent infringement of the patents covered therein were based upon this belief.

This is the first case in which the compulsory licensing of patents has been ordered when the only "wrong" of the defendants—if wrong it was—consisted merely in an overzealous effort to prevent infringement of their patent rights. If compulsory licensing is an appropriate remedy on such a record, patent owners are put at their peril when they seek to enforce the rights they believe in good faith are conferred by their patents. If their patents are invalid, compulsory licensing is of no significance. If they are valid, and are subjected to widespread infringement, efforts to enforce them become proof of an unlawful combination or conspiracy, to be punished by forfeiting their patent monopoly to compulsory licensing. Thus a patent owner loses his statutory monopoly: his effort to protect it becomes a ground for dedicating it to his competitors.

Even if it were assumed that the 1942 patent license was invalid, a provision cancelling it and requiring Gelbman and Andrus to grant non-exclusive licenses would be sufficient to prevent future violation of the Antitrust Act. This was the relief outlined in the opinion (R. 1029). There is nothing in the opinion which suggests any reason why the compulsory licensing should be extended to Besser Co. and Besser. Obviously it was an afterthought.

This case bears no resemblance to the instances in which compulsory licensing of patents has been required

(see cases, *supra*, pages 95-97). As long as patents have not been used as a means to acquire a broader control than that granted in the patents, by cross-licensing or market allocations or price-fixing or tie-in sales, there is no excuse for such a drastic provision.

(2) Future patents.

The provision condemning to compulsory licensing all future patents of these appellants for the next ten years is equally indefensible. The net effect is to forfeit the inventive genius of Besser Co. and Besser for the next decade to the industry, while leaving Besser Co. and Besser powerless to secure reciprocal licenses under the developments of the defendant Stearns or any other competitor. For Besser individually, almost seventy years of age, this on ordinary life expectancy tables is a life sentence.

Appellants have been leaders in the industry since its inception, and it is to be expected that they will continue to be leaders in research and development which will result in advances in the art on which they will be entitled to patent protection. This provision as to future patents will hinder rather than encourage competitive research and industry development (cf. *United States* v. *National Lead Co.*, 332 U. S. at 359; *Hartford-Empire Co.* v. *United States*, 323 U. S. at 417-418).

Various provisions of the *Hartford* decree dealt with the acquisition and compulsory licensing of future patents (see *Hartford-Empire Co.* v. *United States*, *supra*, at pp. 417-418, 424, 430-431). In that case, the defendants used their patents to shut out all competitors from the industry unless they paid tribute to Hartford, and the latter used its patents to acquire other patents from its licensees and to "fence off" other threatening improvements. Therefore, some justification existed for preventing the acquisition of future patents unless they were made available to the industry which had been so effectively stifled by Hartford's ruthless patent control and might be so again (see *United States* v. *Hartford-Empire Co.*, 46 F. Supp. 541 at 619 (N. D. Ohio,

1942)). Nevertheless, this Court recognized that the patent owner was being deprived of its usual rights when it said (323 U. S., at 417):

> "Under paragraph 24(b) a defendant hereafter acquiring a patent cannot set the price for its use by others, elect to use it himself and refuse to license it, or to retain it and neither use nor license it. These are options patent owners have always enjoyed."

Thereafter, the Court decided that, as to future patents, the decree should be limited to those covering the basic machines through which the defendants had controlled the entire industry (see 323 U. S. at 417-418). Patents on ancillary processes or machines, analogous to the Besser Wellnitz patent, were to be left free of the compulsory licensing provision (*id.*, at p. 418). As to these latter, the decree was further modified to permit the defendants to retain these patents and refuse to license, or to license them with restrictions (*id.*, at p. 424; *cf. id.* at pp. 430-431). In the instant case, the decree reaches all future patents.

The unreasonable period of ten years is symptomatic of the arbitrariness of this provision. It permits anyone at any time for any reason to demand a license until the last potential patent expires sometime around 1978. Even the decree in the *National Lead* case, in the face of patent monopoly and cross-licensing, provided for such licensing only on patents issued within five years (see *United States* v. *National Lead Co.*, 332 U. S. at 348). In the *Gypsum* case, the relief requested by the government would have permitted the defendants after five years to seek elimination of the provision for licensing of future patents (340 U. S. at 93, 100-103). In *United States* v. *Imperial Chemical Industries*, 100 F. Supp. 504 (S. D. N. Y. 1951), involving an alleged world-wide conspiracy extending over many years, the government is requesting compulsory licensing only on future patents for five years, except in the nylon field where the request is for eight years. No reason exists, in the present case, why a ten year period should be imposed on appellants.

D. Miscellaneous.

In addition to the provisions of the final judgment discussed above, a number of provisions go beyond the extent of appropriate relief.

(1) Purporting to bind the "successors" and "assigns" of defendants.

Paragraph III of the judgment provides:

> "The provisions of this final judgment applicable to any defendant shall apply to such defendant, its subsidiaries, successors, assigns, and each of its officers, directors, agents, employees and any other person acting under, through or for such defendant." (R. 1064)

The scope of an injunctive order is prescribed by Rule 65(d) of the Federal Rules of Civil Procedure: an injunction

> ". . . is binding only upon the parties to the action, their officers, agents, servants, employees and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order. . . ."

The decree here departs from the prescription of the Rule. Certain of these deviations seem immaterial, but others are substantial.

The effort to make this judgment reach "successors" and "assigns" is improper. It clouds the right of each defendant to dispose of its or his property to third persons who are wholly unidentified and unidentifiable. It is in no sense dependent upon the existence of any combination or conspiracy or other improper conduct.

(2) Divestiture of Stearns stock within 80 days.

Paragraph IV of the judgment directed Besser Co. and Besser to divest themselves of all stock holdings and other interests, direct or indirect, in Stearns. This divestiture, ordered April 12, was to be consummated on or before July

1, 1951 (R. 1064). Thus a total of 79 days was granted to liquidate an investment of nearly $1,000,000 in the stock of an unlisted corporation.

Appellant Besser Co. does not assign as error the requirement that it divest itself of the Stearns stock. It limits its submission to the proposition that the period prescribed was so unreasonably short as to be confiscatory.

In *United States v. National Lead Co.*, 332 U. S. 319 at 363 (1947), the parties were given one year within which to formulate a plan of divestiture. In the *Hartford-Empire* case, 323 U. S. 386 (1945), individual defendants were given two years within which to divest themselves of certain stock, and this Court found the period too short to insure divestiture without severe loss (*id.* at 426). The decision provided that a longer period should be allowed and suggested an alternative provision preventing the voting of the stock before divestiture or the trusteeing of the same until divestiture should be accomplished (*ibid.*).

The time periods specified by the judgment here gave no opportunity for appeal, and of course have long since expired. A new approach to the problem of divestiture is therefore necessary, and appellants respectfully submit that this Court appropriately may outline procedures, including trusteeing, whereby the claimed "control" of Stearns may be terminated and an adequate period be allowed for the orderly liquidation of this investment.

(3) Provision outlawing exclusive licenses under patents.

Paragraph VI(B) of the judgment perpetually enjoins the defendants "from conveying or receiving any patent rights under any license, contract, agreement or understanding which gives the licensee or licensees control over the number of licenses issued or to be issued."

The net effect of this provision is to enjoin Besser Co. or Besser from ever hereafter granting or receiving an exclusive license of a patent, with the right to sublicense. The prohibition is in no sense qualified by the conception of an

unlawful combination, conspiracy, or monopolization tainting any such future license. In the words of this Court in the *Hartford-Empire* case, this provision perpetually places "the defendants, for the future, 'in a different class than other people'" (323 U. S. at 409). "The injunction as drawn is not directed at any combination, agreement or conspiracy. It binds every defendant forever irrespective of his connection with any other or of the independence of his action" (id. at 413). If Olsen, or Darden, or Milewski, or any other of the numerous competitors of defendant, wants to negotiate for an exclusive license of a patent upon a new development, he may do so. If Besser Co. or Besser, however, having purged themselves of any taint of unlawful conduct, and being engaged in their normal operations, seek to negotiate for such a license, they would be violating this decree.

(4) Prohibition of agreements with "same unlawful purpose and effect" as 1942 license.

Paragraph VI(B), in addition to the clause discussed in the preceding subdivision, enjoins the defendants from granting or conveying patent rights under any agreement "which has the same unlawful purpose and effect as the afore-described license agreement of December 7, 1942" (R. 1066).

This provision should be deleted. If this Court sustains appellants' contention that the 1942 patent license was not unlawful in purpose or effect, the provision in VI(B) obviously falls with its premise. But even if the 1942 license should be condemned, this provision in VI(B) cannot properly be allowed to stand.

The provision is too vague to permit these defendants to know its scope or a court to apply it to a set of facts. It does not prohibit a described type of license, but any contract or agreement with respect to patents which has "the same unlawful purpose and effect" as the 1942 license. A charge of contempt asserting that the defendants, or either of them, had violated the provision would require a full

antitrust trial developing the purpose and intent of the parties.

In short, this provision is merely an injunctive direction that in future patent transactions the defendants shall not violate the antitrust laws. As such, it is "so vague as to put the whole conduct of the defendants' business [in this field of patents] at the peril of a summons for contempt."

Hartford-Empire Co. v. *United States,* 323 U. S. 386 at 410 (1945);
Accord: *Schine Theatres* v. *United States,* 334 U. S. 110 at 125-6 (1948);
Labor Board v. *Express Publishing Co.,* 312 U. S. 426 at 436 (1941);
Swift & Co. v. *United States,* 196 U. S. 375 at 396 (1905).

It is analogous to the provisions of paragraph 9 of the decree in the *Hartford-Empire* case which in effect enjoined any future acts monopolizing or restraining trade "as charged in the complaint" and any future acts "having a tendency to continue or revive any of the aforesaid violations." (*Hartford-Empire* record, p. 7660.) In that case the government agreed to eliminate the provision—a concession "required by statute, by the Rules of Civil Procedure, and by [this Court's] decisions" (323 U. S. at 410).

(5) Provision that judgment not limit contests of validity of patents or import value.

Paragraph VII(D) of the judgment provides that nothing in the decree "shall prevent any applicant from attacking in the aforesaid proceedings, the validity or scope of any of the patents, nor shall this final judgment be construed as importing any validity or value to any of the said patents" (R. 1067).

The reference to "aforesaid proceedings" is not clear. The proceedings referred to in the prior subparagraphs of Paragraph VII are those for setting royalty rates and

terms by an extra judicial "committee" of lay "arbitrators" (attacked in Point VI hereof). Surely no "applicant" would be contesting the validity or scope of the patents before the committee. Perhaps the reference is intended to reach to the patent infringement actions mentioned in Paragraph VI.

In any event, the provision is improper. Less than five months prior to the judgment in this case, this Court had rejected the request of the government to insert a similar clause in the *Gypsum Co.* decree. *United States* v. *United States Gypsum Co.*, 340 U. S. 76 at 94 (1950).

(6) Prohibition of ancillary covenants.

Paragraph IX of the judgment prohibits the appellants, regardless of circumstances, from

> "... entering into, adhering to or claiming any rights under any contract, agreement or understanding with any person presently or hereinafter engaged in the development or manufacture of concrete block making machinery which has *the purpose or effect* of preventing such person, or any other person from competing with defendants, or any of them in the development, manufacture or sale of concrete block making machinery." (R. 1068).

Again, this provision goes far beyond the relief appropriate to this case. We do not suggest its deletion, but we believe a modification necessary to prevent the outlawing of ancillary covenants the validity of which, absent combination or conspiracy, would not be questioned.

Assume that Besser Co. enters into a contract to acquire the business or assets of someone engaged in the business. Such a contract would have to be submitted to the Court for its approval (see Paragraph V of the judgment, R. 1065, not questioned on appeal). There is no question that an ancillary covenant in contracts of sale, when reasonable in space and time, is valid, and the vendor's right to enter into such a contract will often affect directly the price at which he can sell. Is there any reason why there should

not be such a provision in a contract to be approved by the Court?

Moreover, the provisions of Paragraph IX, above quoted, share the error already noted in discussing Paragraph VI(B): they outlaw contracts having a described "purpose or effect." This provision is so vague that it would turn a charge of contempt into a full-dress antitrust trial exploring the motives and intents of the parties and the impact of their agreements after they had entered into it. The proper objective of the provision can be accomplished by a requirement of court approval.

Specifically, appellants propose that an appropriate substitute for Paragraph IX might be worded substantially as follows:

> "Defendants are jointly and severally enjoined and restrained from entering into, adhering to or claiming any rights under any contract, agreement or understanding with any person engaged in the development or manufacture of concrete block making machinery which prohibits or restricts such person, or any other person, from competing with defendants or any of them in the development, manufacture, or sale of concrete block making machinery; unless such contract, agreement, or understanding shall have been approved by this Court pursuant to the following:
>
> (A) a copy of any existing contract, agreement or understanding which the defendant desires to have submitted for approval shall be filed in this Court within 60 days of the entry of this judgment;
>
> (B) a copy of any new contract, agreement, or understanding which defendant desires to enter into shall be filed with this Court before it is executed;
>
> (C) a copy of any contract, agreement, or understanding which defendant hereafter, by the acquisition of assets or otherwise, becomes entitled to enforce shall be filed in this Court within 90 days after the defendant becomes entitled thereto;

(D) the copy or copies so filed shall be accompanied by a motion seeking the approval of this Court of such contract, agreement, or understanding; reasonable notice of such motion shall be given the Attorney General, who shall have an opportunity to be heard; and

(E) such motion shall be granted if, but only if, on such hearing the moving defendant shall show this Court that such contract is a proper ancillary covenant which does not unreasonably restrain trade or otherwise violate the antitrust laws."

The proposed modification will effectively accomplish the objectives of the government in this action. It imposes a burden of proof on the defendant to justify the agreement where a valid ancillary covenant is important to its legitimate business operations. It avoids the error, now found in the judgment, of perpetually outlawing, regardless of circumstances, what are entirely proper covenants in appropriate situations. It thus protects the public interest while recognizing the right of the defendants to conduct their business operations along normal lines.

Substitution of the proposed language for present Paragraph IX would suggest the desirability of a slight modification in Paragraph X to avoid inconsistency. There should be inserted in Paragraph X, in the reference to "influencing" any person to refrain from manufacturing concrete machinery, a parenthetical clause: "(other than in compliance with a contract, agreement, or understanding approved by the Court under Paragraph IX)."

POINT VI

The committee-arbitrator procedure employed to set royalties on the compulsory licenses of patents denied the appellants due process of law.

We have summarized above (*supra*, pages 43-52) the extraordinary proceedings which were followed in fixing the royalties to be paid on the compulsory licenses of existing patents, and which the judgment contemplates will be followed during the next decade on all future patents of these appellants. A "committee" of "arbitrators" was established, two "arbitrators" were designated by the government, two by the appellants acting under protest, the judge doffed his judicial role to serve as a fifth "arbitrator", requests for an opportunity to present relevant evidence were denied, and by a 3-2 vote the figures proposed by the government representatives, who were themselves potential licensees, were imposed on the appellants. The impropriety of this procedure is manifest.

When patents are subjected to compulsory licenses at reasonable royalties, important assets of the owner are opened to his competitors. For instance, in this case the Wellnitz patent, which was under development, already represented an investment—as best we can tell from the scant information available incident to its cavalier treatment by the "arbitration committee"—of some $275,000 (R. 1098-1100). Whether a patent be viewed as a property or a privilege, it is indisputably an asset which may possess great value.

Appellants endorse, with an earnestness informed by the irresponsibility of the post-judgment proceedings in this case, the cautionary comment of Judge Kloeb in the *Hartford-Empire* case (65 F. Supp. 271 at 274 (N. D. Ohio, 1946)):

> ". . . What are reasonable terms in a given industry for a license to manufacture and sell [or make or

use] certain inventions cannot be arrived at through mathematical formula, *nor should they be arrived at through arbitrary judgment or mere guess work*" (Emphasis added.)

What constitutes a "reasonable" royalty is a justiciable issue of fact on which the interested parties are entitled to decision in accordance with the fundamental principles of due process. The difficulty of computing such royalties has been widely recognized.

> Hearings before Committee on Patents on H. R. 23,417, 62nd Congress, 2d Session (1912) Part XII, 10-11;
>
> Report of Subcommittee of American Bar Association to consider King Bill, S. 383, 74th Congress (1935) p. 38.

Lacking any precedent for the determination of "reasonable royalties" under an antitrust decree, the trial court in the *Hartford-Empire* case, after the remand, resorted to the analogy of the rule in infringement cases (65 F. Supp. 271 (N. D. Ohio, 1946)). It quoted *Reynolds Spring Co.* v. *L. A. Young Industries, Inc.*, 101 F. 2d 257 at 261 (6th Cir., 1939):

> ". . . the sum allowed should be reasonable and that which would be accepted by a prudent licensee who wished to obtain a license but was not so compelled and a prudent patentee who wished to grant a license, but was not so compelled."

A somewhat similar statement is found in *A. Mecky Co.* v. *Garton Toy Co.*, 277 Fed. 507, 511 (E. D. Wisc., 1921):

> ". . . terms should be discussed which would enable, and not forbid, the [licensee's] acceptance thereof, and which the . . . patentee should desire to be accepted, and not rejected, *to the end that, as patentee, it receive reasonable remuneration . . . Clearly the terms must be such as exhibit the right of the patentee to reasonable pecuniary reward for the*

use, but not such as, because of their severity, would simply intrench him in his monopoly by forbidding even an agreed use" (Emphasis added.)

An informal suggestion by the Court that the parties make an effort to agree on a reasonable royalty was the initial approach of Judge Kloeb in the *Hartford-Empire* case (See 65 F. Supp. at 276). This, of course, is not objectionable. What is imperative, if our courts are to remain instruments for the administration of justice in accordance with the fundamental principles of due process, is that, given a disagreement as to rates, the determination be made in judicial proceedings based on the hearing and evaluation of evidence in the light of appropriate criteria. The complete abandonment of such essential safeguards is complained of here.

The appropriate procedure is well established, was recognized in the form of judgment proposed by the government (R. 1060), and no excuse can be suggested for the failure of the district court to follow it.

The normal procedures of judicial administration, involving the receipt and evaluation of relevant evidence and the making of findings thereon, are as necessary here as in any other aspect of the case. This is clearly implicit in the language of *United States* v. *National Lead Co.*, 332 U. S. 319 at 351 (1947). It was obviously such a hearing that this Court envisaged in the second *Gypsum* case, when the Court, in considering the establishment of a reasonable royalty, left open the questions of "where the burden of proof of value lies or who has the duty to go forward with the evidence . . ." (340 U. S. at 94). These are words of art which refer to a hearing, evidence, and proof.

The judge himself may conduct appropriate hearings on the issue. This was the government's proposal below (R. 1060). It was the method followed in *United States* v. *American Optical Co.*, 95 F. Supp. 771 (S. D. N. Y., 1950). Or in his discretion the judge may delegate the task to a special master, appointed under Rule 53 of the Federal

Rules of Civil Procedure, to "*take testimony* and report to the Court his conclusions, *grounded on such factual basis*" (*United States* v. *Hartford-Empire Co.*, 65 F. Supp. 271 at 276 (N. D. Ohio, 1946)). Reference to a master also was employed in *United States* v. *Vehicular Parking Co.* (D. Del., Reference Order of Oct. 19, 1948, not reported).

The cases are numberless indicating that the determination of such reasonable royalty is a formal matter for the district court either with or without the assistance of a special master.

See *e.g.*, *Dowagiac Mfg. Co.* v. *Minnesota Plow Co.*, 235 U. S. 641 (1915);
The Suffolk Co. v. *Hayden*, 3 Wall. (70 U. S.) 315 (1865);
Reynolds Spring Co. v. *L. A. Young Industries*, 101 F. 2d 257 (6th Cir., 1939);
Austin-Western Road Machinery Co. v. *Disc G. & P. Co.*, 291 Fed. 301 (8th Cir., 1923), cert. den. 263 U. S. 717 (1924);
United States v. *Hartford-Empire Co.*, 65 F. Supp. 271 (N. D. Ohio, 1946);
Consolidated Rubber Tire Co. v. *Diamond Rubber Co.*, 226 Fed. 455 (S. D. N. Y., 1915), aff'd 232 Fed. 475 (2nd Cir., 1916).

Neither procedure was followed here.

It should be unnecessary to mention that the master, being an officer of court, should possess no disqualifying interest or bias. Canon 12 of the Code of Judicial Ethics of the American Bar Association states mere truisms when it prescribes that:

> "Masters, referees . . . and other persons appointed by a judge to aid in the administration of justice should have the strictest . . . impartiality . . . [The judge] should not permit his appointments to be controlled by others than himself . . ."

This Canon, declarative of principles of judicial decorum basic to the administration of justice, was flagrantly disregarded. Certainly neither Olsen nor Darden, or for that matter neither Rosenthaler nor Stark, possessed the disinterest required of masters or appointees to aid in the administration of justice in this case. Olsen and Darden, the government's designees, were inherently disqualified: aside from the fact that they were two of the principal government witnesses, both were competitors of appellants and directly and pecuniarily interested as potential licensees. Apparently the government felt some qualms, as suggested by the meticulous manner in which its "designation" renounced any responsibility for the procedure (R. 1070). Such a renunciation contrasts sharply with the diligence of the government in presenting relevant facts to the master in the *Hartford-Empire* case in a proceeding, the transcript of which exceeded 1250 pages.

When the judge elects to determine, or designates a master to report, the royalty rate, the parties are entitled to present relevant evidence at a hearing conducted in accord with the minimum requirements of due process (Fed. R. Civ. Proc. 53(d)(1). Judge Kloeb in the *Hartford-Empire* case (65 F. Supp. at 275) commented that he had "no criteria to govern him in arriving at a definition of 'reasonable terms' in this particular industry and for this kind and class of machinery." Judge Picard evidenced no such judicial caution. Though the record reflects his complete lack of knowledge on the subject of the Wellnitz patent, and his inadequate information on the Scott patent, he declined repeated requests of appellants for an opportunity to present evidence, declared he did not want to hear it, and proceeded to cast his uninformed but deciding vote for the adoption by the "arbitrators" of figures set by the government representatives who were themselves disqualified by bias and interest. We confess difficulty in finding relevant citations as to the impropriety of this procedure, but our inability stems from the fact that our research uncovered no

case in which a judge of any court, state or federal, heretofore had so departed from the standards of judicial propriety.

When a master is appointed, the parties are entitled to subpoena witnesses (Rule 53(d)(2)). They are entitled to interrogate adverse witnesses. If the judge acts, they are entitled to the same availability of proof and cross examination.

At the hearing, which these appellants were denied, it is the function of the judge or master to consider relevant evidence.

> "Such evidence would be directed to the character of the invention, costs of manufacture, costs of marketing, sales prices, demand, etc. Royalties paid in more or less similar situations would be considered, although the weight of such evidence in any particular case might be slight." *Austin-Western Road Machinery Co.* v. *Disc Grader & Plow Co.*, 291 Fed. 301 at 305 (8th Cir., 1923), cert. den. 263 U. S. 717 (1924).

Such evidence might appropriately include: the cost of research, engineering, drafting, and counsel fees prior to the issuance of the patent; the cost of the patent where purchased from another; the cost of research and development expended and to be expended in the commercial utilization of the patent; the advantages of a machine employing the patent, e.g., savings attributable to use of the invention, greater productive capacity, cost savings on the same product, improvement in quality of the product; the advantages of the patented device or method over the next most satisfactory substitute used as a standard of comparison; the cost of manufacture and the anticipated or actual sales price of the patented article, and the apportionment, if any, appropriate as between the patented device and the balance of the article; the adaptability of the patented apparatus, process or method to various types of machines; and the anticipated number of machines which will use the patent

during its remaining life, including the feasibility of applying the patent development to existing machines.

These are typical of types of information pertinent to the evaluation of a proposed royalty rate. All have been taken from one or more of the many reported cases dealing with the determination of reasonable royalties on patents. All, perhaps, are embraced in the succinct direction of *Dowagiac Manufacturing Co.* v. *Minnesota Plow Co.*, 235 U. S. 641, 648 (1915) to consider "the nature of the invention, its utility and advantages, and the extent of the use involved." Not one of these pertinent aspects was developed in testimony below; and the great majority were not even mentioned in the informal "committee" meetings at which as one "arbitrator" Judge Picard was present and cast his deciding vote.

When a master acts, the parties are entitled to have a report on the matters submitted to him (Rule 53(e)(1)). The parties are entitled to file objections thereto, and have a judicial review thereof (Rule 53(e)(2)). If the judge acts, they are entitled to have him "find the facts specially" (Rule 52(a)) and are entitled to judicial review thereof (Rule 52(b)). Here the "report" consisted merely of a license form setting forth the royalty rates and terms, voted 3-2 by the "arbitrators" (R. 1112).

If we are correct in our view that the judgment erred in compelling the appellants Besser Co. and Besser compulsorily to license all their existing patents, the provision for royalties falls automatically.

But even if the compulsory licensing of present patents be sustained, the rates purported to be established pursuant to the arbitrary committee procedure cannot be allowed to stand.

Conclusion

WHEREFORE, the appellants respectfully submit that upon this appeal, this Court should:

(a) set aside the findings of fact herein shown to be clearly erroneous;

(b) set aside the judgment below; and

(c) remand this cause to the trial court, with instructions to modify the judgment so that it will be limited to relief appropriate to such findings as are not set aside.

Respectfully submitted,

WILLIAM J. DONOVAN,
ROY W. MCDONALD,
CARL R. HENRY,
JOHN W. BABCOCK,

Attorneys for
BESSER MANUFACTURING COMPANY
and JESSE H. BESSER.

PEYTON H. MOSS,
DONOVAN LEISURE NEWTON LUMBARD & IRVINE,
Of Counsel.

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No. 230

In the Supreme Court of the United States

OCTOBER TERM, 1951

BESSER MANUFACTURING COMPANY AND JESSE H. BESSER, APPELLANTS

v.

THE UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (R. 1011) is reported in 96 F. Supp. 304.

JURISDICTION

The final judgment of the district court was entered on April 12, 1951 (R. 1063). The petition for appeal was filed and allowed on June 6, 1951 (R. 1147–8). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 832, 15 U. S. C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869. This Court noted probable

jurisdiction of the appeal on October 8, 1951 (R. 1178).

QUESTIONS PRESENTED

1. Whether the district court erred in finding and concluding that appellants unlawfully monopolized interstate commerce in concrete block machines, and that they combined and conspired with the other defendants to restrain such commerce.

2. Whether certain provisions of the judgment should be set aside.

STATUTE INVOLVED

The Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, as amended, provides in part as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *. [15 U. S. C. 1.]
>
> SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *. [15 U. S. C. 2.]
>
> * * * * * * *
>
> SEC. 4. The several district courts of the United States are hereby invested with

jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * * [15 U. S. C. 4.]

STATEMENT

THE PROCEEDINGS BELOW

This is a civil action brought by the United States under Section 4 of the Sherman Act charging the defendants with conspiring to restrain and to monopolize interstate commerce in concrete block machines, in violation of Sections 1 and 2 of the Act, and charging two of the defendants (the present appellants) with monopolizing and attempting to monopolize such commerce, in violation of Section 2 of the Act.

The complaint, which was filed in April 1949, named as defendants Besser Manufacturing Company, the principal domestic producer of concrete block machines;[1] Stearns Manufacturing Company, the second largest producer of such machines;[2] Jesse H. Besser, for many years president of Besser Manufacturing Company and owner of 99% of its stock (Ex. 4, R. 1184–5); and Louis Gelbman and Hamlin F. Andrus,

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[1] R. 884, 1013–4; Ex. 3, R. 1181, 1183; Ex. 188, R. 1402.

[2] R. 884, 1013–14; Ex. 188, R. 1402.

co-owners of certain patents relating to concrete block machines (R. 4, 13). The corporate defendants will be referred to, respectively, as Besser and Stearns, and the Gelbman and Andrus patents will be referred to as the Gelbman patents.[3] Only defendants Besser and Jesse H. Besser have appealed from the judgment entered below.

The district court, after a trial extending from May 16 to June 23, 1950 (R. 1063), rendered an opinion on January 30, 1951, holding that the defendants had violated Sections 1 and 2 of the Sherman Act, as charged in the Government's complaint (R. 1011–28). The court, after hearings on relief, entered final judgment against the defendants on April 12, 1951 (R. 1063). In this judgment, the court adopted the opinion which it had filed as its conclusions of law and findings of fact (*ibid.*).

The court's final judgment requires appellants to divest themselves of their stockholdings in Stearns, and it prohibits them from acquiring assets or securities of any company engaged in making or selling concrete block machines except upon a showing to the court that the acquisition would not substantially lessen competition in the manufacture or sale of these machines (R. 1064–5). The judgment cancels the existing three-

[3] Andrus is in semi-retirement (R. 872) and Gelbman was the active party of the co-owners in dealings involving their patents (R. 855–6).

party license agreement between Andrus and Gelbman, Besser, and Stearns; prohibits the making of any similar agreement; and bars infringement suits[4] and threats thereof based on acts of infringement occurring prior to the date of the court's judgment (R. 1065–6). Appellants and Andrus and Gelbman are each required to license at a reasonable rate of royalty any patent relating to concrete block machines now owned or controlled by them, or acquired within ten years of the date of judgment (R. 1066–7). Besser is required to grant each present lessee of its concrete block machines an option to terminate the lease, to continue it, or to purchase the leased machines (R. 1068). Finally, each defendant is enjoined from making or enforcing any agreement to prevent a person from competing with the defendants in the development, manufacture or sale of concrete block machines, and from coercing any person to refrain from manufacturing such machines (R. 1068).

CONCRETE BLOCK MACHINES, THEIR USES AND DEVELOPMENT

Concrete block machines are machines used to form and compress a concrete mixture into molded units, commonly called "concrete" or "cinder" blocks, which are used extensively in

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[4] Three related proceedings then pending on appeal were excepted from the prohibition.

the construction of residential, farm and commercial structures (R. 4, 18). These blocks have become increasingly popular and important during the past decade, and particularly since the end of World War II, due to improvements in their style, attractiveness, efficiency and stability and shortages in other construction materials (R. 1019).

When Besser entered the industry in 1904, concrete block machines were hand-operated and could produce 150 blocks per day, whereas Besser now has a machine capable of producing over 6,000 standard-sized blocks in an 8-hour day (R. 1012). In 1909, the original method of packing and compressing the mixture into the mold by hand was replaced by a "power tamper," which trebled productive capacity (R. 893). The next major improvement occurred in 1924 when appellants introduced their plain pallet[5] stripper machine, patented in 1929, which greatly reduced operating costs and had the relatively high productive capacity of 3600 blocks per 8-hour day (R. 895-6; Ex. 180, R. 1391). The plain pallet machine had greater productive capacity than the cored pallet machines then in use because it permitted more rapid and satisfactory ejection of blocks from the mold (R. 326, 730, 895), and it

[5] A pallet is a bed, usually made of metal, upon which the mixture rests during the forming and curing of the block. Pallets are generally either of the plain or the cored type.

cost less to operate because a single pallet could be used in making blocks of various sizes, whereas with a cored pallet a separate pallet is needed for each size of block (R. 730; Ex. 3, R. 1182).[6]

Prior to 1939 concrete had been pounded into the mold by tamping, but in that year machines were developed for packing the concrete in the mold by vibrating the mold (R. 58–61, 910–1). The earlier method caused greater wear and tear (R. 911–2), and the newer machines, using the principle of vibration plus application of pressure to the top of the block, produced "a block more uniformly packed from bottom to top and of accurate height, with a smooth top, and permitted faster operation" (R. 926; see also R. 61–2, 925–7). Besser, which had turned to production of vibrating machines in 1939 (R. 910), stopped making tamping machines in 1943 because their sales had "dwindled down to almost nothing" (Ex. 7, R. 1187).[7] In recent years various other manufacturers have likewise manufactured only vibrating machines (R. 116, 169–70, 383, 505). The ex-

[6] In 1947 Besser, in setting forth reasons why a block maker should use its latest machine, stated that a block maker required a $30,000 investment in cored pallets to obtain production equal to that provided by a $6,000 investment in Besser's plain pallets (Ex. 3, R. 1182).

[7] Besser's general sales manager reported in March 1943: "Due to the almost complete changeover and demand by the trade, we have found that it is no longer profitable for us to continue the manufacture of the Champion Tamper" (Ex. 7, R. 1187).

tent to which these machines dominate the market is shown by the fact that sales of such machines constituted 79.6% of total dollar industry sales in 1946; 83.6% of such sales in 1947, and 91.8% of such sales in 1948 (R. 1013).

MAJOR ASPECTS OF ILLEGAL ACTS AND PRACTICES FOUND BY DISTRICT COURT

Before setting forth the detailed findings and supporting evidence relating to appellants' illegal acts and practices, we think it may be helpful to outline the major aspects of the conduct which the district court adjudged illegal.

Besser now dominates the concrete block machine industry (R. 1015, 1023), and in the course of achieving this position of dominance it has absorbed several major competitors or otherwise restricted their competition (R. 1017–20, 1023–4). The culmination of this course of conduct came in 1946 and 1948 when Besser secretly purchased a controlling block of the stock of Stearns, Besser's only really important competitor (R. 1013–4, 1022–3). These secret stock purchases were made after Besser's president had learned that Stearns planned to manufacture a plain pallet concrete block machine following the expiration in 1946 of Besser's plain pallet patent (R. 1022).[8]

Misuse of rights claimed under patents also played a vital role in Besser's march to dom-

[8] As to the advantages of plain pallet machines, see, *supra*, pp. 6–7.

inance. The crux of this aspect of the case is the 1942 contract under which the Gelbman patents relating to vibrating concrete block machines were licensed to Besser and Stearns (R. 1020).[9] This contract prohibited the patentees from licensing others without the joint consent of Besser and Stearns, and thus "virtually made it impossible for others to obtain rights under those patents" (R. 1021). As the district court said, the "two giants of the industry" were thereby given "the power to restrict competition—present and future" (R. 1020–1). Besser and Stearns utilized this power to wage a vigorous and successful terroristic campaign and, by threats of costly patent infringement suits, drove out of the concrete block machine business many of the "little fellows" of the industry (R. 1023–5).

In the fall of 1947 Besser took a further long step forward toward "realization of a complete monopoly," by inaugurating the policy of leasing and not selling (except for export) its best and most efficient machine (R. 1025; *infra*, pp. 65–67).

Subsequent to the filing of the present action, Jesse H. Besser entered into an agreement to sell his stockholdings in Stearns to a third person (R. 1026). Not only is it doubtful that this was a bona fide sale to an independent purchaser, but, of

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[9] Vibrating machines are recognized in the industry as far superior to the tamping machines previously employed (*supra*, pp. 7–8).

greater significance, the terms of the agreement were such that there were "many possibilities" that the Stearns stock would revert to the seller, and important limitations were placed upon Stearns' activities (and therefore its competition with Besser) (R. 1027). The district court said of this transaction: "To this court it is a practical admission that Besser * * * is seeking to superficially cleanse itself of all taint of monopoly while retaining all its benefits" (*ibid.*).

We now proceed to a more detailed statement of the district court's findings and of some of the evidence supporting or supplementing these findings.

BESSER'S ELIMINATION OF COMPETITORS OTHER THAN STEARNS

In 1929 Consolidated Concrete Machinery Corp. was Besser's chief competitor and running it a close race in dollar volume of sales (R. 1017). In 1931 Besser acquired a large majority of Consolidated's stock, installed four out of seven directors, removed the company's machinery, shut down its plant, and dissolved the corporation (R. 79–82, 1018). As a result, the company, which was then first in the industry in number of machines sold (R. 71), was permanently eliminated as a competitor. And in 1935 Besser purchased all machines, patents, customer lists, etc., relating to concrete block machines owned by Industrial Brownhoist Corporation (Ex. 8, R. 1189). Al-

though the district court did not view these acquisitions as being evidence of monopolization or attempted monopolization (R. 1018),[10] they are pertinent as showing a continuing pattern of conduct, fully established by appellants' later acts. Cf. *United States* v. *Standard Oil Co.*, 221 U. S. 1, 46–47.

In 1938 Besser entered into an agreement with Stephen Flam of California, an inventor and manufacturer of concrete block machines, granting Besser an exclusive license under the Flam patents, except for Flam's retention of the right to manufacture and sell in nine far western states (R. 1019; Ex. 9. R. 1192–3).[11] Any improvements relating to the licensed devices or machinery developed by either party were to be licensed to the other (*id.*, 1198).[12]

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[10] The court's holding as to Consolidated was based upon the ground that the company was in serious financial difficulties and was acquired during the depression of the early 1930's (R. 1017–8). The grounds for the holding as to Brownhoist were that its concrete block machine business was only a minor part of its total business and that the machine business was about to be moved to a location near Besser where it "could be a thorn in Besser's side right in its own backyard" (R. 1018).

[11] The provision for allocating territory was specifically made applicable to machines equipped with devices of a vibrating type "other than as disclosed and claimed in" the patents licensed by Flam (Ex. 9, R. 1194).

[12] The license was to continue to the latest expiration date of any licensed patent unless Besser terminated at the end of three years or at the end of six years, and the licensor could terminate the license if Besser breached its agreement or became bankrupt (Ex. 9, R. 1198–9).

In 1946, when Stephen Flam's company, Stephen Flam, Inc., was the fourth in the industry in dollar sales, Besser absorbed the company by acquiring all of its assets (R. 1019–20; Exs. 27–29, R. 1235–49).[13] By an agreement made at the same time with Stephen Flam, Besser employed him for a five-year period as a consultant in developing concrete block machinery,[14] and acquired his patents relating to such machinery and all rights with respect to any invention made by him during his employment by Besser (Ex. 26, R. 1229–32). In addition, Flam covenanted that he would not, except in connection with Besser, engage in the concrete block machinery business for a period of eight years beginning January 1, 1947 (*id.*, R. 1234). For these various acquisitions, Besser paid $385,000 (R. 1019).

In December 1948 Besser entered into a contract with Bernard Flam, son of Stephen Flam (R. 1023), which recited that Bernard Flam had filed an application for a patent relating to concrete block machinery and was about to file other like applications (Ex. 99, R. 1296–7). The con-

[13] The company also agreed that it would not engage in the concrete block machinery business in the State of California so long as Besser carried on a like business in that state (Ex. 28, R. 1240).

[14] For Flam's services as a consultant, he was to be paid $6,000 a year, but was not to be required to give such services for more than three months in any year, or east of the Rocky Mountains, or if his physical condition did not permit (Ex. 26, R. 1232–3).

tract provided that Besser would pay Bernard Flam $65,000, and that the latter would grant Besser an exclusive license for the life of any patent issued on the pending and contemplated patent applications, and would grant Besser first option to acquire exclusive rights under any patent issued on any invention made by Bernard Flam prior to April 1, 1954 (*id.*, 1297–8). The contract further prohibited Bernard Flam from engaging in the concrete block machinery business prior to April 1, 1959 (*id.*, R. 1299).

Appellants made a similar, although unsuccessful, attempt to eliminate Lith-I-Bar, the third company in the industry in dollar sales (R. 1014).[15] The district court found that Besser tried to buy Lith-I-Bar, that Besser "considered it imperative that the Lith-I-Bar Company be out of business," and that Besser had offered to employ Milewski, Lith-I-Bar's president (R. 383), under an arrangement similar to the one which Besser had made with Stephen Flam (R. 1023).[16] Milewski testified that a Besser representative told him that if Lith-I-Bar would stop production at the end of six months or a year, Besser would put Milewski on its payroll for a 10-year period and he "would not have to do

[15] Lith-I-Bar had, however, only 7.8% of the industry's 1948 dollar sales, as against 65% for Besser and Stearns combined (R. 1013–4).

[16] Appellants have not assigned error to these findings.

anything" (R. 390, 392). As the Besser representative expressed it, they were willing to pay Milewski for "not growing potatoes" (R. 393).

Warren was a manufacturer of concrete blocks at Knoxville, Tennessee, who had developed a concrete block machine marketed by Roy Darden Industries of Atlanta, Georgia (R. 529–30, 539). After Besser's president and its patent counsel had twice visited Warren in 1947 to urge that his machine infringed patents owned by or licensed to Besser (R. 531–2), the patent counsel on a further visit in 1947 proposed an arrangement under which Warren would receive a nominal salary from Besser; would build no more machines, and would give Besser the rights to present or future inventions made by him—an offer which Warren declined (R. 533–4).

In 1948, when Besser purchased the stock of Stearns owned by its president, Eugene F. Olsen, the representative of Besser in this stock purchase asked Olsen to agree to stay out of the concrete machine business for at least five years (R. 850–1). Olsen refused to agree to this. Later, after Olsen had sold his Stearns stock and had organized a corporation (known as Gocorp) to make concrete block machinery, a Besser employee (R. 131) advised Olsen that Besser was interested in buying out Gocorp and that, if he would do this, both he and his son would be offered "some kind of satisfactory position" (R. 133, 1023).

THE 1942 THREE-PARTY PATENT LICENSING AGREEMENT AND RESTRAINTS EFFECTED THEREUNDER

An agreement made in March 1940, which superseded various prior licensing agreements, gave Stearns an exclusive license under the Gelbman patents (Ex. 112, R. 1323–5).[17] In 1941 the licensors (Andrus and Gelbman) and Stearns sued a Besser customer (H. E. Bell Co.) charging that a Besser machine used by the defendant infringed one of the licensed patents (Ex. 10, R. 855, 1202). This suit, which was defended by Besser, eventuated in a judgment holding two claims of the patent invalid (*ibid.*). Following an appeal by the plaintiffs, the interested parties—Besser, Stearns and the patentees—negotiated a settlement which would "stop any further litigation" with respect to the Gelbman patents, and give exclusive licenses under these patents to the "only two firms in this business that amounted to anything" (R. 855–7). This settlement was embodied in the patent licensing agreement of December 7, 1942 (Ex. 10, R. 1201). The major provisions of this agreement are:

The appeal in the *Bell* suit is to be dismissed, and all claims against Besser by reason of its manufacture or use of the accused machine or

[17] The agreement provided, among other things, that all inventions and patents issued thereon made by any officer or employee of Stearns during the life of the agreement should be assigned to the licensors (*id.*, R. 1331–2).

similar machines are waived (*id.*, R. 1203). Besser and Stearns are given licenses under the Gelbman patents, but without power to sublicense (*ibid.*).[18] The licensors (Andrus and Gelbman) covenant that they will not grant any other license under their patents without the written permission of Besser and Stearns (*ibid.*). The parties are to share equally the expense of prosecuting alleged infringers, and are to determine by unanimous agreement what suits shall be brought, but any two parties may bring such a suit at their own expense and keep for themselves any damages awarded (*id.*, R. 1205). The agreement runs for the full term of the licensed patents, with Besser and Stearns each having the right to terminate the agreement after July 13, 1949 (*id.*, R. 1206).[19]

With the increase in demand for concrete blocks which came at the end of World War II (*supra*, p. 6), various concerns undertook the manufacture of concrete block machines. They were, as the district court said (R. 1023), "little fellows," 49 of the 53 companies in the business having together only 21.3% of total dollar 1948 sales (R. 1014), or, on the average, little more than 4/10 of 1% each. Development and improvement of concrete block machines were also undertaken, and

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[18] They were also licensed under any inventions made by the licensors during the term of the agreement (*ibid.*).

[19] The patent involved in the Bell litigation would expire July 12, 1949 (*id.*, R. 1202).

some of these efforts met with marked success. Darden, a manufacturer who began making the Warren 800 machine in 1946 (R. 472), testified that this machine had the highest production per hour of any machine then being produced (R. 509). A machine designed by Samuelson, which the Lith-I Bar Company manufactured under license, could make 480 blocks per hour (R. 384, 441).

Faced with this rising competition, Besser and Stearns, together with Gelbman, took steps to combat it. Roy Darden of Roy Darden Industries, Atlanta, Georgia, who was regarded as "the most aggressive in the lot," was selected as the first target (R. 486). In June 1946 Olsen, Stearns' president, wrote Gelbman that rumors were persistent that Darden was doing quite a lot of business and rather rapidly expanding his organization and, "It might be easier to knock his ears down now than later" (Ex. 52, R. 1259). In July Olsen wrote Jesse H. Besser (Ex. 54, R. 1261):

> I think it is important that we move in on this case (if it is justified at all) because I know that Darden has some rather ambitious plans including the manufacture of a high-production vibrator machine which * * * would make it really effective competition.

In October Besser's sales manager reported from Atlanta that the machine sold by Darden was

manufactured by the Link Belt Company, that manufacture was contemplated "not only in Atlanta but in Dallas, Chicago, San Francisco and in other Link Belt plants", and that this presents a situation which "should be cleared up very quickly" (Ex. 19, R. 1215–6).[20]

After the parties to the 1942 contract had jointly agreed that Darden should be sued for infringement (Exs. 56–57, R. 1263–4), suit was filed against one of Darden's customers in January 1947 (R. 480). Darden did not think that the Warren machine infringed or that the Gelbman patents were "any good" (R. 524),[21] but he quickly capitulated because told by his supplier that he would get no more supplies until the patent litigation was "cleared up" (R. 485–6). Darden requested a license under the Gelbman patents, but Besser and Stearns "flatly refused," Olsen explaining that Besser and Stearns could take care of all normal demands and "there is not any room in this business for your company" (R. 482–3). Olsen said further: "I want you to know we intend to go after them, after the others, at the rate of one every four months until we get them all" (R. 487).

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[20] Besser's president also made two trips to Atlanta to investigate the Darden situation (Ex. 53; R. 1260).

[21] This belief seems to have been well founded. The Court of Appeals for the Sixth Circuit has held invalid certain claims of the two major Gelbman patents. *Whitman* v. *Andrus*, 92 U. S. P. Q. 291, decided February 18, 1952.

The settlement which was agreed upon provided: the infringement suit against Darden's customer would be dismissed; Darden was licensed under the Gelbman patents as to the machines in process of manufacture (limited to 35 machines, including five Warren 800 machines); and Darden agreed not to make or sell any other machines coming within the claims of the Gelbman patents (Exs. 25, 76–77; R. 1224–8, 1274–6).

Besser and Stearns wanted "as much publicity as possible" for the Darden litigation, and a series of advertisements "stressing the patent situation" was proposed in the belief that this would make the industry "patent minded" (Exs. 58–59, R. 1264–5). Stearns wanted the advertising to be by the patentees, and suggested that it "state emphatically" that only Besser and Stearns are licensed under the Gelbman patents (Ex. 68, R. 1268). Besser enthusiastically approved the proposed advertising (Ex. 71, R. 1271). In its letter to Gelbman with reference to the advertising and the Darden litigation, it clearly disclosed its objectives, stating (*ibid.*, R. 1271–2):

> About the worst thing that could happen to this industry would be to have it wide open so that anybody and everybody could make machines and thus have no control on quality and no opportunity for anyone to do anything very important. That is the

> way this industry was until a certain measure of control was secured through Gelbman vibration patent and Besser plain pallet stripper patents.

The patent owners had been willing to license Darden (R. 499), as they have been willing to license other applicants (R. 877), but under the 1942 agreement they were powerless to do so without the consent of Besser and Stearns.[22] Those who applied to the patent owners for licenses were advised, after the necessary consents had been withheld, that the patentees were unable to do anything (R. 499–500; Exs. 15, 18, R. 1212, 1214).

The district court found that it was Besser's objective to bring about the elimination of almost every competitor through "recklessly made threats of [infringement] suit" (R. 1024). The evidence amply supports this finding.

In 1948 Besser's patent counsel, Stark, visited Graveley, a block machine manufacturer at Orlando, Florida (R. 152, 158). Stark, after telling Graveley that his machine infringed and that he could not possibly get a license under the Gelbman patents (R. 163–4), warned that "they could and would sue me [Graveley] and keep me tied up for a long period of time if I made an auto-

[22] Consent was given only when, as in the case of Darden, a maker, threatened with patent litigation, had agreed not to make further machines and received a license covering a few machines already made or in process of manufacture (R. 221–3; Ex. 24, R. 1221–3).

matic block machine, whether or not infringement was involved" (R. 159, 163–4, 165). When Graveley said that he had every reason to believe he would be successful in such a suit he was reminded that he could not afford to be tied up in this way "win, lose, or draw" (R. 166). Graveley could not "afford a long drawn out lawsuit," and abandoned the business of making block machines (R. 168–9).

In 1948 Stark also called upon Winn, a concrete block machine maker at Greensboro, North Carolina (R. 198, 203). Stark told Winn that he was violating certain patents although Stark had not inspected Winn's machine and had merely passed, on his way upstairs, a machine that was being assembled (R. 203, 206). Stark further said that he was going to Florida to interview manufacturers there, but was returning in two weeks and "expected to find our plant closed down" (R. 208). Similarly, after Olsen had formed Gocorp but before it had built a machine, a Besser representative told Olsen that Besser was going to sue Gocorp for patent infringement (R. 120).

Stark and another Besser representative called upon Milewski of Lith-I-Bar in 1948 and intimated that Lith-I-Bar would be sued for infringment and that such litigation might involve expenses as high as $200,000 (R. 388, 390). Milewski was also told that Besser could and might make a directly competitive machine and under-

sell Lith-I-Bar to the point where it "would be driven out of business" (R. 388, 390–1).

In May 1946 Besser's southeastern sales manager visited two small manufacturers of concrete block machines at Birmingham, Alabama, and after a cursory inspection of their machines, advised that they were infringing (R. 544, 552–5). The makers then indicated that they would stop manufacture without further notice (R. 554, 555).[23] The sales manager also stated that he had orders from Besser to contact makers of concrete block machines and that other representatives of Besser would also "perform that chore of calling on manufacturers of block machinery" (R. 555–6).

Besser representatives warned numerous block makers who were using or about to purchase machines other than those of Besser or Stearns, that the machines were infringing (R. 52, 361–2, 439, 447, 466–7, 532, 548).

BESSER'S ACQUISITION OF CONTROL OF STEARNS

Appellants are not now contesting the findings made by the district court as to Besser's secret purchase of stock of Stearns, as a result of which

[23] One of the companies, Fifth Avenue Fabrication Co., made no vibrating machines after 1946 (Ex. 190, R. 1409). The other company, Southern States Materials Co., made no machines of this kind in the 1946–1948 period (*ibid.*, R. 1410).

"Besser's hold on its second chief competitor[24] became, to all intents and purposes, complete" (R. 1022–3). We set forth, however, the steps by which this control was achieved because they have a direct bearing on the district court's conclusion that appellants have illegally monopolized interstate commerce in concrete block machines, which appellants do contest.

In 1945 Olsen, then president of Stearns, told Jesse H. Besser that, on the expiration of Besser's plain pallet patent (expiring in 1946, *supra*, p. 6), Stearns was going to start making a three-at-a-time plain pallet machine (R. 585, 774). Besser's president then asked Pierce Wright, Besser's labor relations adviser, to act as Besser's agent in buying stock of Stearns (R. 584, 586). Jesse H. Besser gave as the reason for purchasing this stock that "he wanted to be the only person manufacturing the plain pallet machine," and "wanted to have some hand in any other company" that made this machine (R. 587).[25] Acting on the instructions of Besser's president,

[24] Stearns unquestionably was Besser's chief competitor. In 1948 Stearns had 12.9% of total dollar sales (App. Br. 9), while the two companies with the next largest sales had, respectively, 7.8% and 5.9% of the total (R. 1014). The district court, in referring to Stearns as Besser's "second chief competitor" plainly meant to describe Stearns as second in the industry and Besser's chief competitor.

[25] Jesse H. Besser, when asked at the trial if Stearns' contemplated production of the three-at-a-time plain pallet machine was the primary reason for buying Stearns stock, replied that it was "a very important reason" (R. 774).

Wright (1) arranged with a broker to buy as much Stearns stock as he could without pushing up the price of the stock; (2) kept the name of the buyer secret; (3) paid for purchased stock with money received from Besser and deposited in a special account in a bank other than the one with which Wright usually did business; (4) selected certain individuals to act as nominees for purchased stock;[26] and (5) promptly delivered the stock certificates to Besser after the nominees had assigned them in blank (R. 587, 589–92).

13,765 shares were purchased in this way in 1946 (R. 592). On Jesse H. Besser's instructions, purchases were discontinued in 1947, but in the latter part of that year Wright was asked to buy, if possible, all the stockholdings of Stearns' officers, the bulk of which was held by Olsen (R. 592–4). It was arranged to act through a Chicago broker, who was instructed to keep the name of the purchaser secret (R. 594–6). Jesse H. Besser fixed as one of the conditions of purchase from Olsen that Olsen agree to stay out of the concrete block machine business for five years, but when Olsen said that he would not agree to do this, the Besser agents were told to go ahead with the purchase (R. 597–8). Purchase of 61,325 shares was closed on March 26, 1948, Besser giving its check

[26] Wright selected as nominees his own counsel, one Vera Dixon (subsequently Mrs. Pierce Wright), a Cleveland attorney, and a Detroit industrial engineer (R. 590–1).

for $813,750 in payment (R. 598–9; Exs. 36–37, R. 1252–1254A).[27]

Besser obtained, by these and other purchases, between 85,000 and 89,000 shares of Stearn's stock, out of about 189,000 shares outstanding (App. Br. 34).[28] A special meeting of Stearns' stockholders was held on May 4, 1948, and a new board of directors was installed consisting of men in whom Besser's president had confidence (R. 602–3, 932).[29] On the same day new officers were elected (R. 603–4). Myron Hultmark, Besser's district sales manager for the Chicago district, was made president and general manager, Wright was made vice president,[30] and Delamater, secretary (R. 604, 929, 933).

The rumor that Besser had purchased the stockholdings of Stearns' officers quickly spread and makers of concrete blocks were gravely concerned by the monopoly situation this would create (R. 115). A meeting called by the executive secretary

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[27] 40,000 shares were placed in Wright's name and the balance in the name of Myron Hultmark, the nominees executing assignments in blank and delivering the stock certificates to Besser (R. 600).

[28] The remaining shares were scattered among many small stockholders (R. 660), the largest single holding in November 1948 being 6,000 shares (Ex. 39, not printed).

[29] Only one member of the new board (Delamater) had been a member of the previous board (R. 602–3).

[30] Wright testified that since he was elected a director and vice president of Stearns on the basis of stock owned by Besser, he always was under the impression that in these positions he "represented" Besser (R. 654).

of the National Concrete and Masonry Association was held in Chicago on April 14, 1948, and attended by representatives of some 12 or 14 of the biggest concrete block plants in the United States (R. 111–2).[31] Olsen was also asked to attend (R. 111). The view expressed at the meeting was that, if Besser had acquired the Stearns stock, the block makers would take steps to start a concrete block machine company of their own "because they were not willing to be put in a position where they would have to go to one concern for high production block machinery" (R. 115). When Olsen stated that he planned to go into the business again, the block makers said that they would not go ahead with their own plans since their essential interest was to have more than one source of supply for high-production block machinery (*ibid.*).

BESSER'S PURPORTED SALE OF STEARNS STOCK AFTER INSTITUTION OF PRESENT SUIT

One of the prayers of the Government's complaint is divestiture of all of Besser's interests in Stearns (R. 11). In February 1950, nearly one year after the filing of the complaint and shortly before trial, a Besser representative began negotiating a sale of its Stearns stock to one Ben Stone

[31] Companies located in the states of Colorado, Illinois, Indiana, Iowa, Kentucky, Missouri, New York and Wisconsin were represented at the meeting (R. 113).

(R. 675, 677). Stone, who lives in Detroit, had a heating company, and was engaged in building a group of houses in a Detroit suburb (R. 657).[32] These negotiations resulted in a contract made on March 30, 1950, providing for sale to Stone of 45,000 shares of Stearns stock (Ex. 159, R. 1374).

The judgment of the district court (par. IV B) required cancellation of the Stone contract (R. 1057), and the contract has been canceled (App. Br. 37) and appellants raise no issue concerning this. We nevertheless call attention to the provisions of the contract and other aspects of the "deal" with Stone because of the light which they throw on appellants' continued purpose to monopolize the concrete block machinery business.

The Stone arrangement has many striking, if not peculiar, aspects. Stone, who agreed to make an ultimate payment of $270,000 for the stock of Stearns, knew "nothing whatever" about the concrete block machine business (R. 683); testified that he "saw very little profit" in Stearns' block machine business, which fact was what "appealed" to him in "making this deal" (R. 668); believed that Stearns' physical plant was "old, dilapidated, and inefficient" (R. 674); planned to sell off the physical plant to obtain additional working capital, acquire the plant of Olsen's Gocorp Corporation and then go into the business of making

[32] Stone testified that his business was investing in businesses for the purpose of operating them at a profit (R. 657).

aglite[33] (670–1, 673–4). In short, Stone's plan was that Stearns should go out of the concrete block machine business.

The Stone contract protected Besser's monopolistic position and, indeed, fortified it in the event that Stone did not carry out his plan to have Stearns abandon the concrete block machine business. The contract provided that Stone should cause Stearns to accept a patent license from Besser upon terms which would restrict and handicap Stearns as a competitor of Besser, and failure to bring about Stearns' acceptance of such license gave Besser the right to void its sale of Stearns stock (*infra*, p. 30).

The Stone contract provides (Ex. 159, R. 1374–7):

Stone is to purchase from Besser 45,000 shares of Stearns stock for $270,000,[34] $10,000 to be paid immediately and the balance in increasing amounts on March 1, 1951, 1952, 1953, and 1954 (par. 1).[35] Until March 1, 1954, Stone is to have

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[33] Aglite is a process for producing, from clay and shale, material suitable for making concrete blocks, and the shortage of cinders gave importance to development of other suitable raw material (R. 759–60). Stone testified that aglite was "the thing that really made me enthusiastic" and that, without this feature, he would not have been interested in the deal (R. 671).

[34] The sales price of $6.00 a share compares with the price of over $13.00 a share paid by Besser when it acquired 61,325 shares of Stearns stock about two years earlier (*supra*, pp. 24–25).

[35] Until March 1, 1954, Besser is to receive the dividends declared on this stock, except that on each dividend after

all voting rights on the 45,000 shares and on all other shares of Stearns currently owned by Besser (par. 2), and until that date Stone is given an option to meet the terms of any bona fide offer for purchase of additional shares of Stearns owned by Besser (par. 3). Stone will use his voting rights to cause his election as president and general manager of Stearns (par. 6). Besser will transfer to Stearns all of Besser's inventories and other assets relating to machinery for the manufacture of aglite, Stearns paying the cost thereof less a credit of $30,000 (par. 9).[36] Stone may terminate the agreement at any time and Besser may terminate it for any default by Stone (par. 5).[37]

The provisions of the contract which here are of perhaps greatest significance are those relating to Stearns' acceptance of a patent license from Besser. "Stone will do everything within his power" to cause Stearns to accept a patent license from Besser (par. 7). Such license shall authorize Stearns to manufacture and sell (1) cored pallet machines without limitation as to size or kind and (2) plain pallet machines pro-

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March 1, 1951, Stone is to receive an amount proportionate to the part of the $270,000 purchase price then paid (par. 4).

[36] Stearns also assumes all of Besser's obligations under a certain contract relating to this business (par. 9).

[37] Upon termination by either party, Besser shall refund to Stone any payments made by him on account of his purchase of Stearns stock, less $10,000 (par. 5).

ducing not more than one or two blocks simultaneously,[38] and shall require Stearns to pay substantial royalties to Besser and to recognize and accept the validity of any concrete block machinery patents "owned, controlled or licensed by Besser" (par. 8). Stone's failure to bring about Stearns' acceptance of such license shall give Besser the right to "declare void" the sale of 45,000 shares (par. 7).

Stone agreed to these provisions without knowing what patents Besser had or controlled (R. 687), without reading certain Besser patents which he was shown (R. 666), without inquiring as to the patents which were the basis for the statement in the purchase contract that "there exists presently a serious question of infringement of patents by Stearns" (R. 663–5), and without seeking the advice of counsel on Besser's patents (R. 667). And prior to the making of the Stone contract Besser had never at any time advised Stearns that it was infringing any Besser patent (R. 942–3).[39]

Besser's president discussed with Wright, whom Besser had installed as vice president of Stearns (*supra*, p. 25), the terms of the contem-

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[38] The fact that Stearns was going to make a plain pallet three-at-a-time machine was what chiefly induced Besser's acquisition of Stearns stock (*supra*, p. 23), and Besser's president testified that the Stearns machine "that is used mostly is the three-at-a-time" (R. 732).

[39] Stearns, like Besser, currently was a licensee of the Gelbman patents.

plated Stone contract (R. 606–7). Wright advised Besser's president that the terms of the proposed contract "would cause quite a commotion" among Stearns' other stockholders (R. 614), and that rumors about the Stone contract were running around and "the stockholders were all up in arms about it" (R. 618). Wright was told that Besser was going through with the Stone commitment, that it was in contract form and would be filed with "the Antitrust attorneys," and "he [Jesse H. Besser] was reasonably sure he would be able to teach those government jaspers a lesson and get what he wanted" (R. 616).

Facts relating to Besser's monopoly position in the industry following its acquisition of control over Stearns, and to Besser's policy (adopted in October 1947) of leasing and not selling Besser's most advanced machine, are set forth in the Argument (*infra*, pp. 39–42, 65–67).

SUMMARY OF ARGUMENT

Appellants do not attack the holding that they have attempted to monopolize commerce in concrete block machines. This violation, even if it stood alone, would justify the relief awarded by the district court's judgment. Accordingly, it may be unnecessary, on this appeal, to reach the further holdings that appellants monopolized commerce and that they combined with the non-appealing defendants to restrain commerce. In any event, the holdings are correct.

I

Acquisition of power to exclude competitors from a given field of commerce, with intent to exercise such power as occasion therefor arises, is a forbidden monopolization of a part of interstate commerce. *American Tobacco Co.* v. *United States*, 328 U. S. 781. The finding, not here attacked, that appellants attempted to monopolize necessarily imports intent by appellants to exclude competitors, since such intent is an essential ingredient of attempt to monopolize. In any event, the evidence abundantly establishes such intent. The evidence likewise establishes power to exclude. It is undisputed that appellants had or controlled 65% of the industry's dollar sales, that the sales thus controlled were more than eight times those of their nearest competitor (which had 7.8% of the total), and that the remaining 27.2% of total sales were divided among 50 odd companies, truly characterized by the district court as "little fellows." Appellants thus dominated the industry to a degree even exceeding that of the defendants in the *American Tobacco* case.

II

The holding that appellants combined with the non-appealing defendants in illegal restraint of commerce is supported by the 1942 license agreement, to which all defendants were parties, and

the action taken thereunder. The agreement contemplated joint action by the two "giants of the industry" in denying licenses to their competitors and in bringing infringement suits. Pursuant to this agreement the parties cooperated in utilizing rights claimed under patents as a means of excluding competitors, for the declared purpose of securing "a certain measure of control" over the industry. Such joint action goes to ends forbidden by the Sherman Act and transcends privileges conferred by the patent grant.

The holding of unlawful combination is likewise supported by the finding and evidence that the defendants, both jointly and individually, deliberately embarked upon a campaign of harassing competitors through reckless threats of infringement suits, "whether or not infringement was involved."

III

The relief granted by the district court's judgment is appropriate and necessary to disperse appellants' monopoly power, deprive them of the fruits of their monopolistic practices, and terminate their unlawful combination and conspiracy. It plainly does not exceed a proper exercise of the district court's discretion. The judgment which has been entered, apart from certain minor changes to which the Government does not object, should be sustained.

A. Appellants' objection that too short a time was allowed for divestiture of their Stearns stock is without merit. The district court had ample

reason for concluding that prompt outright divestiture was imperative, in order to bring to an end appellants' hold on the industry before this hold became so firmly established as to become, or threaten to become, permanent. If, after a bona fide effort to effect stock divestiture, a showing is made that more time is needed, the United States will not object to a reasonable extension of time.

B. The policy which appellants adopted late in 1947 of making their most advanced machine available only under lease resulted in a substantially greater cost to the block maker for use of the machine than if he had been able to purchase it. The leases perforce accepted by would-be purchasers of this machine were a product of appellants' monopolistic position in the industry, and particularly in the manufacture of the type of machine which appellants refused to sell. In order to relieve those lessees who would prefer to purchase from the excess burden so forced on them, the district court ordered appellants to give each existing lessee an option to terminate the lease, to continue it, or to purchase the leased machinery on mutually satisfactory terms. This was proper and necessary relief. Cf. *International Salt Co.* v. *United States*, 332 U. S. 392.

C. In view of the fact that misuse of rights claimed under patents largely contributed to the illegal attempt to monopolize, monopolization, and

restraint of trade which the district court found, it was fully justified in requiring the licensing of present and future patents at fair royalty rates. Like provisions have been repeatedly sustained by this Court. The ten-year period within which future patents are to be subject to the licensing requirement is comparable to periods approved by this Court in other cases. The licensing machinery chosen by the district court was, in substance, that suggested by certain of the defendants, and as to the patents of the non-appealing defendants it has worked successfully. If, however, this Court should conclude that some other machinery is more appropriate, we urge that it direct substitution of the machinery which the Government proposed in the court below and which this Court has approved in numerous cases.

ARGUMENT

INTRODUCTION

Appellants concede (Br. 6, 52, 85) that the district court's finding that they attempted to monopolize the concrete block machine business is supported by evidence sufficient to withstand appellate challenge. Appellants' contention is that the evidence does not warrant the findings that they monopolized, and conspired with the other defendants to restrain and monopolize, commerce in block machines. The Government believes that

these findings have ample evidentiary support (see points I and II, *infra*, pp. 37–53). The issue on this appeal, however, is whether the provisions of the judgment should stand. To the extent that the judgment provisions which are under attack constitute relief appropriate to prevent further attempt to monopolize and to dissipate consequences of the past unlawful attempt, the question of whether appellants have violated the statute in other respects need not be reached. Cf. *Standard Oil Co.* v. *United States*, 337 U. S. 293, 314.

Appellants seek modification or limitation of various judgment provisions, but attack only three basic requirements of the judgment—(1) that appellants grant existing lessees of their machines an option to purchase leased machines, (2) that the 1942 licensing agreement to which appellants and the other defendants are parties be canceled, and (3) that appellants grant a license under their concrete block machine patents at a reasonable rate of royalty to any applicant therefor. We believe that each of the foregoing requirements constitutes appropriate and necessary relief even if attempted monopolization is assumed to be appellants' only violation of the statute.

I

APPELLANTS HAVE MONOPOLIZED INTERSTATE COMMERCE IN CONCRETE BLOCK MACHINES, IN VIOLATION OF SECTION 2 OF THE SHERMAN ACT

In *American Tobacco Co.* v. *United States*, 328 U. S. 781, this Court carefully considered the meaning and effect of the prohibition of Section 2 of the Sherman Act against monopolizing any part of interstate commerce. The Court there held that there is unlawful monopolization when there is power "to exclude actual or potential competition from the field," coupled with "the intent and purpose to exercise that power" (*id.*, 809). The Court specifically held that "actual exclusion of competitors is not necessary to" the offense of monopolizing (*ibid.*). It likewise held that the power of exclusion exists when there is power to exclude competitors "to a substantial extent" (*id.*, 786).

Appellants do not question the finding below that they have engaged in an unlawful attempt to monopolize. An attempt to monopolize, however, requires not only acts but the intent to obtain and to exercise power to exclude competitors. "Intent is * * * essential to" the offense of attempted monopolization. *Swift & Co.* v. *United States*, 196 U. S. 375, 396. The unchallenged finding of attempted monopolization necessarily imports, therefore, a finding of the intent which, when coupled with power to exclude

competitors, constitutes the offense of monopolizing. Cf. *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 173.

But with respect to intent to exclude competitors, we need not rest on what is implicit in appellants' concession made as to their attempt to monopolize. We submit that the evidence not only justifies, but requires, the finding of appellants' intent to exclude competitors.

For example:

(1) Appellants absorbed their leading competitors as opportunity therefor arose, a course of conduct culminating with acquisition of control over Stearns (*supra*, pp. 10–14, 22–26). By this last step appellants brought under their control a company which, in the words of one intimately acquainted with the industry, was the only other concern "in this business that amounted to anything" (R. 857). (2) Appellants, even after institution of the present suit, took steps to throttle the competition of Stearns in the event that the controlling block of Stearns stock held by appellants should pass from their hands (*supra*, pp. 26–31). (3) Appellants combined with their only really important competitor to eliminate other competitors, by jointly using rights claimed under unadjudicated patents of doubtful validity to threaten them with costly infringement suits, and by refusing to allow them to obtain patent licenses (*supra*, pp. 15–22). (4) Ap-

pellants have unmistakably avowed their purpose to exclude or limit competition, by admitting that what motivated the Stearns acquisition was its contemplated manufacture of a machine comparable to the most advanced and efficient machine being made by Besser (*supra,* p. 23), and by such statements as the following made by Besser through its president (R. 1024):

> About the worst thing that could happen to this industry would be to have it wide open so that anybody and everybody could make machines and thus have no control on quality and no opportunity for anyone to do anything very important.

With respect to *power* to exclude competitors, the undisputed facts establish a dominance of the industry surpassing that of the "Big Three" of the industry who were found guilty of monopolizing in the *American Tobacco* case. The "Big Three's" combined share of total industry production had been declining, not progressively increasing, and during the past three years shown by the evidence went from 73.3% to 71%, and from 71% to 68% (328 U. S. at 794–795). The remaining production was divided among six companies, no one of which had ever attained more than 10.6% of total production (*id.* 795). But Besser, who had bought Stearns under its control, had, together with Stearns, 49.7% of the dollar sales of the industry in 1946, 67.2% in

1947, and 65% in 1948 (R. 1013)[40] Even more significant on the question of power to exclude is the fact that the remaining 35% of 1948 dollar sales was divided among 52 companies, and the two with the largest dollar sales had only 7.8% and 5.9% of the total (R. 1014). Thus Besser (plus the company controlled by it) had dollar sales more than eight times those of its nearest competitor and more than eleven times those of its next competitor.[41]

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[40] Appellants suggest (Br. 57) that, in determining Besser's exclusionary power, no consideration should be given to Stearns' sales for 1946 and 1947 and for ⅓ of 1948. This is obviously not the proper test to apply. Stearns was brought under Besser's control. As to the period subsequent to acquisition, the combined sales of the two companies concededly furnish the yardstick to apply in gauging Besser's position in the industry. But in so far as sales for a prior period are given consideration, in order to have a more balanced picture than is possible on the basis of sales figures for only one year, the sales of the two companies during the prior period must likewise be combined if they are to represent correctly the position in the industry attained by appellants (Besser and its president), and their concomitant power to exclude competitors.

[41] The "dollar volume" measurement has been used as a measure of the existence of monopoly power in antitrust cases and governmental studies. See *United States* v. *U. S. Gypsum Co.*, 333 U. S. 364; *United States* v. *American Can Company*, 87 F. Supp. 18 (N. D. Cal.); Monograph No. 21, "Investigation of Concentration of Economic Power," Temporary National Economic Committee (76th Congress, 3rd Session, p. 115); Department of Commerce Report (Census of Manufacturers) to House of Representatives Subcommittee on

Besser's patent counsel and another representative, when they called upon the president of the largest independent competitor (Lith-I-Bar), merely put into words what was implicit in Besser's dominant position in the industry. They advised this competitor that Besser "could and might enter into the field of making a machine directly competitive with us and undersell us to a point where he would be driven out of business" (R. 391).[42]

Appellants urge (Br. 59–60) that the continued existence of some small competitors and the recent emergence of one competitor (Olsen's Gocorp Corporation) refute power to monopolize. Before a jury or trial court these facts might be urged as grounds for inferring lack of power to exclude. That they do not require this inference was held in the *American Tobacco* case, which was decided on the assumption that the prosecution had neither claimed nor established any actual exclusion of

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Study of Monopoly Power (Celler Committee) dated December 1, 1949. Its use here was appropriate for the reasons stated by the district court (R. 1013). Indeed, other evidence in the case indicates that if the 65% figure is in any respect inaccurate it is too low rather than too high. For example, in 1947, prior to the commencement of this suit, Besser estimated (Ex. 3, R. 1183) "conservatively that Besser machines produce 80% of the concrete block made in the U. S. A."

[42] At this same meeting the competitor was threatened with costly patent litigation, and was told that Besser "considered it imperative that the Lith-I-Bar Company be out of business" (R. 390–1).

competitors (328 U. S. at 787). Here the district court, having heard the evidence, including evidence of actual exclusion of certain important competitors, found monopolization. The evidence is in all respects consistent with the court's finding.

II

APPELLANTS COMBINED AND CONSPIRED WITH THE NONAPPEALING DEFENDANTS TO RESTRAIN TRADE AND COMMERCE, IN VIOLATION OF SECTION 1 OF THE ACT

The district court concluded that by the 1942 license agreement, and by joint action taken thereafter, appellants had conspired with defendants Stearns, Andrus and Gelbman to restrain and monopolize trade (R. 1028). Accordingly, it held that agreement illegal (R. 1021) and adjudged it "null and void" (R. 1065). The court further held that Besser and (at least inferentially) Stearns and Gelbman had abused their patents by harassment of asserted infringers and reckless threats of suit (R. 1024–1025). Appellants vigorously attack both holdings.

A. THE 1942 LICENSE AGREEMENT

The terms of the 1942 agreement, and the circumstances leading to its adoption, are set out in the Statement, *supra*, pp. 15–22. Appellants argue that it was a mere "joint exclusive license" which, they assert, is in no way prohibited by the antitrust laws (Br. 66), and that its "only effect was

to eliminate litigation between" Besser and Stearns (Br. 65). But it is apparent on the face of the agreement that its effect was much more than that. By its terms the agreement called for joint action by the parties to it, and thus by Besser and Stearns, which were the two largest companies in the field of block machine manufacturing and each of which was the other's principal competitor.

Although the agreement gave neither Besser nor Stearns a right to sublicense, Gelbman[43] covenanted not to grant any licenses without the written approval of both of them (Ex. 10, R. 1203). And the parties agreed that determination of what infringement suits were to be brought should be made unanimously by all three parties but with the proviso that any two could prosecute, in which case the third shared none of the expense or recovery (Ex. 10, R. 1205). Thus, on its face, the agreement sets up machinery for joint action by the two largest companies in the industry to determine who will or will not receive licenses under the patents of a third party, and to determine when and against whom infringement suits should be brought. The agreement applied not only to the nine patents and applications listed in the license but also to any future inventions of Gelbman in the field to which it related. It extended for the life of the patents and applications listed and

[43] We shall sometimes refer to both licensors as "Gelbman" (see p. 4, *supra*).

could, as to subsequent inventions, be further extended, subject to the privilege of Besser or Stearns (but not Gelbman) to terminate after July 13, 1949 (*id.* R. 1205–1206).

The record is replete with evidence that the purpose of the agreement was far broader than a mere compromise of litigation.[*] Gelbman testified that it was intended not only to "stop any further litigation" with respect to the Gelbman patents—and hence any further challenge by Besser to their validity—but also to confine licensing under them to "the only two firms in the business that amounted to anything." (R. 855–7). Indeed Besser's purpose to monopolize the industry was better served by abandoning its attack on the Gelbman patents and by placing itself in a position to use those patents, jointly with Stearns, as a means of suppressing competition of others. Besser's view of the importance to it of maintaining the validity of the Gelbman patents is well expressed in Besser's letter to Gelbman, signed

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[*] A contract of compromise is subject to the Sherman Act, like any other contract, and if it is used to suppress competition is illegal. *United States* v. *Masonite Corp.*, 316 U. S. 265; *Standard Oil Co.* v. *United States*, 283 U. S. 163, 174, 175; *National Harrow Co.* v. *Hench*, 83 Fed. 36, 38 (C. A. 3).

It should be noted that the 1942 agreement went far beyond the scope of any existing patent controversy. The Bell suit involved two claims of one of the Gelbman patents. The 1942 license covered nine patents and applications and any further inventions which Gelbman or Andrus might make during the life of the agreement (R. 1202–1203).

by Jesse H. Besser, stating (Ex. 71, R. 1271–1272):

> About the worst thing that could happen to this industry would be to have it wide open so that anybody and everybody could make machines and thus have no control on quality and no opportunity for anyone to do anything very important. That is the way this industry was until a certain measure of control was secured through Gelbman vibration patent and Besser plain pallet stripper patents.

That this view was shared by Stearns and Gelbman is reflected in the proposal, enthusiastically approved by all three, for a series of advertisements "stressing the patent situation," which would "state emphatically" that Besser and Stearns were the only licensees under the Gelbman patents (*supra*, p. 19). As Olsen (President of Stearns at the time) testified, "The intent was to enter into an agreement whereby the two companies would, unless they changed their mind, be the only licensees" (R. 149).

The scope of the mutual consultation between Besser, Stearns, and Gelbman to achieve this objective of maintaining "a certain measure of control" through the Gelbman patents is perhaps best illustrated by the extensive correspondence and discussion relating to the activities of Roy Darden (Exs. 19–21, 51–59, 63, 67, 68, 70–72, 78–81, 84; R. 1215–1218, 1258–1273, 1276–1281). Darden's

competition was especially feared because he was starting to produce an efficient high-speed machine, and because he appeared to have back of him the financial resources of the Link-Belt Company (*supra*, pp. 17-18.) Some time prior to June 12, 1946, Jesse H. Besser investigated Darden's operations and spoke to Gelbman about them (R. 1258). In June, 1946, Olsen, of Stearns, wrote Gelbman, with a copy to Besser for comment, suggesting that "it might be easier to knock [Darden's] ears down now than later" (R. 1259), and in July he wrote Besser asking for its comments on the situation and pointing out that Darden's plan included "the manufacture of a high-production vibrator machine which * * * would make it really effective competition" (R. 1261). On July 31, 1946, Besser's distribution manager wrote Gelbman, stating that he had discussed the Darden matter with Jesse H. Besser and with Olsen, and that both wanted Gelbman to institute suit (R. 1263). In November, 1946 Gelbman wrote Besser, with a copy to Olsen, suggesting that "all of us * * * get together" with Larsen, who had been retained as a patent investigator (R. 1267).

Thereafter, a notice was sent to Darden to stop infringing (R. 1273). On January 15, 1947, Gelbman wrote identical letters to Besser and Stearns, stating that Darden had asked for a license, and adding, "Kindly advise me what your pleasure

is in the matter" (R. 1217). Olsen, for Stearns, replied on January 21, 1947, that he was in favor of continuing the suit and added, "There are a lot of angles to this and you, Jesse [Besser] and I should have a heavy session on this matter the first time we can get together. This is likely to be at the Chicago meeting in February" (R. 1218). The three parties decided to end the suit by giving Darden a limited license permitting him to make a limited number of machines then in production. A preliminary agreement to that effect was entered into on February 20, 1947, between Darden, Gellman, Besser, and Stearns (Exs. 76–77, R. 1274–6), and was later finalized. (Ex. 25, R. 1224.)[45]

We think it clear that such joint action by competing manufacturers with respect to the licensing of and suits under the patents of a third party violates the antitrust laws. This is particularly so where, as here, the participants are by far the two leading companies in the field and the patents to which the joint action relates are asserted by

[45] Not long thereafter, on April 17, 1947, Stearns wrote Gellman, with a copy to Besser, suggesting that "it would be wise to start suit against some user of one of the other infringing machines. Our opinion—based on all the angles—is that maybe we should check up on 'Lith-*O*-Bar' next" (Ex. 81, R. 1279). Lith-I-Bar is the third in the industry in dollar sales (R. 1014). For Besser's threats of infringement suits against Lith-I-Bar, and its attempt to buy Lith-I-Bar out by paying its president for "not growing potatoes" (R. 393), see pp. 13–15, *supra*.

the parties to be of prime importance in the manufacture of the most efficient and up-to-date type of machine. Plainly, absent the existence of patents, an agreement by two competitors to take joint action to eliminate or regulate the competition of others would violate the antitrust laws. And the fact that the agreement here related to patent rights did not give the parties a "universal license" to violate the prohibitions of the Sherman Act. *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 49. Assuming that the action taken to deny licenses and sue asserted infringers [46] would have been within the scope of the patent grant if taken by a single patentee holder, that fact would not render permissible the joint action taken by competing manufacturers. As the court below said, "It is this combination requiring collective action that primarily invalidates the agreement" (R. 1021).

In *United States* v. *National Lead Co.*, 63 F. Supp. 513, 524 (S. D. N. Y.), affirmed, 332 U. S. 319, Judge Rifkind held that although a single patent owner could refuse to license at will—

> where there is a refusal to license (or refusal to license except on specified conditions which would extend the patent monopoly) which is the product of agreement or conspiracy, on the part of the owners of

[46] But see *infra*, pp. 53–58, pointing out that infringement suits were used by the parties as a means of unlawful harassment under color of assertion to patent rights.

> competing patents, I believe, the law is offended to the same extent as the law is violated when several combine and agree not to do business with a particular customer or class of customers.

Similarly, in *United States* v. *General Instrument Corp.*, 87 F. Supp. 157 (D. N. J.) the court held invalid a patent pool by which dominant manufacturers of variable condensers combined their patents in a single licensing agency. The court said (pp. 195–6):

> The Development parties exceeded the boundaries of permitted cross-licensing of the patents separately owned by them when they vested in their creature, Development, the power to grant licenses and to use those licenses for aggressive or defensive purposes. * * * the normal patent monopoly with its products of legitimate cross-licensing and royalties, is extended to give multiple advantages to individual patent holders dominant in the industry by combining their patents and affording the mechanism to reap mutual rewards greater than their individual patents would justify.

(See also *id.*, p. 191.)

A like result is produced here. The 1942 agreement covered not only Gelbman's inventions, but also Olsen's and Stearns' inventions, which had been assigned to Gelbman under a grant-back provision of Gelbman's prior license to Stearns (Ex. 10, R. 1202; Ex. 112, R. 1323;

App. Br. 13). While Besser's patents were not included in the 1942 agreement, they were combined with the Gelbman-Olsen-Stearns patents in the sense that the same policies with respect to licensing and infringement which were adopted and adhered to cooperatively by Besser and the other parties to the agreement were also applied by Besser to its own patents. Thus Besser's agent charged competitors with infringement under both Besser's Scott patent and the Gelbman patents (R. 203, 439; Ex. 95, R. 1291, Ex. 98, R. 1295). See *Whitman* v. *Andrus*, 92 U. S. P. Q. 291 (C. A. 6). Besser's desire, as stated by its president, was to maintain "control" of the industry "through Gelbman vibration patent and Besser plain pallet stripper patents" (*Supra*, p. 45).[47] Thus the result here is comparable to that under a closed patent pool, in which the parties combine their patents and financial power for the purpose of excluding others from use of the pooled technology and of controlling competition.

In *United States* v. *Line Material Co.*, 333 U. S. 287, two manufacturers had combined their pat-

[47] The situation here is markedly different from the "patent pool" sustained in *Standard Oil Co.* v. *United States*, 283 U. S. 163. The pool there was open on reasonable terms to all manufacturers desiring to participate (283 U. S. at 168). Moreover, the Court concluded that there was no evidence of substantial control by the defendants of either cracked gasoline or total gasoline production (pp. 176–177) and that there was no general intent or purpose to restrain trade (see pp. 171, 174, 175, 176, 178, 179, 182).

ents for the purpose of fixing the prices at which licensees might sell the product. The opinion of Mr. Justice Reed, which was the opinion of the Court, while not questioning the principle that a single patent owner could fix the price at which his licensees sold, held that that principle did not extend to a combination of two patent holders. He stated (333 U. S. at 311):

> While the *General Electric* case holds that a patentee may, under certain conditions, lawfully control the price the licensee of his several patents may charge for the patented device, no case of this Court has construed the patent and antimonopoly statutes to permit separate owners of separate patents by cross-licenses or other arrangements to fix the prices to be charged by them and their licensees for their respective products. Where two or more patentees with competitive, non-infringing patents combine them and fix prices on all devices produced under any of the patents, competition is impeded to a greater degree than where a single patentee fixes prices for his licensees. The struggle for profit is less acute. * * * The merging of the benefits of price fixing under the patents restrains trade in violation of the Sherman Act in the same way as would the fixing of prices between producers of nonpatentable goods.

Similarly here, the "merging of the benefits" of the power to grant or deny licenses and to sue

asserted infringers produced a different result than would the act of a single patentee. It destroyed competition between Besser and Stearns to the extent that, although they presumably continued to compete with each other in trying to sell machinery, they united together in a concerted attempt to preclude effective competition with either of them from anyone else. The right to compete became a special privilege to be enjoyed only by Besser and Stearns. The "little fellows" had to face, not merely the major company, but the combined efforts of the two leading companies to drive them out of business. Finally, Besser, which absent the agreement would have been the company best equipped financially to challenge in the courts the validity of the Gelbman patents, became vitally interested in preserving their validity. The effect was to delay for about a decade the ultimate holding of invalidity. "It is as important to the public that competition should not be represented by worthless patents, as that the patentee of a really valuable invention should be protected in his monopoly * * *". *Pope Mfg. Co.* v. *Gormully*, 144 U. S. 224, 234.

Accordingly, we think it clear that the 1942 agreement and the acts taken thereunder, standing by themselves, were illegal. But they need not be viewed in isolation; "the character and effect of a conspiracy is not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *United*

States v. *Patten*, 266 U. S. 525, 544. Accordingly, the participation in the 1942 agreement of Besser, the only party to that agreement who has appealed from the holding of its illegality, must be viewed in the light of the other evidence of Besser's conduct, and particularly of the undisputed fact that Besser attempted to monopolize the business of block machinery and the finding that its plan of monopolization, begun at least as early as 1938 and continuing through its ultimate acquisition of Stearns, came to full fruition. That the 1942 agreement formed part of that plan is evident from what has already been said. We need only remind the Court of the letter of Jesse H. Besser stating that "about the worst thing that could happen to this industry would be to have it wide open," and that "that is the way this industry was until a certain measure of control was secured through Gelbman vibration patent and Besser plain pallet stripper patents."[48]

B. HARASSMENT OF COMPETITORS UNDER COLOR OF ASSERTION OF PATENT RIGHTS

This combination between competitors was, moreover, not limited to taking action which a single patent owner could legitimately have taken. On the contrary, Besser, Sterns and Gelbman, having combined their resources, proceeded, as the district court found, to take advantage of the ex-

[48] As the court below pointed out (R. 1022), the fact that the agreements extended to future inventions of Gelbman is a further indication of an intent to restrain trade and monopolize.

pensive nature of patent litigation to force competitors to discontinue operations.

Appellants devote no less than 26 pages of their brief (pp. 15–33, 73–81) to an effort to demonstrate that Besser's and Stearns' activity was no more than a bona fide enforcement of patent rights. Judge Picard held otherwise, however, and he was peculiarly qualified to evaluate appellants' contention, having presided at the trial of the patent infringement suit involving Gelbman's apparatus (2,275,678) and method (2,366,780) patents and appellants' Scott patent, *Andrus* v. *Whitman*, 93 F. Supp. 383 (E. D. Mich.) (decided June 28, 1950, 5 days after the trial herein ended).[49]

We have set out (pp. 20–22, *supra*) some of the evidence on which Judge Picard's finding was based. We need only remind the Court of some of the incidents which illustrate its character. The defendants' purpose is evident in their attempt to make the industry "patent conscious" and aware that Besser and Stearns were the only licensees—thus putting the "little fellows" on notice that in any patent litigation the alleged infringer would be pitted against the combined financial strength of the two largest concerns.

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[49] In addition, at least nine manufacturers or users (other than Besser) of concrete block machinery testified herein, and in each instance (R. 169, 199, 218–219, 313–314, 324–326, 395–397, 442–445, 446, 471–476, 530–531) the court questioned them at length as to the type of machines which they were manufacturing or using and which the defendants had alleged to be infringements.

It is shown in their dealings with Darden, who, although he did not think the Gelbman patents "any good," was forced to capitulate when told by his supplier that he would get no more supplies till the patent litigation was cleared up. It was to Darden that Olsen said "There is not any room in this business for your company" and that "we intend to go after * * * the others * * * until we get them all". Similarly, Graveley abandoned his business when Stark, Besser's patent counsel, threatened to "sue me [Graveley] and keep me tied up for a long period of time if I made an automatic block machine, whether or not infringement was involved", and reminded Graveley that he could not afford to be tied up in this way "win, lose or draw".[30] On another occasion Stark, having merely passed by Winn's machine, told Winn he was infringing and that on his return in two weeks he "expected to find our plant closed down".

This demand that a competitor close his plant, this plan to "go after" competitors until "we get them all", cannot be justified on any theory that the defendants' patents, if valid, dominated the field. As the Sixth Circuit stated in *Whitman* v. *Andrus*, 92 U. S. P. Q. 291, 293, "Gelbman was not, nor did he claim to be, an innovator in the use of vibration to compact concrete material in a

[30] Stark intimated to another competitor, Lith-I-Bar, that the expenses of an infringement suit might be as much as $200,000.

mold." Indeed appellants admit (Br. 10) that "it is certain that both vibrating and tamping machines of all established capacities can be and are being manufactured and sold without infringement of the Gelbman-Andrus or the Besser patents". The most that the defendants are entitled to do was to demand that competitors not infringe. To use patents as a means of forcing competitors out whether or not they were infringing by emphasizing that the little fellow could not stand the expense of suit, "win, lose or draw", clearly exceeds the patent grant.

It should be noted that at the time of these statements and acts the alleged infringers had good reason to be optimistic about their legal chances of success. Not only was it possible to make vibrating and tamping machines without infringing, but there was good reason to believe the patents invalid. In the *Bell* suit (defended by Besser), a district court had held two claims of one of the Gelbman patents invalid. Recently the Sixth Circuit has held two of the Gelbman patents invalid. *Whitman* v. *Andrus*, 92 U. S. P. Q. 296. Both Darden and Graveley felt confident of their legal position but bowed to superior financial power. Both the success and the vice of the defendants' activities may be measured by the fact that several competitors capitulated following threat of suit, while only one, Lith-I-Bar, the third largest in the industry, resisted; yet when the de-

fendants sued Lith-I-Bar it secured an adjudication of invalidity of the two Gelbman patents involved.

To such a situation, Judge Frank's observation in *Picard* v. *United Aircraft Co.*, 128 F. 2d 632, 641–642 (C. A. 2), is most appropriate:

> * * * most patents escape judicial scrutiny, since few patents ever get into court. For the expense of defending a patent suit is often staggering to the small businessman. And there is reason to believe that, unable, for that reason, to defend a threatened patent suit, many persons capitulate to a well financed patentee without litigating; the result is that many patents, which are "spurious"—i. e., would probably not stand up in court, if contested—confer, in actual fact, patent monopolies which are as effective, for all practical purposes, as if they had been judicially held valid. The actual enjoyment of a patent monopoly—which, of course, has its effect on the public—may, it seems, often depend on the fact that the patent is owned by a wealthy concern and that alleged infringers lack funds to defend themselves.

Threats by dominant producers of infringement suits to harass competitors are a familiar part of the pattern of monopoly cases under the Sherman Act. E. g., *Patterson* v. *United States*, 222 Fed. 599 (C. A. 6), certiorari denied, 238 U. S. 635; *Stewart-Warner Corporation* v. *Staley*, 42 F. Supp. 140 (W. D. Pa.). Harassment of competi-

tors by patent litigation as a part of a monopolistic program was condemned in *United States* v. *Hartford-Empire Co.*, 46 F. Supp. 541 (N. D. Ohio), affirmed, 323 U. S. 386. Judge Kloeb said (p. 565):

> Another part of the plan was a system of litigation against all remaining outsiders. Here the power of litigation pursued by a strong combination of two companies, * * * backed by unlimited financial means, is brought into play against individual companies, most of them small manufacturers of glass products.

The record here amply justified the holding that Besser alone and Besser, Stearns and Gelbman in combination engaged in a similar program of unlawful harassment.

III

THE RELIEF ORDERED BY THE DISTRICT COURT IS APPROPRIATE AND NECESSARY

As we have seen, the district court rightly concluded that appellants have attempted to monopolize and monopolized trade and commerce in block machines, and combined and conspired with the other defendants to restrain such trade. Accordingly, the United States is entitled to a judgment dispersing appellants' monopoly power, *Schine Chain Theatres* v. *United States*, 334 U. S.

110, 128, 129, depriving appellants of the fruits or benefits of their monopolistic practices and trade restraints, *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 189, and terminating the combination and conspiracy. In addition, the judgment should "forbid the doing in the future of acts like those * * * found to have been done in the past which would be violative of the statute." *United States* v. *Standard Oil Co.*, 221 U. S. 1, 78. "[R]elief, to be effective, must go beyond the narrow limits of the proven violation," *United States* v. *United States Gypsum Co.*, 340 U. S. 76, 90; "* * * the usual ways to the prohibited goal may be blocked against the proven transgressor * * *" *International Salt Co.* v. *United States*, 332 U. S. 392, 400.

In its major outlines, the judgment entered below (R. 1063–9) gives three types of relief. (1) It breaks up appellants' monopoly power by requiring divestiture of the Stearns stock and by prohibiting future acquisitions of stock or assets save on a showing that competition will not thereby be lessened (Secs. IV and V). (2) It deprives Besser of one of the fruits of its monopoly power by requiring that existing lessees of its block machines be given an option to purchase such machines and necessary accessory equipment (Sec. VIII). (3) It prevents unlawful use of patents by invalidating the three-party agreement of 1942, enjoining the execution of similar agreements in the future, and

requiring licensing of existing and future patents at fair royalties (Secs. VI and VII).[51]

We believe that such relief is the minimum necessary to "cure the ill effects of the illegal conduct" which has been found and to "assure the public freedom from its continuance." *United States* v. *United States Gypsum Co.*, 340 U. S. 76, 88. The district court had the "opportunity to know the record and to appraise the need for prohibitions or affirmative actions" (*id.*, 89). The judgment which it entered provides relief of a kind awarded in many other cases involving like violations of the statute and clearly is not an abuse of the discretion vested in the trial court with respect to appropriate remedy. Moreover, appellants' activities since the filing of the complaint (*supra*, pp. 26–31) demonstrate their disregard for the Sherman Act and point up the need for a decree which will assure future conformance with the Act.

Appellants do not object to many provisions of the judgment, and object only in detail or phraseology to others. We shall discuss below the provisions concerning which appellants' brief raises any question.

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[51] In addition, the judgment enjoins certain other types of conduct (Secs. IX and X), contains the usual visitorial provision (Sec. XI), the usual provision retaining jurisdiction (Sec. XII), and a provision (Sec. III) making the judgment binding on successors and assigns.

A. DIVESTITURE OF STOCK AND PROHIBITION AGAINST FUTURE ACQUISITIONS

Appellants do not object to the substance of the provisions (Secs. IV and V) requiring divestiture of the Stearns stock and prohibiting subsequent like acquisitions (App. Br. 85, 102). Plainly the United States was entitled to an order of divestiture. *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61, 97); *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 189. And, to prevent future violations, appropriate protection against subsequent acquisitions and against interlocking directorates was equally necessary. *United States* v. *Crescent Amusement Co., supra.*

Appellants contend, however, that the time allowed them to accomplish the divestiture was too short. And they invite this Court to "outline procedures, including trusteeing" (Br. 102), which they seemingly suggest would be preferable to an outright sale of the Stearns stock held by them. If appellants are now seriously seeking a trusteeing of the stock, we are firmly opposed. The situation presented by this case is one which calls for outright divestiture, by sale, as promptly as is reasonably possible.

1. The execution of the Stone contract, by which Besser sought to "superficially cleanse itself of all taint of monopoly while retaining all its benefits" (R. 1027) demonstrates Besser's continuing determination to relegate Stearns to the position

of a second rate competitor despite the pendency of this suit. Nothing short of a complete severance of Besser's connection with the stock will provide absolute and final assurance against future efforts to accomplish the same results.

2. As Besser has already held a controlling stock interest in Stearns for approximately four years, it is imperative that Stearns' restoration to a full competitive position with Besser be achieved as rapidly as possible. A trusteeing of the stock would simply create a further period of uncertainty which would adversely affect Stearns' ability to compete in at least two major respects.

(a) Block makers are wary of purchasing an "orphan piece of equipment" (R. 547)—i. e., a block machine made by a manufacturer who may not be available to supply necessary replacement parts and servicing for the life of the machine. Any doubt as to the continued existence of the seller is an obvious handicap to the sale of the machine. We think Stearns is suffering from that handicap now and will continue to do so for so long as the ownership of controlling interest in it remains unsettled. The industry is well aware that Besser has already made a contract (now cancelled by court order) with Stone, whose avowed purpose was "to sell off the physical plant at Stearns" (R. 674) and direct Stearns' assets and energies to making Aglite equipment (R. 671). This alone suggests the possible termination

of Stearns' activities as a block machine manufacturer. If Stearns is to be restored to the position of a full-fledged competitor to Besser all such handicaps must be removed. This can only be accomplished by a complete and final severance of all Besser's connections with Stearns.

(b) Stearns' vigor and future success will depend largely upon its management. It is important that the new owners of the controlling shares install officers of their choosing as soon as possible so that they can adopt immediate and long range policies. A trusteeing of the stock would simply delay the day when the new owners would begin operating the company.

The district court was well aware of the foregoing considerations and set a limited time (60 days for the submission of a plan and 78 days for completing divestiture) to spur appellants into acting promptly. Until they have made a bona fide effort to comply, no one can say with absolute assurance that the period of 78 days is or is not an adequate time for the disposal of the stock, which is all that is involved. There is reason to believe the time would have been adequate. The stock is not lacking in attractiveness, as is indicated by the efforts of the Stearns minority stockholders (Tr. 2373–5) and Stone (Tr. 2469) at the hearing on relief to secure an inside track to the purchase of it.[52]

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[52] While invalidating the Stone contracts, the court (Tr. 2467) did not bar Stone as a potential purchaser of the stock

If, after a bona fide effort to comply, it should appear that more time is necessary the United States would not object to a reasonable extension of time, and it so stated in the court below (R. 1040). Until an effort is made to comply promptly, appellants' objection would seem to be premature. In any event, since these provisions of the decree were stayed and the date specified for completing divestiture has expired it will be necessary for the district court, on remand, to set new dates for the submission of a plan and completion of divestiture.

B. PROVISION GRANTING BESSER'S PRESENT LESSEES THE OPTION TO PURCHASE LEASED MACHINES

Appellants (Br. 94) ask this Court to strike from the judgment Section VIII (A), which gives to Besser's *existing* lessees the option (1) to terminate the lease, (2) to continue it, or (3) to purchase the leased machine or machines on terms "mutually satisfactory to the parties concerned" (R. 1068). The Government submits

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but made it clear that it would examine any agreements between Besser and Stone with a "fine tooth comb" (Tr. 2468). Stone argued that the public interest and that of the industry would be better served if Stone were permitted to acquire the stock rather than the Stearns minority stockholders (Tr. 2469). The United States expresses no opinion on whether either the Stearns minority stockholders or Stone could qualify as purchasers. But their indication of a strong desire to buy emphasizes the attractiveness of the stock.

that this section of the judgment should be upheld.

In October 1947 Besser adopted the policy, which it has subsequently unwaveringly followed, of making their most advanced machine, the V-3-R (Super Vibrapac), available to block makers in the United States only under lease (R. 947).[53] The policy provoked immediate resistance. In October 1946 Longenecker, president of a block-making company in Pennsylvania (R. 449–50), had placed a purchase order for one of Besser's Super Vibrapac machines and had made a down payment of $3,500 (Exs. 148–151, R. 1360–4). Besser delayed making delivery, and in October 1947 informed the purchaser that it had changed its policy and was now leasing this machine only, and therefore would not fill the purchase order (R. 452–4). Although Longenecker wished to purchase and not lease (R. 453), he accepted a lease as "the best course possible * * * to follow" under the circumstances (R. 455).[54] See also R. 1043, 1047.

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[53] On foreign orders, the machine is sold and not leased (R. 948).

[54] Since he had put in a purchase order before the leasing policy was determined and since he was the first Besser customer to enter into the lease agreement, he was given the privilege of buying the leased machine in the event that Besser later changed its policy and again offered its machines for sale (Ex. 153, R. 1369–70).

As we have stated, the leasing policy was adopted in October, 1947. Besser, having already acquired some 14,000 shares of Stearns, was at about this time laying plans for the secret acquisition of clear control of Stearns, which it completed by March, 1948 (*supra*, pp. 24-25). Besser alone had 47.8% of the industry's dollar sales in 1947 (App. Br. 57). Together with Stearns it had 67.2% of such sales in 1947 and 65% in 1948 (R. 1013). But these percentages fail to represent the complete monopoly which Besser had of a machine making 750 blocks per hour, the capacity of Besser's Super Vibrapac machine (App. Br. 38, 39). At the time of trial no other manufacturer had a machine with a rated hourly capacity even approaching this (Ex. 190, R. 1408-12). Lith-I-Bar's machine had a rated capacity of 480 per hour (R. 383) and Appley's machine a capacity of 100-120 per hour (Ex. 190, R. 1408). Manufacture of the Warren machine, having a capacity of 800 per hour, had been brought to an end by instituting an infringement suit which had been settled because the suit had cut off supplies and because the defendants were unable to finance extended patent litigation (*supra*, p. 18). No 750 block-per-hour machine was available from companies other than Besser until Gocorp produced a high speed machine in the early part of 1949 (Tr. 2366). Consequently a block maker who desired a high production machine had no alternative but to accept the Besser

machine on whatever terms Besser chose to lease it.

The costs of any block maker who uses the Super Vibrapac machine to capacity or near capacity are very much greater if he rents rather than purchases. The rental is one cent for each block produced up to 1,500,000 in one year, which figure is below the year's output if the machine is operated only eight hours per day for only a 5-day week.[55] The yearly rental, assuming such production of 1,500,000 blocks, is $15,000. The machine has a 10-year life (R. 950), so that a lessee, if he is to get production equal to that of the machine in the hands of a purchaser, must lease the machine for ten years and pay $150,000 as rental. Besser's president testified that the sales price of the machine if it had been sold would have been $40,000 (R. 754–5). In other words, production of 1,500,000 blocks annually—a conservative estimate of yearly production—would cost the block maker almost four times as much under appellants' lease agreement as it would if the machine were purchased.

Appellants seem to suggest (Br. 90) that the leasing is advantageous to Besser's customers. We have no doubt that some customers, given a choice between purchase and lease, would have chosen to lease, notwithstanding the onerous

[55] 750 blocks per hour, 8 hours per day, 5 days per week, 52 weeks per year = 1,560,000.

terms of the lease. The point is that no choice was given, or rather, that the only choice was between leasing and doing without the most efficient machine on the market.

Appellants also suggest (Br. 90) that the judgment interferes with "adapting distribution to the customer's needs" and that it strikes down leases which "provide a local operator, with limited capital, access to a more efficient machine with a minimum investment, thus permitting him to compete more successfully in his local market." Obviously the judgment has no such effect. Only in the instances in which the lease does not best serve the customer's needs will he avail himself of the option to purchase provided by Section VIII (A).

The option which the judgment gives restores the lessees to the bargaining position which they would have had absent Besser's violations of the Sherman Act. It is a purpose of the Sherman Act to secure equality of opportunity and to preserve for all freedom to deal in a competitive market, whether as buyers or sellers. *Ramsay Co.* v. *Bill Posters Association*, 260 U. S. 501, 512; *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 493; *United States* v. *Women's Sportswear Association*, 336 U. S. 460, 464. Relief is fashioned to achieve this end. *United States* v. *U. S. Gypsum Co.*, 340 U. S. 76, 88–89.

The relief awarded is narrower than that sustained in *International Salt Co.* v. *United States*, 332 U. S. 392. The defendant there had distributed its machines primarily by leases and had in some cases refused to sell its machines outright (6 F. R. D. 302, 306). Paragraph VI of the decree, which the Court sustained, required International Salt "to offer to lease or sell or license" its present type of machine or other types which might be developed, and provided: "Any person with whom defendant International Salt now has a lease agreement relating to the Lixator or Saltomat machines may elect to retain his rights under the existing lease or to enter into a lease or sale or license contract with defendant International Salt in accordance with the provisions of this paragraph." 332 U. S. 392, 399, n. 7. Thus that judgment not only gave existing lessees an option to buy, but also required the defendant to continue forever to offer its machines for sale.

Nothing in *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, requires a different result. In that case this Court was primarily concerned with the effect of the decree in prohibiting future leasing at a time when the defendants were no longer participating in any conspiracy or other violation of the Sherman Act (323 U. S. at 414). The Court also invalidated, without discussion, a provision terminating existing leases (p. 422). The provisions there involved, terminating all existing

leases and prohibiting future leasing, were far less moderate than the present provisions, which merely give existing lessees an option to purchase. Particularly in view of the subsequent decision in *International Salt*, this Court's decision with respect to the provision before it in *Hartford-Empire*, concurred in by only four Justices (see 323 U. S. at 436, 449–450) is not to be taken as a declaration of a rule of law that under no circumstances can existing leases be made terminable.[56]

Section VIII of the present judgment leaves the appellants free to adopt a leasing system for the future if they so desire and if they are able to find lessees. But as a matter of elementary justice, any present lessee who was forced against his wishes to take the lease in lieu of purchasing machinery, should be given a reasonable opportunity to free himself from the onerous terms which Besser was able to impose on him through the exercise of monopoly power. Besser should not be permitted to avoid this requirement on the basis of asserted hardship or inconvenience. As this Court has said, "those who violate the Act may not reap the benefits of their violations and

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[56] Compare *United States* v. *National Lead Co.*, 332 U. S. 319, 358, stating that "it cannot be assumed that, by [the deletion of paragraph 24 (c) of the *Hartford-Empire* decree, the Court] announced its disapproval, in all future decrees, of provisions requiring the supplying of technical information to licensees at a reasonable charge."

avoid an undoing of their unlawful project on the plea of hardship or inconvenience." *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 189.

C. PATENT PROVISIONS

1. *Cancellation of the 1942 license agreement and prohibition of similar agreements.*—After cancelling [57] the three-party agreement of December 7, 1942 (Sec. VI (A), R. 1065) the judgment provides:

> (B) Defendants are jointly and severally enjoined and restrained from conveying or receiving any patent rights under any license, contract, agreement or understanding which gives the licensee or licensees control over the number of licenses issued or to be issued, or which has the same unlawful purpose and effect as the afore-described license agreement of December 7, 1942.

This provision must be interpreted in light of the court's statement (R. 1021):

> It may well be that an exclusive license to one party would be valid, but here the patentees have joined hands with the two largest competitors in the industry and by terms of their agreement have virtually made it impossible for others to obtain rights under those patents.

[57] In view of the illegality of the 1942 agreement, discussed *supra*, pp. 42–53, the lower court was justified in ordering its cancellation. Cf. Sections IV and V of Judgment entered in *United States* v. *U. S. Gypsum Co.*, 340 U. S. 76, 99.

As Section VI (B) is directed to preventing a revival or repetition of the vice found to exist in the 1942 agreement, we do not construe it as barring the granting or receiving of a bare exclusive license. Since, however, Besser seems to find it ambiguous and since it is susceptible of a possible construction beyond that intended, we do not object to a clarification of it in the following manner: strike the words "or licensees control" from the fifth line (as printed *supra* p. 71) and substitute therefor the words "joint control with any other licensee or licensees." As thus amended, we think it will be clear that the purpose of the provision is to preclude any arrangement by which patent licensees, acting jointly, may control the granting or denial of other licenses.

Contrary to the claim made by appellants (Br. 104), the injunction against granting or conveying patent rights under any agreement "which has the same unlawful purpose and effect as the aforedescribed license agreement of December 7, 1942" (R. 1066) is not subject to the same infirmity as was the provision stricken in *Hartford-Empire Co.* v. *United States,* 323 U. S. 386, 410. That provision enjoined appellants from violation of the antitrust laws "as charged in the complaint." Similar in scope to the provision under consideration is the injunction approved in *United States* v. *Crescent Amusement Co.,* 323 U. S. 173, 187. In the *Crescent* case this Court

considered an injunction prohibiting exhibitors from making franchises with certain distributors "with the purpose and effect of maintaining their theatre monopolies and preventing independent theatres from competing with them", and from entering into "any similar combination and conspiracy for similar purposes and objectives." The injunction approved in the *Crescent* case necessarily requires reference back to the Court's opinion in order to ascertain what constitutes defendant's theatre monopolies. The provision here, which refers to but one contract and its operation, is sufficiently definite to inform Besser as to the area of forbidden activity.

2. *Compulsory Licensing of Patents.*—Section VII (R. 1066–7) orders appellants and Gelbman and Andrus to grant to any applicant a non-exclusive license at a fair royalty rate under any, some or all of the patents and applications pertaining to block machinery now owned or controlled by them or which are applied for or issued within 10 years from the date of entry of the judgment. As Besser has shown a propensity for misusing patent rights, *supra*, pp. 42–53, any judgment here would fall far short of its purpose if it failed to require such licensing.

This Court has sustained compulsory licensing in every case coming before it in which the district court has ordered that remedy. *Hartford-Empire Co.* v. *United States*, 323 U. S. 386; *United States*

v. *National Lead Co.*, 332 U. S. 319; *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 340 U. S. 76. Contrary to appellants' suggestion (Br. 95–97), the remedy is not limited to "flagrant" cases. As this Court said in *United States* v. *National Lead Co.*, 332 U. S. 319, 357, of a related provision requiring exchange of technical information:

> The fact that the violations of the Antitrust Act may have been more reprehensible in [the *Hartford-Empire* case] than here is not persuasive because this provision is not and should not be punitive. The justification for the compulsory imparting of methods and processes rests upon its appropriateness and upon the necessity for it in providing an effective decree.

In any event, appellants' violations of the antitrust laws were deliberate and flagrant.

Appellants attack upon the compulsory license remedy amounts to a claim that they should not now be disarmed of the weapon they fashioned out of patents. Even after divestiture of the Stearns stock, Besser will still be by far the largest manufacturer in the industry and will still have an especially dominant position in respect of the most advanced and efficient machines. In view of Besser's unlawful use of patents, through combination with Stearns to deny licenses and through harassing use of infringement actions, the judgment here would fall far short of

its purpose if it failed to disarm Besser of the patent weapon until the effects of its oppressive tactics have been dissipated. The appropriateness of compulsory licensing is especially apparent from the attitude evidenced by representatives of prospective licensees during the proceedings on royalty determination. They there clearly indicated that their desire was not so much to use the technology embodied in Besser's patents, as to obtain freedom for themselves and their customers from any threat of infringement litigation. As Olsen stated, the license being sought "gives the licensee nothing except assurance that he will not be attacked by Besser" (R. 1105).

The determination of the period of time during which future inventions should be subject to the licensing requirement was within the discretion of the trial court. *United States* v. *U. S. Gypsum Co.*, 340 U. S. 76, 94. The ten-year period which it adopted is not excessive when viewed in the light of the periods fixed in other cases. Thus, in the *Hartford-Empire* case, this Court approved a requirement of compulsory licensing of future patents without limitation as to time. 323 U. S. at 413, 417. In the *Gypsum* case this Court also directed the licensing of future patents and stated

> Whether the term for compulsory licensing of new patents is to be five years, or for a longer period with the privilege to the appellees to move for a limitation for such

> new patents, as provided in the [decree proposed by the Government] we leave to the District Court [340 U. S. at 94].

In the *National Lead* case the period adopted by the district court and approved by this Court was five years.

Appellants complain of discrimination in that the decree fails to direct Stearns to license its patents. Insofar as the record in this case shows, Stearns had no patents relating to block machines other than those transferred to Gelbman and Andrus (R. 352–3; Ex. 10, R. 1202; Ex. 112, R. 1323; R. 95–7). Since the latter are required (R. 1066) to license these patents, all known existing patentable inventions of Stearns are being made available to any manufacturer, including Besser Company. In view of the possibility, however, that Stearns may in the future acquire patent rights we believe that the decree should have required licensing of Stearns' patents on the same terms as Besser's. While we do not believe that it would be appropriate for this Court to remedy the inadvertent omission of Stearns from the licensing provisions, since Stearns is not a party to this appeal, we intend, on remand, to apply to the district court for such relief. Furthermore, appellants clearly cannot object to lawful relief awarded against them because of the failure to award like relief against some one else.

3. *The Licensing Procedure.*—The mechanism established by the district court for determining the rate of royalties and form of license agreement is in substance that urged upon the court by counsel for Gelbman and Andrus. These two defendants, who had at least 11 existing patents (R. 1072–3) subject to compulsory licensing (as compared with three held by Besser, *infra*, p. 79), sought to have the form of the license and rate of royalty determined at one time and submitted to the court for its approval (Tr. 2389, 2405, 2412).

Under the procedure adopted, the Government and Gelbman and Andrus were each to select two persons to act as a committee to determine fair royalty prices and the form and contents of the royalty contracts for the Gelbman and Andrus patents; if they could not agree they were to select a fifth, and if they were unable to agree on a fifth member the court could either act as the fifth member or select another person in his stead (Sec. VII (B) 1). The same procedure was to be followed as to the Besser patents, with Besser selecting two of the members of the committee (Sec. VII (B) 2).

This procedure has worked satisfactorily as to the Gelbman and Andrus patents. The Government and Gelbman have each appointed two representatives who, sitting as a committee, agreed upon and filed with the court (R. 1072)

a form of license and a schedule of royalties for those patents.[58] Besser, however, ignored the requirement that it appoint its representatives by April 21, 1951, the date specified in the judgment. It made no effort to comply until May 9, 1951 (R. 1086), after the trial court had temporarily denied its request for a stay pending the appeal, and again directed (R. 1082) it to comply with Section VII of the judgment.[59] Thus,

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[58] In choosing its representatives, the Government further sought to carry out the original idea proposed by counsel for Gelbman and Andrus by selecting persons in the industry who would represent the interests of prospective licensees. After a poll of a representative number of prospective licensees, the Government designated Olsen and Darden to sit on the committee, and advised the court that these two designees would serve on the committee on their own behalf and as agents of other prospective licensees and not as agents of the Department of Justice (R. 1070). The Government gave no advice or instruction whatever to Olsen and Darden (R. 1137, 1141, 1146).

[59] The trial court had made it clear that compliance with Section VII (B) 2 to the extent of determining the rate of royalty and form of license would be without prejudice to appellants' right of appeal (R. 1087, 1098).

The Orders of Stay granted by Mr. Justice Reed similarly were designed not to delay the creation and operation of the committees. The first order, dated May 11, 1951, was by its terms inapplicable to Section VII (B) 1 and 2 (calling for creation of the committees and determination of licensing terms); it granted a 30-day stay "for the purpose of allowing the completion of the proceedings as directed by Par. VII (C)", for the inclusion of licensing terms in the judgment. The second order (R. 1176), issued after completion of those proceedings, stayed the actual issuance of licenses pending determination of the appeal.

Besser's present claim (Br. 108) that it did not get an adequate opportunity to present evidence supporting its request for a higher royalty than that actually set, if in fact true, is in part, at least, the result of its own lack of diligence.

Three of Besser's patents were before the committee. An agreement was reached as to one (R. 1090). Another (Scott) has now been declared invalid.[60] *Besser Manufacturing Company* v. *Whitman*, 92 U. S. P. Q. 291 (C. A. 6). Thus there is only one Besser patent (Wellnitz) as to which any issue of royalty rate is presently alive. After receiving and considering information presented by appellants' representative (R. 1097–1111) as to the value of the Wellnitz patent, the court fixed (R. 1111) the royalty at $25 per 8-inch compartment ($75 per three-at-a-time machine), which was only $25 per machine less than the royalty previously charged for an exclusive license (R. 1104). This was one of the patents to which Olsen was referring in stating that all the prospective licensees were interested in was freedom from threats of infringement suit for themselves and their future customers (*supra* p. 75).

It is clear that the district court had discretion to adopt whatever reasonable licensing procedure seemed appropriate to it. *United States* v. *United*

[60] The district court was familiar, prior to the committee meeting, with the nature and scope of the Scott patent as a result of the *Andrus* v. *Whitman* litigation, *supra*, p. 54.

States Gypsum Co., 340 U. S. 76, 94. If, however, this Court should feel, in the light of the experience with the district court's licensing procedure as applied to the Besser patents, that some other procedure would be more appropriate, we respectfully suggest that the Court consider the procedure which the government has consistently urged for adoption in this case. (See Government's proposed decree (R. 1034, 1056). This procedure is identical in substance with that approved by this Court in *Gypsum* and included in many antitrust judgments.[61] Under the Government's proposal Besser would be compelled to grant nonexclusive licenses free of restrictions except those specifically permitted by the judgment; the rate of royalty would be determined in private negotiations[62] between the patent owners and the

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[61] At least twenty-five consent judgments contain this type of procedure. Included are: *United States* v. *Libbey-Owens-Ford Glass Co.* (N. D. Ohio, 1948), CCH Trade Reg. Service, Par. 62323; *United States* v. *Owens-Corning Fiberglas Corp.* (N. D. Ohio, 1949) *id.* Par. 62442; *United States* v. *Automatic Sprinkler Co.* (N. D. Ill. 1948) *id.* Par. 62230; *United States* v. *Gamewell Co.* (D. Mass. 1948), *id.* Par. 62286; *United States* v. *American Optical Co.* (S. D. N. Y., 1948), *id.* Par. 62308; *United States* v. *General Cable Corp.* (S. D. N. Y., 1948), *id.* Par. 62300; *United States* v. *Technicolor, Inc.* (S. D. Calif., 1950), *id.* Par. 62586.

[62] This procedure has two distinct advantages over the machinery established by Judge Picard: (1) the objective of compulsory licensing would be attained with a minimum of interference to the normal business relationship between a licensor and licensees, and (2) in the absence of a controversy

prospective licensee; and in the event of a failure to agree upon a satisfactory rate of royalty the matter would be determined by the Court.

The adoption of the suggested machinery at this time would, in effect, nullify some of the work already performed by the "committees". Since, however, two of the Gelbman patents and Besser's Scott patent were largely, if not entirely, invalidated by the recent decision of the Sixth Circuit it will be necessary in any event for the "committees" to completely re-examine and readjust the rates of royalties already fixed.[63] In short, we think the procedure proposed by the Government will, in the long run, prove less burdensome on the district court and generally more workable than the procedure now set up in the judgment. For one thing, it would eliminate the necessity of re-establishing the committee each time new patents subject to compulsory licensing are acquired in the future, or existing patents expire or are held invalid.[64]

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as to the rate of royalty the court would be relieved of the burden of determining or reviewing any rates of royalty.

[63] A package royalty rate for the use of nine of Gelbman's patents has been fixed (R. 1072).

[64] Since Gelbman and Andrus have not appealed and are not before this Court, we recognize that this Court may not wish to make any modification of the decree as it affects them. If, however, this Court should direct that the licensing procedure applicable to appellants' patents be changed, the district court would, presumably, not wish to have two different procedures applicable under the same decree.

D. MISCELLANEOUS PROVISIONS

1. *Application of the judgment to "successors" and "assigns."*—Appellants attack (Br. 101) Section III (R. 1064), which makes the provisions of the judgment applicable to "successors" and "assigns", thus giving it a broader application than that provided by Rule 65 (d) of the Federal Rules of Civil Procedure.

As this Court pointed out in *Regal Knitwear Co.* v. *Labor Board*, 324 U. S. 9, 12, a formula including the words "successors" and "assigns" has been used in several antitrust judgments.[65] We do not, therefore, understand that Rule 65 (d) forbids the use of those words where, as here, they are necessary to insure compliance with affirmative provisions of the judgment. Besser could, for example, assign the present leases to a third party who would not, in the absence of this provision, be bound to carry out the provision (Sec. VIII, R. 1068) requiring Besser to give the lessees the option to purchase. It is also possible that the same result might be accomplished by a sale of the assets, including the leased machines, of the Besser Manufacturing Company so that the buyer could escape compliance with Section VII unless the

[65] See decrees in *United States* v. *Pullman Co.*, Civil Action No. 994, E. D. Pa. 1944; *United States* v. *Vehicular Parking, Ltd.*, Civil Action No. 259, D. Del. 1944; *United States* v. *Great Lakes Towing Co.*, 1 Decrees and Judgments in Federal Antitrust Cases, 253–54 (N. D. Ohio, 1915); all cited at 324 U. S. p. 12, n. 5.

judgment is binding on "successors." If, following compliance with the affirmative provisions of the judgment, appellants find that this provision "clouds" their right to dispose of their property, they may follow the course suggested by the *Regal* case (*id.*, 15) and petition for a modification or construction of this provision under Section XII (R. 1069).

2. *Prohibition Against Contracts Restraining Others From Competing.*—Appellants' proposed substitute (Br., 106) for Section IX (R. 1068) is unacceptable to the government for the following reasons:

(a) Appellants have utilized restrictive agreements as a part of their program to monopolize. By the 1938 agreement (Ex. 9, R. 1192) territories were illegally allocated[66] between Besser and Stephen Flam. In the contract of purchase of Stephen Flam, Inc. (Ex. 28, III, R. 1240) the seller agreed that it would not engage in the concrete block machinery business in the state of California so long as Besser carries on a like business

[66] Agreements which limit the area of competition between competitors or divide the fields in which they may do business have long been condemned as violative of the Sherman Act. *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 241; *Hartford-Empire Co.* v. *United States*, 323 U. S. 386; *American Tobacco Co.* v. *United States*, 328 U. S. 781, 802–803. The validity of the Flam agreement is not saved by the presence of patents as the agreement shows on its face (Par. 1, R. 1194) that the division of territories applied to machinery and devices not covered by the licensed patents.

in that state (Ex. 28, R. 1240). These agreements and others like them demonstrate Besser's propensities for using "ancillary" contracts for an illegal purpose which Section IX is designed to prohibit.

(b) Although the district court has already examined these restrictive contracts (R. 1019, 1023) and ordered the cancellation of any such agreement outstanding on the entry of the judgment, Besser now proposes (Brief, 106—proposed Section IX (A)) a procedure which would permit a reexamination of some or all of the same agreements. As this could lead to a retrial of some of the same issues already adjudicated, we see no justification for the substitute provision.

In *United States* v. *National Lead Co.*, 332 U. S. 319, 363, this Court said in response to National Lead's argument that one of the injunctive provisions there involved imposed an unjustified restriction on its power to contract:

> If National Lead later can demonstrate that its right of contract has been unduly restricted, it may, under the terms of the decree, apply to the District Court for a modification of the judgment.

The same statement is equally applicable here.

3. *Absence of Any Adjudication of Validity.*—Section VII (D) of the judgment provides that nothing in the judgment shall prevent any applicant from attacking, in the royalty determina-

tion proceeding, the validity or scope of any of the patents required to be licensed and states that the judgment shall not be construed as imparting any validity or value to any of the patents. This provision merely states what would be the effect of the judgment in any event. The district court believed, however, that this provision was particularly necessary here to avoid any confusion which might arise in the minds of prospective licensees as to their rights in the royalty determination hearing. This confusion could very easily arise due to the fact that the same court had also handled the patent infringement litigation (*Andras* v. *Whitman, supra*) involving an attack on the validity of some of the same patents which were subjected to compulsory licensing. In these circumstances the provision is simply a recognition of the dubious validity of at least three of the patents subject to compulsory licensing, important claims of which, although held valid by the district court, have now been invalidated by the Court of Appeals (*Whitman* v. *Andrus, supra*).

The provision differs markedly from that which this Court refused, in *United States* v. *United States Gypsum Co.*, 340 U. S. 76, 94, to add to the decree, in that it is limited to the right of a license applicant to attack validity in the royalty determination proceeding under the decree, while the proposed provision in *Gypsum* would have ap-

plied to "this" proceeding or "any other proceeding" (340 U. S. at 103). The present provision thus relates to a matter peculiarly within the court's control. Moreover, since an applicant in such a proceeding is not yet a licensee, the provision does not touch on the scope of a licensee's estoppel to attack the validity of the licensed patent, the point with which the decisions cited by this Court at footnote 15 of the *Gypsum* opinion were concerned. In the light of the special circumstances mentioned above, we submit that adoption of this provision was not an abuse of the district court's discretion.

CONCLUSION

For the foregoing reasons the judgment of the district court (with the minor modifications noted herein) should be affirmed.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

H. G. MORISON,
Assistant Attorney General.

JAMES L. MORRISSON,
CHARLES H. WESTON,
MARCUS A. HOLLABAUGH,
Special Assistants to the Attorney General.

WILLIAM D. KILGORE,
WHAREY M. FREEZE,
Attorneys.

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